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**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

S.C. 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.

APPENDIX FOR PETITION FOR A WRIT OF CERTIORARI

VOLUME VIII

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1 STATE OF SOUTH CAROLINA
2 ADMINISTRATIVE LAW COURT
3

4 DUKE ENERGY CORPORATION,

5 Petitioner(s),

6 vs.

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

7 SOUTH CAROLINA DEPARTMENT OF REVENUE,

8 Respondent(s).
9

10 D E P O S I T I O N

11 WITNESS: JAN URBAN

12 DATE: Wednesday, December 21, 2011

13 TIME: 10:33 a.m.

14 LOCATION: Willoughby & Hoefer, P.A.
15 930 Richland Street
Columbia, South Carolina

16 TAKEN BY: Attorneys for the Petitioner

17 REPORTED BY: SHERI L. BYERS
18 Registered Professional Reporter

19 - - - - -

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29 (INDEX AT REAR OF TRANSCRIPT)

1
2 STIPULATION: It is stipulated among counsel
3 that this deposition is being taken in accordance with
4 the Rules of the Administrative Law Court, and that the
5 deponent reserves the right to read and sign the
6 deposition transcript.

7 -----
8 JAN URBAN, being first duly sworn,
9 testified as follows:

10 EXAMINATION

11 BY MR. TRESH:

12 Q. Okay. Good morning, Ms. Urban.
13 Can you state your full name for the record,
14 please.

15 A. Jan Steensen Urban. Steensen is
16 S-t-e-e-n-s-e-n, and Urban is U-r-b-a-n.

17 Q. Great. I just want to go through some
18 general ground rules, a little bit of how this is going
19 to work. I'm going to ask you a bunch of questions
20 today. And if at any time you don't understand my
21 questions, if you can let me know or ask me to rephrase
22 the question, that will be great. Otherwise, I'm going
23 to assume that you understand the question and that the
24 response is that -- and that your response is in
25 response to a question I've asked you.

1 break at any time during the deposition, please let me
2 know. I will only ask if there is a question pending
3 that you complete the answer to the question before we
4 take any break.

5 Do you understand?

6 A. Yes, sir.

7 Q. Okay. Is there any reason that you are
8 unable to respond completely and truthfully to the
9 questions that I'm going to ask you today?

10 A. No, sir.

11 Q. Let's start.

12 Ms. Urban, did you do anything to prepare for
13 the deposition today?

14 A. Yes, sir.

15 Q. Can you tell me what you did?

16 A. I had several meetings with the attorneys.

17 Q. Did you meet with anybody else?

18 A. No, sir. Just the three attorneys that are
19 present here.

20 Q. Okay. Did you discuss this deposition by
21 telephone or otherwise with anybody else within the
22 Department of Revenue or anybody else other than the
23 attorneys?

24 A. No, sir.

25 Q. Okay. Did you review any documents in

1 preparation for the deposition today?

2 A. Yes, sir.

3 Q. Who provided you with those documents?

4 A. The attorneys provided me with a copy of a
5 appeals report that I had written.

6 Q. Any other documents?

7 A. Yes, sir. There were a handful of documents
8 including -- and I can't recall what all they were, but
9 it would have been -- I recall there was an e-mail
10 document. I believe there was a memorandum from
11 Mr. Maybank directed to me. I think there may have been
12 several e-mail documents. I don't recall the exact
13 number, but it was, you know, less than -- I don't
14 believe there was more than maybe five or six documents.

15 Q. And after you reviewed those documents, did
16 you have any subsequent meetings or conference calls?

17 A. Only with the attorneys here.

18 Q. Okay. Can you do me a favor and describe
19 your educational background.

20 A. I have bachelor's degree from the University
21 of South Carolina and a Master's in Business
22 Administration from the University of North Florida. I
23 obtained my master's while working as -- while working
24 for the Internal Revenue Service. I had eight years'
25 experience auditing with Internal Revenue Service.

1 After passing the CPA exam, I left the
2 Internal Revenue Service, worked in public accounting
3 for several years and then was hired by the
4 Department -- what at that time was the South Carolina
5 Department of Revenue. Well, that's what they are now.
6 I think they were the South Carolina Tax Commission at
7 that time. -- to head up their appeals program.

8 Q. And are you currently a certified public
9 accountant?

10 A. I am.

11 Q. Do you hold any other professional licenses?

12 A. No, sir.

13 Q. I would like to get an idea before you worked
14 for the South Carolina Department of Revenue, what your
15 employment history was. You mentioned a couple of
16 different appointments. I would like to go
17 chronologically. Beginning with after you graduated
18 from college, did you go directly to the MBA program at
19 the University of Central Florida after college?

20 A. It was the University of North Florida. No,
21 sir. My first job was -- well, at that time I had some
22 part-time jobs. I had my first job after I left the
23 University of South Carolina was with the South Carolina
24 Department of Social Services as a financial analyst to
25 determine whether someone qualified for financial

1 assistance, and I reviewed the financial documents. If
2 there was a dispute, I was the person who would
3 coordinate that dispute.

4 My husband at that time accepted a position
5 in Jacksonville, Florida. When we moved to
6 Jacksonville, I did some temporary work for a temporary
7 employment agency. I think we moved in late summer.
8 And that December, I believe it was, I accepted a
9 position with the Internal Revenue Service. They, at
10 that time, were hiring people who were in the top
11 10 percent of their graduating class. So I was lucky
12 enough to be hired.

13 I handled audits for the Internal Revenue
14 Service, individual corporations. Subsequently, moved
15 into the ERISA area and became an ERISA specialist.

16 When my husband at that time accepted another
17 position here in Columbia, he had obtained his Ph.D.
18 from USC and wanted to move back to Columbia because of
19 research facilities, he -- the Internal Revenue Service
20 transferred my position to the Columbia office. And I
21 continued to work for them and decided to sit for the
22 CPA exam.

23 Once I passed the CPA exam, I was lucky
24 enough to receive an award for the highest scores in the
25 state at that time, but I was unable to be licensed

1 because South Carolina -- because of the licensing
2 requirements in the state of South Carolina. You had to
3 work for two years under a licensed CPA, and you had to
4 have certain audit requirements. So at that time I left
5 the Internal Revenue Service and worked in public
6 accounting.

7 I worked largely -- and there was a pay
8 increase, you know. I worked largely with individuals
9 who were somewhat involved in deferred compensation
10 plannings, and so I had a lot of ERISA background,
11 advising with regards to define benefit and define
12 contribution plan.

13 When I -- subsequently when my husband and I
14 were beginning to discuss having a family, I was looking
15 for something that would provide a more stable work
16 schedule, and the opportunity arose at the Department of
17 Revenue. And I was lucky enough to be selected for the
18 position, for a new position that they were creating to
19 handle appeals of disputed tax matters.

20 And this was a position, not a legal
21 position, this was simply a position to coordinate
22 matters, attempting to resolve them to the best of our
23 abilities without litigation. Or to prepare the
24 disputed matter for subsequent litigation.

25 Q. When you were first hired by the IRS, what

1 was your title?

2 A. Tax auditor.

3 Q. And when you left the IRS, what was your
4 title?

5 A. A revenue agent grade 12.

6 Q. And when you were first hired into the South
7 Carolina Department of Revenue, what was your title?

8 A. I'm not exactly sure what it was, but it was
9 something like manager. It may have been called "audit
10 disputes" or "audit resolution." And when I left, I was
11 a manager, office of appeals.

12 Q. When you first joined the Department of
13 Revenue, did you have any supervisory responsibilities?

14 A. Yes, sir.

15 Q. How many people did you supervise?

16 A. I believe it was four. It may have been
17 five. I was also responsible for administering their
18 CPA candidate training program, so whenever -- and there
19 were three CPA candidates at the time that I was hired,
20 who were under -- who had passed the exam and who were
21 placed under my supervision.

22 Q. So the manager of audit resolution was also
23 in charge of the CPA certification process?

24 A. That's correct.

25 Q. Okay. In the course of your employment at

1 the South Carolina Department of Revenue, did you ever
2 conduct any tax audits?

3 A. Not personally. I did, in fact, supervise
4 audits, auditors who were conducting tax audits as part
5 of my responsibility of supervising CPA candidates.

6 Q. So as part of your job of dispute resolution,
7 you were supervising the auditors that were conducting
8 the audits?

9 A. As part of my job in dispute resolution, I
10 was supervising an auditor. And if that -- certain --
11 we have a number of field offices, so I had domestic
12 audit -- I remember I had a domestic auditor, for
13 instance, in Greenville, so I would -- that would be
14 performing audits under my supervision, also as part of
15 it, who would be a CPA candidate, had passed the CPA
16 exam and needed to work under the direct supervision of
17 a CPA, myself.

18 I also had analysts who had passed the CPA
19 exam who were working under my supervision, who were
20 handling protested matters and were not auditing.

21 Q. So that -- so in your role as dispute
22 resolution -- so an auditor would conduct an audit under
23 your supervision and then you would seek to resolve the
24 dispute with the taxpayer in some sort of process
25 postaudit? In other words, you were involved in the

1 preaudit and the postaudit?

2 MR. GREEN: Objection to form.

3 BY MR. TRESH:

4 Q. Were you involved in the preaudit process
5 with a taxpayer and then involved in the process of
6 trying to settle that very same audit?

7 MR. GREEN: Objection to form.

8 THE WITNESS: Could you explain what you mean
9 by the preaudit process. I'm confused.

10 BY MR. TRESH:

11 Q. Sure. Did you supervise the audit of a
12 taxpayer and then for that same taxpayer supervise the
13 settlement process?

14 A. Okay. I supervised the auditor. The auditor
15 would be in a position where they would audit a
16 taxpayer. If there was a -- if the taxpayer had a
17 dispute with the auditor, then like any other audit
18 supervisor, I would meet with that taxpayer and attempt
19 to resolve the issue as any other audit supervisor was
20 expected to do.

21 I don't recall any situations where I was
22 supervising an auditor who was a CPA candidate where
23 that matter was not resolved and then came in under the
24 normal appeals process.

25 Am I answering the question?

1 Q. Yes. Thank you.

2 A. Okay. And let me clarify. Most of my
3 responsibility as supervising the office of appeals
4 would be supervising anywhere from three to five
5 analysts who worked for me who were not performing
6 audits.

7 Q. Okay. In the course of your duties for the
8 South Carolina Department of Revenue, approximately how
9 many settlement agreements were you and -- were you
10 primarily responsible for? Approximately how many cases
11 did you primarily settle?

12 MR. GREEN: Objection to form.

13 THE WITNESS: The number of protested matters
14 in our inventory would vary over a time period, as did
15 our staff. Which I think from the time that I was
16 initially hired, I believe there were three analysts and
17 it went as high as, I think, six or seven analysts, you
18 know, during the period. So the number of protested
19 audits at any one time, you know, could vary
20 significantly.

21 I don't recall -- I can't recall exactly. We
22 maintained reports. But I would say that there would be
23 anywhere from maybe at the time that I was first hired,
24 maybe somewhere in the less than 50 protested audits to
25 maybe as high as, you know, 200 protested audits at

1 times.

2 BY MR. TRESH:

3 Q. So my question related to settlements. So
4 those 50 to 200, were those audits that you settled over
5 the course of your employment that you were involved --
6 directly involved in the settlement of?

7 A. Okay. When you say "directly involved" in --

8 Q. Have personal involvement.

9 A. Sometimes that involvement would simply be
10 related to -- an analyst would have a protested audit in
11 their inventory, so my involvement might simply be to
12 have them discuss the file with me. I might not be in a
13 meeting, or, you know, they might actually have me
14 sitting in on a meeting.

15 So, you know, as in any other supervisory
16 position, the level of involvement would differ, but
17 ultimately, the responsibility would have been under my
18 supervision.

19 Q. And approximately how many audits ultimately
20 were under your supervision?

21 A. Well --

22 Q. Was it the 50 to 200 or so?

23 A. You know, I think it would be -- certainly my
24 boss expected me to have ultimate responsibility for
25 every audit that was in appeals through, you know, my

1 supervisory responsibility of the analysts that were
2 under me.

3 Q. And were there a lot of those audits that
4 were settled each year?

5 A. Yes. The percentage of files that advanced
6 to litigation out of those would be a relatively small
7 percent.

8 Q. So would it be fair to say that you were
9 involved in a great number, a lot of numerous
10 settlements over the course?

11 MR. GREEN: Objection to form.

12 THE WITNESS: Over the course of my
13 employment, I hate to use terms like "great number" that
14 are nonspecific, but, you know, certainly there were --
15 I would think there would be a number of around at least
16 a hundred a year. May have been. You know, I just
17 can't --

18 BY MR. TRESH:

19 Q. That's okay.

20 A. -- can't give you the exact number.

21 Q. Okay. And was your compensation tied in any
22 way to the number of audits you settled or how those
23 audits were settled?

24 A. No, sir.

25 Q. And did you receive an annual review each

1 year?

2 A. Yes, sir.

3 Q. And during that annual review, was it ever
4 discussed whether or not that percentage of cases that
5 were settled or not settled?

6 A. No, sir.

7 Q. Okay.

8 A. I will add a clarification. South Carolina
9 has a tax payor bill of rights that specifically
10 prohibits compensation. I can't remember the exact
11 terminology, but it...

12 Q. So in your experience, it would be a
13 violation of South Carolina law to tie anybody at the
14 department's compensation to whether or not they were
15 settling audits?

16 A. I would want to -- I would want to review
17 that language in the Taxpayer Bill of Rights, but there
18 is -- the Taxpayer Bill of Rights does address
19 compensation.

20 (PETITIONER'S EXH. 1, Income Tax and License
21 Fee, SCDOR00021785, was marked for identification.)

22 BY MR. TRESH:

23 Q. I'm going to ask you to take a look at a
24 document in a moment.

25 A. Should I take a look at it now?

1 Q. Yes, please. Have you seen this document
2 before?

3 A. I'm not sure.

4 Q. Would you like to take a moment?

5 A. Okay. I am not sure if I have seen this
6 document before.

7 Q. Okay.

8 A. The note on the bottom indicates it's
9 directed to a person named Rita, who would be processing
10 audits. So this could have gone directly to her.

11 Q. Okay. Who is Rita? If you don't know,
12 that's okay.

13 A. Yeah. Honestly, I can't tell you exactly who
14 she is.

15 Q. A person --

16 A. But I -- you know, which Rita it was, I ...

17 Q. Someone within the Department processing
18 audits?

19 A. Someone within the Department, right.

20 Q. Okay. And who's the note from?

21 A. It's from John Comer.

22 Q. Do you know who that is?

23 A. Yes, sir. He was the audit supervisor for
24 the Rock Hill district office.

25 Q. Okay. And the note, it's handwritten, and

1 it's from John Comber. And it says, "This assessment
2 for sales and use tax was netted against a refund of
3 corporate income tax and license fee that we issued to
4 Duke on 8-14-02. Please make sure our auditors get
5 credit for the collection. Audit file will follow."

6 What was meant by -- by the statement,
7 "Please make sure our auditors get credit for
8 collection"?

9 A. Okay. Statistics were kept by district
10 office and by auditor as to various audits completed and
11 the -- the results of those audits, and that's what this
12 would relate to.

13 Q. And so if an audit was completed and settled,
14 an auditor would get credit?

15 A. Yes, sir.

16 Q. And what type of credit -- did that credit in
17 any way factor into how they were reviewed or their
18 compensation?

19 A. I don't believe so, no, sir.

20 Q. What was meant, then, by "they get credit"?

21 A. This was simply part of the statistics that
22 the Department kept for each field office.

23 Q. What were those statistics used for?

24 A. I don't believe I, you know, could -- I would
25 simply be speculating.

1 Q. So you don't know what the --

2 A. No. No.

3 Q. Okay. But the statistics, it says, "Please
4 make sure the auditor would get credit," correct?

5 A. That's correct.

6 Q. Okay. So not the field office. An
7 individual auditor was getting credit some way?

8 A. That's correct.

9 Q. Okay. If I can ask you to take a look at
10 what is marked as SCDOR 21783.

11 A. Rita Murrah.

12 (PETITIONER'S EXH. 2, E-Mails, SCDOR00021783,
13 was marked for identification)

14 BY MR. TRESH:

15 Q. Okay. Have you ever seen this document
16 before?

17 A. I don't believe so..

18 Q. And this appears to be an e-mail from Rita
19 Comer -- from Rita Murrah to John Comer; is that
20 correct?

21 A. That's correct.

22 Q. The subject of the e-mail is Duke Energy,
23 correct?

24 A. Correct.

25 Q. And it was sent on August 19 of 2002; is that

1 correct?

2 A. Correct.

3 Q. The e-mail says, "John, I need to give credit
4 for this payment of \$2,857,494.79. Do I give the six
5 people on the front credit at Perry 50 percent and the
6 other five at 10 percent? I'm just making sure."

7 What do you think Ms. Murrah was referring to
8 when she talks about giving individual credit? That
9 would seem to indicate individuals received some sort of
10 credit, not just the Department office; is that correct?

11 MR. GREEN: Objection as to form.

12 THE WITNESS: Okay. I think -- I think it's
13 exactly what the document says. That -- and -- again,
14 this would simply be speculation on my part, but my
15 initial reaction would be that Mr. Perry probably had
16 devoted more time on this audit, which is why the credit
17 was put that way.

18 BY MR. TRESH:

19 Q. Would the payment of the 2,857,494.79 in any
20 way affected the auditor's compensation to your
21 knowledge?

22 A. No, sir, it would not have.

23 Q. Okay.

24 A. To my knowledge.

25 Q. Would it have affected their advancement

1 within the Department?

2 A. No, sir.

3 Q. Okay. I would like to talk about Duke
4 Energy's audit for a moment. Were you at all involved
5 in the audit of Duke Energy Corporation for corporate
6 income taxes or sales taxes or license taxes?

7 A. I don't believe I was involved in the audit.
8 I was involved in a protest of the audit. And then
9 subsequently, I was involved in requesting an audit for
10 verification of the subsequent claim for refund. But
11 to -- I'm assuming by saying, "Were you involved in the
12 audit," was I out there auditing? No.

13 Q. Did you supervise the auditor that was out
14 there auditing?

15 A. I don't believe so.

16 Q. Okay. You had mentioned a moment ago that
17 you had requested an audit of a verification of a refund
18 claim. Do you recall what refund claim that was?

19 A. Subsequent to our resolution of -- or
20 subsequent to our settlement of a Duke RAR audit matter,
21 an additional claim for refund was submitted to our
22 office services section requesting an additional refund.

23 When that matter was forwarded to my office,
24 there had been no review of the numbers that were
25 requested in the refund, and I felt that the numbers

1 needed to be confirmed.

2 Q. What type of tax was that for?

3 A. I believe that that was corporate income. It
4 may have been corporate income and licensee. I'm not
5 sure.

6 Q. Do you recall what years?

7 A. No, sir. There were many years involved.

8 Q. There were many years involved. Okay.

9 Were you involved at all in the sales tax
10 audit for Duke Energy for any of the periods from 1978
11 through 2002?

12 A. I don't recall if there were any disputed
13 sales tax issues or not. I don't believe I was
14 involved. Let me rephrase that. I don't recall being
15 involved.

16 Q. Okay. With regard to the audit that you
17 initiated for corporate income taxes for Duke, who did
18 you ask or who did you -- how did you initiate that
19 audit? Did you ask an auditor to?

20 A. No. I honestly don't recall. I suspect that
21 since that claim for refund came in to our office
22 services section, which simply handles office matters, I
23 suspect it would have been referred to the field audit
24 supervisor who -- under whom foreign audits -- the
25 foreign field audit supervisor.

1 Q. And once you initiated that audit or
2 requested that audit be initiated, did you have any
3 other involvement then?

4 A. I don't believe so.

5 Q. Does the Department have any formal
6 guidelines for negotiating and/or entering into
7 settlements with taxpayers?

8 A. There is a revenue procedure on -- I believe
9 it's -- I believe it's titled Appeals Procedure, and I
10 believe that that document contains certain settlement
11 guidelines.

12 Q. Are settlements a common practice with
13 taxpayers within the Department?

14 A. I'm hesitating because of the term "common
15 practice." They're not uncommon. But whether you would
16 say they were common, I'm not sure. You know, it's a --
17 it's a term of some judgment, I suppose.

18 Q. Did it happen frequently?

19 A. Of the many cases that came in to the appeals
20 section, certain cases, there would be settlements.
21 Other cases, there was no settlement authority, and, you
22 know, they would routinely advance forward.

23 Q. You mentioned a moment ago that there was a
24 revenue procedure that set forth certain formal
25 settlement guidelines. Did the Department have any

1 informal guidelines, or did you have any informal
2 guidelines with respect to how settlements were arrived
3 at?

4 A. No, sir.

5 Q. Did you receive any training on how to
6 conduct settlements from the South Carolina Department
7 of Revenue?

8 A. No, sir.

9 Q. So how did you know when you entered into a
10 settlement -- and you said earlier that you were a
11 supervisor over the settlement process, if you didn't
12 receive any training, how did you know how to conclude a
13 settlement, how to document a settlement?

14 A. There was the revenue procedure outlining
15 the -- the appeals process.

16 Q. So the revenue procedure would have told you
17 how to settle a matter with the taxpayer in the absence
18 of any other formal training?

19 A. It provided the guideline for a settlement --
20 the authority for any kind of settlement. And many of
21 the cases that would be settled, and this perhaps is --
22 it's a clarification of the term "settlement." Many of
23 the matters that would be resolved in appeals were the
24 result of additional information submitted. So that a
25 taxpayer might provide additional information in support

1 of their position, additional documentation as to the
2 item in question that would be used to resolve the
3 issue.

4 Q. Once an issue was resolved and the Department
5 and the taxpayer had a meeting of the minds, whatever
6 that case may be, there was no formal training, from
7 what you've just said, in terms of how to go ahead and
8 memorialize that. That formal training -- that process
9 would have been set forth in the revenue procedure?

10 A. That is correct. Yes, sir.

11 Q. Okay. When did you first have any contact
12 with -- with Duke Energy or their representatives? Let
13 me rephrase.

14 Who at Duke Energy did you have contact with
15 regarding the resolution of their audits for the periods
16 '78 through 2002?

17 A. I really can't recall. That was over ten
18 years ago, so I just don't -- I can't recall.

19 Q. Okay. Can you describe to me the settlement
20 process between a taxpayer and the Department as they're
21 trying to settle a case? What would be the steps that
22 would normally take place from the time there's been an
23 audit assessment and now a settlement process is
24 initiated until the settlement process is concluded?

25 A. Okay. And I believe these are described in

1 the revenue procedure, but I've been retired for a
2 number of years, also.

3 Q. Okay.

4 A. The settlement or the -- and I'll refer to
5 this as the dispute resolution process.

6 Q. If I can, you understand that you've been
7 proffered as the person most knowledgeable about the
8 settlement process within the Department.

9 MR. GREEN: I proffered her for the person
10 most knowledgeable about the factual basis for the
11 settlement. Ron Urban has been proffered for the
12 process of the settlement and for the waiver form. I
13 proffered her for the factual basis.

14 MR. TRESH: Factual?

15 MR. GREEN: Yes. Because you all had a
16 specific request in there on the settlement part about
17 the factual stuff. So she was the one that was most
18 knowledgeable about that process. I've tendered Ron for
19 the procedures and the analysis of that and the waiver
20 form.

21 MR. TRESH: Thank you for that clarification.

22 BY MR. TRESH:

23 Q. So in your experience, what was the process
24 of how a settlement would be conducted from -- after an
25 assessment has been issued, once it would hit your desk

1 and once you would take responsibility for that, how did
2 that process work?

3 A. Okay. To clarify, there would have been a
4 proposed settlement issued by the auditor as opposed to
5 a final assessment. So once an audit was conducted and
6 a proposed assessment was issued, if the taxpayer could
7 not reach agreement with the auditor and the audit
8 supervisor, it would be expected that the audit
9 supervisor would initially have a conference. Then the
10 taxpayer would submit in writing the reasons for his
11 disagreement.

12 The auditor would then, under the audit
13 supervisor's review, prepare the file for transfer to my
14 office. In the file would be the taxpayer's statement
15 of their disagreement, their protest, we might refer to
16 it, along with the auditor's position as reviewed by the
17 audit -- the supervisor of why they felt adjustments --
18 the proposed adjustments should sustained.

19 Once the file came into my section, I would
20 review the protest and the auditor's position and assign
21 it to a specialist, an analyst who was working in my
22 section. And different analysts had different --
23 many -- had different specialty areas. Many of them
24 were generalists and could work in any area, but if an
25 analyst had seen the same issue in another case, then,

1 you know, we might assign that case to -- if the same
2 issue comes in again, you know, there would be some
3 selection there.

4 The analyst would -- generally as a first
5 step would prepare a statement of the facts and issues
6 as they understood them and an application of the law
7 and provide that to the taxpayer as a starting point.

8 Many times that's all the taxpayer needed
9 because they -- you know, that was enough to clarify
10 what the statute was, and the case would be closed as
11 agreed.

12 In other cases, the taxpayer would be able to
13 submit additional information in support of their
14 position and the case would -- would be approved. And
15 the analyst might at that point submit that information
16 back to the auditor to review to make sure that they
17 were in concurrence.

18 In other cases, if the analyst could not
19 resolve the file, then it might come into my -- to me to
20 meet with the analyst and the taxpayer and their
21 representatives. And in years -- in certain time
22 periods, there were cases that I would actually handle
23 as we had staffing cutbacks.

24 Q. Did you handle the Duke case?

25 A. I was definitely involved in the Duke case.

1 I can't recall if I had an analyst involved in it or
2 not.

3 Q. So would this process that you've just
4 described work in the same way for the denial of a
5 refund claim that would come up --

6 A. Generally.

7 Q. -- to your office generally?

8 A. Yes.

9 Q. And who would have final approval of a
10 settlement?

11 A. The revenue procedure provided guidelines for
12 that, and it did depend on whether the settlement was
13 factually based. In other words, if the taxpayer simply
14 submitted additional information that showed they were
15 clearly entitled to an adjustment, that's not really a
16 settlement. That's just simply amending the audit to,
17 you know, the application of the law. So that required
18 no one else's approval.

19 Q. Okay.

20 A. Yeah. Generally, if it required approval and
21 specifically I recall if it required a settlement under
22 the hazards of litigation, that required counsel's
23 approval.

24 Q. Okay. And did the settlement process vary
25 based upon the amounts at issue?

1 A. I don't believe so.

2 Q. Would the Department typically memorialize a
3 settlement?

4 A. And by "memorialize"?

5 Q. Write it down somewhere. Have a written
6 agreement with the taxpayer?

7 A. There was a -- there was a provision for the
8 taxpayer to sign either an 870 or an 870AD. In many
9 cases, you know, it may simply be the final letter of
10 settlement proposal from the taxpayer, that that would
11 be what would be included in the file. Or I suppose
12 there were cases where it was simply a memorandum to the
13 file.

14 Q. Was there a -- what's the difference between
15 an 870 and an 870AD?

16 A. The 870 -- and again, it's been a while. The
17 AD stood, as I remember, for appeals division, so that
18 the -- so that a settlement reached, for instance, by an
19 audit supervisor that could execute an 870. But if it
20 was by the appeals division, it would be -- it had to
21 have our approval to use an AD, as I -- as best I
22 recall. I believe the AD prohibited reopening those
23 issues.

24 Q. And so in a settlement that you were involved
25 in, would you have authority to execute an 870 as

1 opposed to an 870AD?

2 A. I believe I would have had authority to do
3 either.

4 Q. Would the Department -- would the Department
5 typically retain all of the documents related to a
6 settlement with a taxpayer?

7 A. In general, I believe so. Yes.

8 Q. Did the Department have any formal policies
9 on recordkeeping?

10 A. No, sir. I'm not aware of any.

11 Q. When you were involved in a settlement, did
12 you keep any files typically on --

13 A. We did maintain an appeals file, which, you
14 know, it was with the audit. Once the audit and
15 settlement were concluded, we did not keep any files.

16 Q. And would you have -- in the course of the
17 matters that you settled, would you have put any
18 documentation relative to a settlement in that appeals
19 file?

20 A. I believe so.

21 MR. TRESH: Let's go to 21800.

22 (PETITIONER'S EXH. 3, SC870AD and SC870,
23 SCDOR00021800, DE00012157, and DE00012158, was marked
24 for identification.)

25 BY MR. TRESH:

1 Q. In front of you are three documents. I would
2 like to start with the first page that is marked SCDOR
3 21800. At the bottom right-hand corner, you will see a
4 Bates stamp number.

5 A. Yes, sir.

6 Q. Have you seen this one before?

7 A. Yes, sir. My name is on it.

8 Q. Okay. And is it correct this is
9 South Carolina -- that this is Form SC870AD?

10 A. Yes, sir.

11 Q. Signed by you?

12 A. Yes, sir.

13 Q. Can you tell me the purpose and effect of
14 South Carolina Form 870AD?

15 A. This form is entitled an Offer of Waiver of
16 Restrictions on Assessment and Collection of Additional
17 Tax, and it was executed with regards to a sales and use
18 tax audit.

19 Q. Okay. And for what periods?

20 A. I believe that's January 1st, 1991, through
21 December 31st, 2001.

22 Q. And this form was signed by you?

23 A. Yes, sir.

24 Q. And this form -- would the effect of this
25 form have been to settle all of the issues for the tax

1 years 1991 -- 1-1-1991 through 12-31-2001 for sales and
2 use taxes?

3 A. Yes, sir.

4 Q. No other taxes would be impacted by this
5 form; is that correct?

6 A. That is correct.

7 Q. Turn to Bates stamp number 12157 on the next
8 page. Can you tell me what this is?

9 A. This is SC870. That's not -- it's a blank
10 form. It's revised 7 of '97.

11 Q. Okay. And have you ever seen this form
12 before, this type of form?

13 A. I've seen this type of form, yes, sir.

14 Q. With respect to the Form 870AD that we just
15 looked at and this Form 870, are these forms generally
16 available to taxpayers?

17 A. I'm honestly not sure.

18 Q. Okay. That's okay.

19 A. I mean, you know, we have a number of
20 forms -- there were a number of forms on the
21 department's Web site, and I'm not sure if these were
22 included on them.

23 Q. Would you typically -- in the course of
24 settling a matter, would you typically send this form,
25 either the 870AD or the 870, to a taxpayer?

1 A. No, sir, not necessarily.

2 Q. Okay. If I can go back to the Form SC870AD
3 for a moment, the first document, number 21800, form is
4 executed by you and dated August 13th, 2002, correct?

5 A. Correct.

6 Q. And there's a space for the taxpayer's
7 signature, correct?

8 A. Correct. And let me say, it's dated
9 August 13, 2002. I'm not sure if that's the date I
10 signed it or that may be the date that it was signed by
11 Duke. You know, I can't attest to that.

12 Q. Okay. And it's signed by the taxpayer as
13 well?

14 A. Yes, sir.

15 Q. And on the document, on the 870AD, it says,
16 "See reverse side." But on this form there is no
17 reverse side; is that correct?

18 A. That's correct.

19 Q. Okay. Okay. Go to document 12158, which is
20 the third page of what we just handed to you. Can you
21 tell me what this document is?

22 A. This is the reverse side of the SC870.

23 Q. Okay.

24 A. Or it appears to be.

25 Q. Are you familiar with this?

1 A. I was at one time. It's been a while since
2 I've seen this.

3 Q. Take a moment, if you don't mind, and perhaps
4 you could just read this over and refresh your
5 recollection.

6 A. Okay.

7 Q. Okay. I'm particularly interested in the
8 second paragraph from the top. It has "note" in bold
9 letters. It says, "If you wish to give up your right to
10 file a claim for refund and prevent the Department from
11 assessing additional amounts at a later date, an SC870AD
12 should be executed in lieu of this SC870."

13 Is your understanding of the meaning of that
14 that if a taxpayer were to give up its rights to file a
15 refund claim, then it would have executed an SC870AD and
16 not an SC870?

17 MR. GREEN: Objection to form.

18 THE WITNESS: Could you state that again.

19 BY MR. TRESH:

20 Q. Sure. Yeah.

21 A. I'm kind of lost in that.

22 Q. Absolutely. So you read that second
23 paragraph?

24 A. Right.

25 Q. It talks about the right to file a refund

1 claim and prevent the Department from assessing
2 additional tax at a later date, an SC870AD should be
3 executed in lieu of this SC870. Is it your
4 understanding that the meaning -- that the difference
5 between an SC870AD and an SC870 is that an SC870AD
6 closes the statute of limitations for a taxpayer to file
7 refund claims, while an SC870 would keep the statute of
8 limitations for refund claims open?

9 MR. GREEN: Objection to the form.

10 THE WITNESS: It's my understanding that an
11 SC870AD was used when both the Department and the
12 taxpayer were in agreement that the matter would be
13 closed and that neither party would revisit the matter.

14 BY MR. TRESH:

15 Q. What was meant in this document when it
16 speaks to -- it uses the words "Your right to file a
17 claim for refund," would it be your understanding
18 that -- given your prior answer that if you -- if a
19 taxpayer were to execute SC870, that they would retain
20 the right to file a refund?

21 A. If they otherwise had the right to file a
22 refund.

23 MR. TRESH: Okay. Thank you.

24 Okay. I would like to -- EES 74.

25 (PETITIONER'S EXH. 4, SC Revenue Procedure

1 #95-6, was marked for identification.)

2 MR. GREEN: I would just point out again, she
3 is tendered for the factual basis, not the procedure or
4 settlement. You can ask obviously, but she is not the
5 witness I intended for that process. I just note that
6 for the record.

7 MR. TRESH: Okay. Thank you.

8 BY MR. TRESH:

9 Q. Have you seen this document before?

10 A. Yes, sir.

11 Q. Are you familiar with it?

12 A. Yes, sir. I was at one time. It's been a
13 long time.

14 Q. Was this the revenue procedure that you
15 referred to earlier when you were saying that the
16 Department had certain procedures in place for settling
17 matters?

18 A. Yes, sir.

19 Q. Were you employed by the Department of
20 Revenue at the time that this document was published?

21 A. Yes, sir.

22 Q. Were you directly involved or did you assist
23 in preparing and issuing this document?

24 A. No, sir.

25 Q. Do you know why the Department issued this

1 revenue procedure?

2 A. This document was issued in 1995. I believe
3 it was at the time of the Administrative Procedures Act
4 had been passed and to provide for implementing
5 procedures for the Administrative Procedures Act. But
6 it supersedes earlier documents involving the appeals
7 procedures.

8 Q. Were you involved in any discussions amongst
9 Department of Revenue personnel related -- or prior to
10 the issuance of this document but related to the
11 issuance of this document? In other words, did you have
12 input into what went into this document?

13 A. I honestly don't recall. Certain documents
14 would be circulated among the staff for review. There
15 may have been some discussion with me, but I don't
16 specifically recall.

17 Q. Okay. If I can ask you to turn to page 3 of
18 the document. And I know you said it's been a little
19 while since you've looked at it. Perhaps if you could
20 take a look at paragraph O.

21 A. Certainly.

22 Q. It's a Waiver of Restrictions on Assessments.

23 Okay. Do you understand paragraph O,
24 sections 1 and 2, to mean that a Form 870 does not
25 preclude a taxpayer from pursuing a claim for refund,

1 but Form South Carolina 870AD would preclude a taxpayer
2 from pursuing a refund?

3 A. Yes, sir.

4 Q. Has this always been the -- was this the
5 department's practice with respect to the impact or
6 affect --

7 MR. GREEN: Object to the form.

8 MR. TRESH: -- of an 870 versus an 870AD,
9 would that have been the department's practice that this
10 document reflect the department's practice prior to its
11 issuance?

12 THE WITNESS: I do not recall when the
13 Department first adopted using an 870 or an 870AD. So I
14 don't know if it was -- if it was first implemented with
15 this revenue procedure or if it was an earlier
16 procedure. I just don't recall the date.

17 BY MR. TRESH:

18 Q. Are taxpayers required to abide by and follow
19 tax procedures issued by the Department of Revenue?

20 A. I think revenue procedures generally describe
21 the department's procedure to the extent that they
22 provide direction to taxpayers relative to, for
23 instance, when an appeal must be submitted or a protest
24 must be submitted, yes, they would be required to follow
25 the revenue procedure.

1 For some reason, I'm thinking that the
2 revenue procedures are more directed at the Department,
3 but I may be wrong about that distinction.

4 Q. Okay. Can an issue or a tax year be settled
5 without a taxpayer executing a Form 870 or a Form 870AD?

6 A. Yes. In many cases, the matters that came to
7 my office were simply settled with either a check being
8 issued by the taxpayer to resolve the matter or a refund
9 being issued by the Department.

10 Q. So matters could be settled with nothing in
11 writing?

12 A. Well, the check would be in writing. Or it
13 might simply be a letter that the taxpayer might
14 withdraw their claim for refund, and there would be no
15 870 or 870AD.

16 Q. You testified earlier -- you mentioned
17 earlier in this deposition that there were two types of
18 settlements. There were ones that were factually based
19 and there were settlements based upon hazards of
20 litigation.

21 Would it have been common to settle a matter
22 based upon hazards of litigation without anything in
23 writing other than a check?

24 A. I think there generally would be notations in
25 the file. There might not be an 870 or an 870AD.

1 Q. Would there have been some type of settlement
2 agreement executed?

3 A. Frequently, there would be a letter from
4 either the Department or from the taxpayer proposing the
5 terms of the settlement.

6 Q. But nothing memorializing, signed by both
7 parties?

8 A. No.

9 Q. Let me ask you to turn to page 8 of this
10 document of the revenue procedure. Can you read, to
11 refresh your recollection, section 2A?

12 A. Right. Which refers to a resolution report?

13 Q. Resolution report. And so the section 2A
14 says, "If Appeals agrees with the taxpayer or all issues
15 are settled at the conference, Appeals will prepare a
16 resolution report."

17 You testified a moment ago that this was at
18 least -- this revenue procedure was at least directed to
19 the Department. To your knowledge, was there any
20 resolution report prepared in connection with the audit
21 of Duke Energy?

22 A. I can't -- I don't know.

23 Q. But you would agree that this document --

24 A. Requires.

25 Q. -- requires a resolution report for a

1 settlement?

2 A. Yes, sir.

3 Q. So on any matter settled -- any matter where
4 there were hazards at issue -- being settled based upon
5 hazards of litigation, the Department was required by
6 its own revenue procedure to prepare a resolution
7 report; is that correct?

8 A. That's correct.

9 Q. Okay. Do you recall the final outcome from
10 the Department's income tax, corporate license tax, and
11 sales tax audit of Duke Energy for the periods 1978
12 through 2002?

13 A. I'm sorry, I was looking back for what was in
14 the resolution report.

15 Q. That's okay. My question --

16 A. Okay.

17 Q. I'm sorry.

18 A. Okay.

19 Q. Okay. So my question was, do you recall the
20 outcomes in the Department's income tax corporate
21 license tax and sales tax audits of Duke Energy for the
22 periods 1978 through 2002?

23 A. I recall that there was an income tax -- I'm
24 sorry, that there was a sales and use tax audit that was
25 offset against a refund that was agreed to on the income

1 and license fee audit.

2 MR. TRESH: Okay. We can go to Bates number
3 21780.

4 (PETITIONER'S EXH. 5, Report of Field Audit:
5 Income Tax & License Fee, SCDOR00021780, was marked for
6 identification.)

7 BY MR. TRESH:

8 Q. Have you seen this document before?

9 A. I can't directly recall seeing it, but I
10 would think that I would have seen it back in 2002.

11 Q. Okay. Would you have been involved in
12 drafting this document?

13 A. This would have -- not directly. This would
14 have been prepared, I believe, by either the auditor or
15 the audit supervisor.

16 Q. And can you explain to me what this document
17 is.

18 A. It's a recomputation of the taxpayer -- of
19 Duke's income tax for the periods 1978 through '94.
20 They're license fees for the periods '84 through '94,
21 along with an interest computation. And then a netting
22 of the sales and use tax against that with a refund of a
23 little over \$3 million due.

24 Q. Okay. Do you recall whether Duke and the
25 Department of Revenue agreed to the offsets described in

1 this document, in this revenue report -- in this field
2 audit report? That would be 21780.

3 A. Whether the --

4 Q. Whether Duke and the Department had agreed to
5 the computations that are set forth in Bates number
6 21780 in front of you?

7 A. Okay. I can't answer that question because I
8 remember that there was an interest -- a dispute
9 regarding the computation of interest, and I don't know
10 if this reflects that interest.

11 Q. Okay.

12 A. So I'm just -- I do -- to the extent that
13 you're asking did the Department agree to off -- to
14 reduce the corporate income and license fee refund by
15 the offsetting sales and use tax, yes, they did.

16 Q. Okay. Did you have direct involvement in the
17 process that led to the offset that took place that's
18 documented in this field audit?

19 A. I would have had some involvement in that.
20 I'm not sure that -- I don't recall whether there was
21 ever an issue as to whether or not the Department would
22 do the offset. I just don't recall that.

23 Q. Okay. So you don't remember -- you don't
24 recall direct involvement in the facts leading up to the
25 offset of sales tax against the income tax that's set

1 forth in this field report?

2 A. Procedurally -- procedurally, I would have
3 been involved in, you know, directing the offset.
4 Whether there was an -- whether there was an issue as to
5 whether or not the offset could be made, I don't recall
6 that.

7 MR. TRESH: Okay. Let's go to -- if we can
8 hand out Bates number 21809.

9 MR. GREEN: Is it time for a quick break?

10 MR. TRESH: That would be fine.

11 (PETITIONER'S EXH. 6, Letter Dated March 20,
12 2002, SCDOR00021809 and 21810, was marked for
13 identification.)

14 (A recess transpired.)

15 BY MR. TRESH:

16 Q. Before we took a break, we had passed this
17 out. So you have in front of you SCDOR Bates number
18 21809. It's a letter from Burnie Maybank to John
19 Swearingen and yourself, correct?

20 A. Correct.

21 Q. Dated March 20, 2002?

22 A. Correct.

23 Q. Have you seen this letter before?

24 A. Back in 2002.

25 Q. I'm sorry, you saw it back in 2002?

1 A. Yeah. I saw it back in 2002.

2 Q. Okay.

3 A. I don't believe I've seen it since then.

4 Q. If you wouldn't mind, take a moment to
5 refresh your recollection.

6 A. Sure.

7 Q. Is it correct that this letter references a
8 settlement proposal that the Department made in a
9 facsimile dated March 18?

10 A. That is correct.

11 Q. Was that fax something that you would have
12 sent?

13 A. I don't -- I don't know. It could have
14 either come from me or it could have come from
15 Mr. Swearingen or could it have come from another
16 person. I don't recall.

17 Q. At the time that the fax was sent, so around
18 March of 2002, would you have had responsibility for
19 discussions regarding the Duke audit?

20 A. Yes, sir.

21 Q. Okay. And that would that fax -- the
22 Department's proposal in that fax, would the DOR --
23 well, would you have typically maintained the settlement
24 proposal like that in your file in an audit that you
25 were responsible for?

1 A. A copy of -- if I had sent the fax, I would
2 have maintained a -- I hopefully would have maintained a
3 copy in the file. If I would have simply been involved
4 in discussions about a settlement proposal that's
5 outlined in the fax, then whoever prepared the fax, if
6 it was prepared by the auditor or, you know, that's
7 where the document would have been.

8 Q. Would DOR policy -- would the Department of
9 Revenue policy at that time have been to put the fax
10 settlement proposal in a file of some sort?

11 A. Of some sort, yes, sir.

12 Q. Okay.

13 A. Let me correct that. It's my belief that if
14 a fax were sent, that a copy of that fax would have been
15 maintained somewhere. I don't believe there was any
16 written policy that said that that was necessary, but
17 certainly it should have been.

18 Q. It should have been. Okay.

19 And would it have been the Department's
20 informal policy that a --

21 A. Sure.

22 Q. And would there have been any consequences if
23 someone, say, threw away or destroyed records that
24 should have been maintained?

25 MR. GREEN: Objection as to form.

1 THE WITNESS: I'm not aware of any case that,
2 you know, records would -- you know, could sometimes be
3 misplaced or, you know, maybe a record -- maybe an
4 administrative person who mailed the fax or faxed the
5 fax did not get it back to the right file. But the
6 principle is that a copy of that fax should have been
7 related. I certainly concur with that.

8 BY MR. TRESH:

9 Q. Okay. So would you agree that this letter
10 states that Duke would enter into or execute an 870AD
11 for sales tax and license tax?

12 A. Correct.

13 Q. Okay. Would you agree that the letter states
14 that for the purposes of income tax, subject to
15 verifying the figures as stated above, Duke proposes
16 accepting the Department's proposal except that it would
17 agree to execute an SC870 rather than 870AD?

18 A. Yes, sir. That's what it states.

19 Q. And would you agree that in response to the
20 facsimile that the Department sent over that's
21 referenced in this letter, that Duke's response in this
22 letter to you states that this signing an 870, not an
23 870AD, would have the effect of keeping the years open
24 for both the DOR and the state until the end of this
25 year unless the DOR and Duke jointly agree to execute

1 another waiver?

2 A. Yes, that's correct. That it would keep open
3 the years that were otherwise open on a waiver that
4 could subsequently be extended.

5 Q. So the effect of your proposal and this
6 counter proposal in this letter would have been if the
7 year was already opened, the year would remain open; is
8 that correct?

9 A. Through the end of the --

10 Q. The year 2000?

11 A. -- the year. It must have had an expiration
12 date of December 31st, perhaps.

13 Q. Okay. Did Duke sign Form SC870AD for sales
14 tax purposes?

15 A. Yes, sir. I believe you gave me a copy of
16 that.

17 Q. Okay. And did Duke ever, in fact, ever sign
18 an SC870AD for income tax purposes?

19 A. I haven't seen a copy. You know, we're
20 talking 2002, so ...

21 Q. But given your being proffered as the person
22 most knowledgeable about the facts, were you aware or do
23 you ever recall that Duke Energy ever signed the Form
24 SC870AD for income taxes?

25 A. I don't believe so, no.

1 MR. TRESH: Okay. We can go to 21667.

2 (PETITIONER'S EXH. 7, Letter Dated July 2,
3 2002, SCDOR00021667 and 21668, was marked for
4 identification.)

5 BY MR. TRESH:

6 Q. Okay. So in front of you, Bates number
7 21667, you've got a letter from Mr. John Swearingen and
8 you dated July 2, 2002. It's a letter to you -- excuse
9 me, to Mr. John Swearingen and you from Nexsen Pruet,
10 Duke's lawyers; is that correct?

11 A. Correct.

12 Q. Have you ever seen this letter before?

13 A. Back in 2002 I'm sure I did.

14 Q. Okay. And this letter was sent a couple of
15 months after the letter we just looked at, right?

16 A. Correct.

17 Q. And it was sent by Burnie Maybank, Duke's
18 counsel at the time, right?

19 A. Correct.

20 Q. Okay. And in this letter, is it correct that
21 it also states that Duke Energy is willing to enter into
22 a Form 870AD for the purposes of sales tax only?

23 A. Okay. Let me --

24 Q. Absolutely.

25 A. Could you repeat the question.

1 Q. Okay. So this letter, which was sent a
2 couple of months after the prior exhibit we looked at,
3 this letter also states that Duke would accept the
4 Department of Revenue's proposal except that it would
5 agree to execute an 870 -- SC870 rather than an SC870AD
6 for income taxes to keep the statute of limitations open
7 through 12-31-02; is that your understanding of the
8 letter?

9 A. That's my understanding, yes, sir.

10 Q. And does this letter also state that as
11 previously indicated, Duke is examining the possibility
12 of filing amended returns?

13 A. Correct.

14 Q. And in that letter, when Duke said it was
15 examining the possibility of filing amended returns,
16 would it have been your understanding that Duke was
17 intending on filing refund claims? Would you have taken
18 that they wanted to keep the statute open?

19 A. Yeah. Correct.

20 MR. GREEN: Objection as to form.

21 BY MR. TRESH:

22 Q. Okay. So based upon this letter, it would
23 have been your understanding that Duke was examining the
24 possibility of filing refund claims?

25 A. Yes, sir.

1 Q. Okay. And the letter is signed by Burnie
2 Maybank. On page 2 of the letter, did someone else sign
3 the letter?

4 A. Yes, sir. Mr. Swearingen.

5 Q. Who is Mr. Swearingen?

6 A. He is the foreign audit supervisor.

7 Q. Okay. And did Mr. Swearingen have
8 responsibility for the Duke settlement process at this
9 time as well?

10 A. I am -- I don't recall his exact position. I
11 believe he was working as the foreign audit supervisor
12 very closely with myself. He certainly wasn't working
13 for me as an analyst at this time.

14 Q. But he was working for the Department --

15 A. Correct.

16 Q. -- in the position of working on the
17 settlement that was being discussed with Duke Energy?

18 A. Correct.

19 Q. And this settlement that's being discussed
20 per this letter says that Duke was going to file refund
21 claims and the statute of limitations would remain open
22 through 12-31-02, correct?

23 A. It says that Duke was con--- examining the
24 possibility of filing amended returns, which would have,
25 as you indicate, been refund claims. It didn't say that

1 they were going to file refund claims.

2 Q. But -- I'm sorry, go ahead, please.

3 A. No, that's fine.

4 Q. But it was -- Duke was clear that they are
5 stating that it was their understanding that the statute
6 of limitations was open through 12-31-02. What would
7 have been the impact of Mr. Swearingen's signature on
8 this letter? Why would be Mr. Swearingen have signed
9 this letter? Did it reflect an agreement of some sort?

10 A. I really can't answer that. I don't know if
11 that is simply acknowledging his receipt of the
12 correspondence or if, you know, there was some
13 discussion that it would represent a settlement
14 agreement.

15 Q. Well, let's look at the last paragraph of the
16 letter if we can. Is it accurate --

17 A. It may be I overlooked it.

18 Q. Yeah.

19 A. Okay. Yeah. He is signing it in response to
20 the last paragraph.

21 Q. And is he reflect -- and in signing the
22 letter, Mr. Swearingen, on behalf of the Department of
23 Revenue, is stating that he agrees that this letter
24 accurately reflects his understanding; is that correct?

25 A. That's correct.

1 Q. Okay. So Mr. Swearingen would have agreed
2 that the -- on behalf of the Department would have
3 agreed that the statute of limitations remained open
4 through 12-31-02; is that correct?

5 MR. GREEN: Objection to the form.

6 THE WITNESS: He's agreeing that certain
7 statute periods. He's not stating which statute
8 periods. Certain periods would be open, would be my
9 take of that language.

10 BY MR. TRESH:

11 Q. Okay. What periods would be open on your
12 take of the language based on the letter?

13 A. Anything that -- under I believe it was
14 section 12-54-85 was the statute at that time. Anything
15 that would otherwise be open under the statute.

16 Q. So anything that would otherwise be open
17 would remain open as a result of this agreement?

18 A. Yeah. It doesn't give him any additional
19 rights, but it doesn't take away any rights that are
20 otherwise ...

21 MR. TRESH: Okay. Perfect.

22 If we can, let's take a look at Exhibit 8.
23 My tab 1, Maria. If you could go to Bates number 22041,
24 a series of e-mails that I would like to talk about.

25 (PETITIONER'S EXH. 8, E-Mails, SCDOR00022041,

1 22024 through 22026, 22019 through 22021, 21660 through
2 21665, 22016 through 22018, was marked for
3 identification.)

4 BY MR. TRESH:

5 Q. If I can ask you to take a moment and look
6 through these e-mails.

7 A. And just to be -- should I start at the back,
8 is that the train? Or start I start at the front and go
9 forward?

10 Q. The front would be great. Thank you.

11 A. Can I ask a question?

12 Q. Absolutely.

13 A. Is there any difference between the Exhibit
14 21660 and 22018? And I'm just asking so I don't have to
15 read them through carefully.

16 MS. TODOROVA: What is the second document?

17 THE WITNESS: It's two pages after 660, I
18 think that's 22018. They look like the same memo, the
19 same e-mail. They are both from myself to Ron Urban.

20 MS. TODOROVA: No difference.

21 THE WITNESS: I was worried I needed to go
22 through --

23 MS. TODOROVA: We just included them because
24 that's how they were produced to us.

25 THE WITNESS: Okay. Thank you.

1 Okay.

2 BY MR. TRESH:

3 Q. Okay. Have you ever seen these e-mails
4 before?

5 A. I'm sure I have back at that time.

6 Q. Had you seen these e-mails? You've mentioned
7 at the beginning of your deposition that you had gone
8 over some e-mails to prepare for this deposition. Had
9 you seen these e-mails as part of that preparation?

10 A. At least one of them I have, which -- and
11 that would be the one, your number 21661, I had seen
12 that.

13 Q. Okay. And do you recall any -- do you agree
14 that most of this correspondence, the e-mail
15 correspondence takes place between March of 2002 and
16 July of 2002?

17 A. Correct.

18 Q. And that the e-mail chain involves a series
19 of e-mails between you and Harley Priesmeyer -- some of
20 them involved Harley Priesmeyer?

21 A. Correct.

22 Q. Do you remember who Harley Priesmeyer was?

23 A. I remember he was with Duke representing this
24 matter. I can't tell you his title without looking at
25 the e-mail.

1 Q. That's okay. Do you -- do you agree that
2 most of this correspondence revolves around the signing
3 of a form -- South Carolina Form SC870 and the impact of
4 that form versus signing a Form 870AD and what the
5 impact of 870AD would be?

6 A. Correct.

7 Q. And do you agree that the e-mails seem to be
8 the Department's view that an 870A reflect the
9 Department's view, in your view, that the 870AD would
10 have closed the statute of limitations for income tax
11 had Duke signed a Form 870AD for income taxes for the
12 period 1978 through 2001, that that would have closed
13 the statute of limitations, while a Form SC870 would
14 have kept the statute of limitations for income tax
15 open; is that correct?

16 MR. GREEN: Objection to the form.

17 THE WITNESS: I agree with the first part of
18 that statement, that the execution of a Form SC870AD
19 would have closed the statute. I'm not sure what
20 periods would have remained open if they had simply
21 executed the 870. I don't know what periods were open.

22 BY MR. TRESH:

23 Q. The periods that were otherwise open,
24 correct?

25 A. That were otherwise open.

1 Q. Okay. What was Duke's position with respect
2 to executing an 870AD for income taxes for the period
3 '78 through 2001 versus executing a Form 870?

4 A. Could you repeat the question? I'm sorry.

5 Q. That's okay.

6 What was Duke's position with respect to
7 executing a Form 870AD that would have closed the
8 statute of limitations? Did they agree to execute that,
9 or were they taking the position that they didn't want
10 to execute that?

11 MR. GREEN: Object as to form.

12 THE WITNESS: Duke was requesting an SC870,
13 and my reading of their e-mail from Harley Priesmeyer,
14 which is your exhibit 21663, I seem to recall that there
15 was some discussion that they wanted to file returns for
16 some credits. Possibly investment tax credits related
17 to property that was in use in South Carolina.

18 Sometimes, and I don't know if this is the
19 case in this taxpayer, but sometimes taxpayers have --
20 it takes -- it takes time for them to determine what
21 property is actually located in South Carolina when
22 reviewing -- pulling it out of their federal schedules
23 in order to claim the investment tax credits.

24 And this e-mail indicates that -- and that
25 for at least later years, there was some issue of some

1 credits they felt they were entitled to.

2 BY MR. TRESH:

3 Q. Can I ask you to look at Bates number 21661.

4 A. Yes, sir.

5 Q. And is it correct that this is an e-mail from
6 you to Harley Priesmeyer from Duke Energy dated July 10,
7 2002?

8 A. Correct.

9 Q. And in that e-mail is it correct that you are
10 telling Harley that you didn't have a problem with
11 language that would hold open the periods to address an
12 interest computation question, but that it would be
13 unusual for us, the Department, to hold open periods for
14 other credit or deduction adjustments; is that correct?

15 A. Correct.

16 Q. And then there's a handwritten note on this
17 e-mail dated July 11, 2002, one day later; is that
18 correct?

19 A. Correct.

20 Q. And that handwritten note indicates that
21 there was a conference call between Harley Priesmeyer,
22 from Duke Energy; Pat Hobson; and John Swearingen and
23 yourself; is that correct?

24 A. Correct.

25 Q. And can you tell whose handwriting that --

1 A. That's my handwriting.

2 Q. So this is your note?

3 A. (Nods head.)

4 Q. And does your note from that time indicate
5 that following your e-mail to Harley, that there was a
6 conference call the next day --

7 A. Correct.

8 Q. -- in which Duke made it clear to you that
9 they weren't just talking about investment tax credits,
10 that they indicated they wanted to preserve their right
11 to file a claim for refunds or other deductions and
12 credits; is that correct?

13 A. Let me read my note, please.

14 My note indicates the language states,
15 "Indicated that our earlier understanding was that they
16 only needed to review later years."

17 So it seems that there was some discussion
18 that they were only going to be reviewing later years.

19 Q. Does your note say that the taxpayer also
20 wants to preserve their right to file a claim for refund
21 for other deductions and credits?

22 MR. GREEN: Objection as to form.

23 THE WITNESS: My note states, "Taxpayer wants
24 to hold open --" "-- wants to hold all periods open for
25 income and license. Indicated that our earlier

1 understanding was they only needed to review later
2 years. Advised that we would agree to 870AD for sales
3 and use; however, TP is not prepared to cut a check for
4 sales and use. They want until 12-31-02 to complete
5 review. Requested that they study position and get back
6 with us."

7 Reading this chain of e-mails, I believe what
8 I was speaking of here is that they wanted to hold the
9 periods open for income and license, but it was our
10 earlier understanding that they only needed to review
11 the later years. And I think that was related to some
12 credits that they were gathering information for.
13 That's my speculation ten years later.

14 BY MR. TRESH:

15 Q. Why would Duke have -- do you know why Duke
16 would have asked to hold earlier periods open to file
17 refunds for later years? In other words, if the years
18 at issue were '78 through 2002, do we agree with that?
19 Do you agree that the years in issue in this e-mail
20 chain for income tax is '78 through 2002?

21 A. I'm not sure. Is it 2002 that it goes up to?

22 Q. 2001, excuse me.

23 A. Okay.

24 Q. So '78 through 2001, do you agree?

25 A. Yes, sir.

1 Q. Okay. And Duke is asking to hold those
2 periods open, correct?

3 A. Correct.

4 Q. For '78 through 2001, that was your
5 understanding of their position, correct?

6 A. Correct.

7 Q. Okay. And if we go back to one of the
8 earlier exhibits that -- the letter that Mr. Swearingen
9 executed, that was on July 2nd, I believe. If we can go
10 back to that for a minute. Mr. Swearingen, as late as
11 July 2nd, if we look at DOR 21668, Mr. Swearingen
12 executed a letter that specifically agreed to hold those
13 periods open, correct?

14 A. Correct.

15 Q. Okay. So it was --

16 A. Well, let me say -- and I would have to
17 reread this. I'm not sure that this letter talks about
18 periods. I think it just simply talks about whether an
19 870 or an 870AD will be executed.

20 Have I missed something at the front?

21 Q. If you look on the front page of the letter,
22 if we go back to 21667.

23 A. Uh-huh.

24 Q. Second sentence of the second paragraph. "We
25 understand this would have the effect of keeping the

1 years open for both the DOR and the state until the end
2 of the waiver period, 12-31-2002."

3 A. Yeah. I'm sorry.

4 Q. Is that correct?

5 A. That's correct. What I cannot address is
6 what those years were.

7 Q. Okay.

8 A. That's simply the clarification I'm
9 attempting to make.

10 Q. Based upon your recollection having been
11 directly involved in this process, do you have any
12 reason to -- do you have any reason to believe that the
13 years at issue in that letter that Mr. Swearingen was
14 executing and agreeing to hold open were not '78 through
15 2001, is there anything you can recall that would
16 indicate otherwise?

17 A. From this chain of e-mails, there's an
18 indication that they were looking for credits and
19 adjustments and my -- I don't have a direct strong
20 recollection. I would -- I would -- it indicates to me
21 that they were looking at later years and I --

22 Q. When you say "later years," what do you mean
23 by that?

24 A. Years -- and I'm not sure what year
25 South Carolina adopted. We started -- the legislature

1 adopted additional tax credit incentives recruiting
2 industry and recruiting investment in South Carolina.
3 And I'm not exactly sure what those later years were,
4 but it was not as far -- there were many more incentives
5 in the later years than there were in the early '70s.

6 Q. So for the period '78 through 2001, that is
7 the subject of this e-mail chain, are you suggesting
8 that Duke wanted to file refund claims or that these
9 credits or incentives related to years after 2001,
10 before 2001? What was Duke asking to hold the statute
11 open for?

12 A. I'm not sure of the answer to what years they
13 were asking, but my thought would be from my e-mail that
14 they were gathering information about credits for more
15 recent years. That it wasn't for this very long period.

16 Q. If it was for more recent years, why would
17 they have needed some sort of agreement to hold the
18 statute of limitations open? In other words, if it was
19 for years that were within the statute, why would they
20 need anything?

21 A. Years that were covered by the audit.

22 Q. Oh, okay. So years --

23 A. But not the -- more recent. The audit
24 covered, as you know, a large number of years. I'm
25 thinking that this related to the more recent years in

1 the audit period. Not years subsequent to the audit.

2 Q. Is there anything in this e-mail
3 correspondence or any correspondence that you're aware
4 of that would in some way limit where Duke was
5 suggesting that they only hold open part of the statute
6 of limitations?

7 A. Yeah.

8 Q. What part would that be?

9 A. In your Exhibit 21661, Mr. Priesmeyer is
10 writing to me, "Duke is planning on filing amended
11 returns for some credits and other deductions/
12 adjustments not previously taken for these years."

13 I'm thinking that those are credits for more
14 recent years that they're assembling information for.
15 It doesn't state that. It's not clear.

16 Q. Is it true you stated earlier that these
17 e-mails refer to the period '78 through 2001; is that
18 correct?

19 A. Correct.

20 Q. So when Mr. Priesmeyer's e-mail when he says,
21 "these years," do you have any reason to believe that he
22 was referring to anything other than '78 through 2001?

23 A. Yeah. It's not my belief that they were
24 going back in the records to '78 to pull out property
25 that would qualify for investment tax credits. I just

1 don't -- you know, it's not clear to that. But I would
2 not have intimated that.

3 Q. Is there anything in this e-mail that refers
4 to investment tax credits? Is it correct that the
5 language says, "For other credit or deduction
6 adjustments"?

7 A. That is correct, yeah.

8 MR. TRESH: Okay. Let's go to 21807.

9 (PETITIONER'S EXH. 9, Memorandum Dated July
10 25, 2002, SCDOR00021807, was marked for identification.)
11 BY MR. TRESH:

12 Q. I've handed you is a memorandum from --
13 memorandum to Mr. John Swearingen and yourself from
14 Burnie Maybank, Duke's counsel, dated July 25th, 2002;
15 is that correct?

16 A. Correct.

17 Q. And have you seen this document before?

18 A. Yes, sir.

19 Q. And the document states -- the middle of the
20 memo, it says, "Although Duke is prepared to sign the
21 870 and the 870AD, which you have submitted --"

22 A. Are you in the second paragraph?

23 Q. Second paragraph.

24 A. Okay.

25 Q. I'm sorry, first paragraph. Excuse me.

1 A. Thank you. I'm with you.

2 Q. Sorry.

3 A. Yes, sir.

4 Q. Okay. "Although Duke is prepared to sign the
5 870 and the 870AD, which you have submitted, I don't --
6 I didn't think it was a good idea to do so while we were
7 at apparent disagreement over what the proposed
8 settlement meant."

9 Do you know what that disagreement was about
10 that was referenced in this memorandum?

11 A. No, sir. I'm not sure if that relates back
12 to there had been a disagreement about interest
13 calculations. I couldn't tell you completely what that
14 means, no, sir.

15 MR. TRESH: Okay. Let's go to number 10. Go
16 to 21781.

17 (PETITIONER'S EXH. 10, Memorandum Dated
18 August 12, 2002, SCDOR00021781 through 21800, was marked
19 for identification.)

20 BY MR. TRESH:

21 Q. The first page of Bates 21781, have you seen
22 this document before?

23 A. This one I'm not sure of. It may have been
24 the cover -- if the cover memo would have been faxed to
25 Mr. Swearingen, I may not have seen the cover sheet. I

1 may have just seen the attachment.

2 Q. Was the cover sheet addressed to you?

3 A. Yes, sir.

4 Q. And is it sent from Burnie Maybank, Duke's
5 counsel?

6 A. Correct.

7 Q. And it was sent on August 12th, 2002,
8 correct?

9 A. Correct.

10 Q. And it's entitled Duke Settlement?

11 A. Correct.

12 Q. And it states, "Attached is a fax executed
13 copy of the SC870AD sales and use tax. I should have
14 the original to you shortly."

15 Is that correct?

16 A. That's correct.

17 Q. Okay. And you've seen this document before.
18 This is your signature on the bottom of the signed
19 870AD?

20 A. Yes, sir.

21 Q. So it appears from this memorandum that you
22 had sent -- you or Mr. Swearingen, the Department, had
23 sent Duke a form 870AD for sales taxes?

24 A. That is correct.

25 Q. And that Duke executed and signed and sent it

1 back, correct?

2 A. Correct.

3 Q. Okay. And to your knowledge, did the
4 Department ever send a similar 870AD for income taxes?

5 A. Based on the chain of correspondence, it
6 doesn't appear that we would have sent an AD for income
7 taxes.

8 Q. Is there any reason why you would send one
9 for sales taxes and not for income taxes?

10 A. It wouldn't -- Duke was requesting an SC870,
11 not an SC870AD. And we -- this was executed in August.
12 The chain of correspondence in which they made clear
13 that they did not want to execute an 870AD was prior to
14 that time, so we apparently did not send them one.

15 Q. Are you aware of any other document or
16 agreement signed by the Department and Duke Energy that
17 would have prohibited Duke from filing refund claims, in
18 other words, that would have settled their income --
19 would have prohibited them from filing income tax refund
20 claims? Is there any written settlement agreement
21 between Duke Energy and the Department that you're aware
22 of?

23 A. I'm not aware of any other written settlement
24 agreement other than the document that you provided that
25 was signed by Mr. Swearingen.

1 Q. And that document would have held open the
2 periods for Duke to file refunds; is that correct?

3 A. Would have held open certain periods.

4 Q. Otherwise open periods?

5 A. Exactly.

6 MR. TRESH: Okay. Let's look at 21782.

7 (PETITIONER'S EXH. 11, Letter Dated December
8 19, 2002, SCDOR00021782, was marked for identification.)

9 BY MR. TRESH:

10 Q. Okay. This is a letter from John Comer to
11 Duke Energy dated December 19, 2002. Do you agree?

12 A. Correct.

13 Q. And Mr. Comer was an audit manager for the
14 South Carolina Department of Revenue; is that correct?

15 A. Yes, sir.

16 Q. And have you seen this letter before?

17 A. I don't recall seeing that, no, sir.

18 Q. Okay. Can you take a moment to look over the
19 letter?

20 A. Certainly.

21 Q. Would you agree that this letter was a letter
22 to Mr. Priesmeyer, who was at Duke Energy at the time,
23 and it closed the sales and use tax audit for Duke
24 Energy?

25 A. Correct.

1 Q. Is there any other effect that this letter
2 would have, in your opinion?

3 A. I don't believe so.

4 Q. Okay. You had mentioned earlier in this
5 deposition that there was a dispute regarding interest
6 that Duke was having with the Department of Revenue at
7 the time these negotiations were taking place; is that
8 correct?

9 A. Correct.

10 Q. Okay. And do you remember what the issue was
11 with respect to the calculation of interest?

12 A. I can't tell you the exact periods involved,
13 but it related to a change -- a legislative change where
14 the code provided for the compounding of interest. And
15 as best I recall, it was related to how that affected
16 additional taxes and interest due prior to the adoption
17 of that code section.

18 Q. And do you remember whether that dispute was
19 resolved?

20 A. In one of the memorandums there was
21 discussion that that issue would be forwarded to
22 counsel's office for a final agency determination to be
23 issued. And I recall that the file was forwarded to
24 them. Once it went to counsel's office, I'm not sure --
25 you know, I'm sure it was resolved. I don't recall

1 exactly when it was resolved.

2 MR. TRESH: Okay. Bates number 9356.

3 (PETITIONER'S EXH. 12, Consent Order,
4 DE00009356 and 9357, was marked for identification.)

5 BY MR. TRESH:

6 Q. I've handed you what's a consent order,
7 docket number 03-ALJ-17-0094-CC. Anonymous Taxpayer
8 Petition versus South Carolina Department of Revenue; is
9 that correct?

10 A. Correct.

11 Q. Does this appear to be a consent order that
12 was filed with this Administrative Law Judge Division in
13 South Carolina?

14 A. Correct.

15 Q. And does it relate to the interest
16 disagreement that we were just speaking of?

17 A. Let me review.

18 Q. Absolutely.

19 A. I'm sorry, your question again.

20 Q. Does this appear to be related -- this
21 consent order, is this related to the interest issue --
22 the interest dispute that Duke was having with the
23 Department of Revenue during --

24 A. I believe it is, yes, sir.

25 Q. Okay. And if I can direct your attention to

1 item number 2 in this document, and it states, "The
2 parties further acknowledge and agree that petitioner
3 has certain refund claims pending before the Department,
4 which also relate to tax years prior to December 31st,
5 1985.

6 "The settlement of this matter shall not
7 constitute a resolution of the substantive issue of the
8 calculation of interest for pre-September 1985 tax
9 periods and shall not be binding on either party with
10 respect to petitioner's claims."

11 Would that statement be consistent with your
12 earlier testimony that Duke had or was considering
13 filing other refund claims and that those claims would
14 have been pending with the Department at this time?

15 A. Correct.

16 (PETITIONER'S EXH. 13, Letter Dated February
17 4, 2010, was marked for identification.)

18 BY MR. TRESH:

19 Q. I'm handing you a document dated February 4,
20 2010. It's a document from Michael S. Traynham, counsel
21 for litigation for the South Carolina Department of
22 Revenue to Burnie Maybank and James F. Reames from
23 Nexsen Pruet Law Firm; is that correct?

24 A. Correct.

25 Q. Have you ever seen this document before?

1 A. No, sir.

2 Q. If I can ask you to take a look at it for a
3 moment.

4 A. Sure.

5 Q. Rather than reading the entire document, can
6 you just generally familiarize yourself with it. This
7 document was issued after I had left the Department and
8 retired. Does it appear to be a determination issued by
9 the South Carolina Department of Revenue with respect to
10 Duke's income tax claims for corporate -- income tax
11 refund claims for corporate income taxes for the years
12 1978 through 2001?

13 A. Correct.

14 Q. And in the analysis, were you aware that the
15 Department had issued -- is this document frequently --
16 a Department determination frequently referred to as a
17 FAD? Have you heard that term before?

18 A. Final Agency Determination, yes, sir.

19 Q. Okay. So you're familiar with that term?

20 A. Yes, sir.

21 Q. So I'll referred to this was a FAD, if that's
22 okay with you.

23 A. Sure.

24 Q. Are you aware that the Department had issued
25 a FAD with respect to Duke's corporate income tax

1 returns for the years 1978 through 2001?

2 A. Not until you presented me with this
3 document.

4 Q. And does it appear to you that the Department
5 denied Duke Energy's refund claims for the corporate
6 income tax for the tax years 1978 through 2001?

7 A. Yes, sir.

8 Q. And would it be typical for the Department to
9 put all the reasons why it was denying a refund claim in
10 its FAD? In other words, when you were at the
11 Department, if the agency issued a determination which
12 was telling a taxpayer why it was denying its claims,
13 would the Department of Revenue tell the taxpayer why it
14 was denying its claims?

15 A. The Department -- I believe the answer is
16 that the Department would address those issues that were
17 raised by the taxpayer. So I can think of instances
18 where matters might be under protest where there might
19 be alternative arguments that were not raised by the
20 taxpayer that wouldn't be discussed.

21 Am I -- I'm not disagreeing with you, I'm
22 just saying that there might be alternative arguments
23 that would not appear in a FAD if they were never raised
24 at any point in the earlier dispute.

25 Q. So the Department might deny refund claims

1 but not tell the taxpayer why it was denying its refund
2 claim?

3 A. No. The Department would in denying -- if
4 the taxpayer were requesting a refund and stating its
5 reasons for the refund, the Department -- and the
6 Department disagreed with the reasons that the taxpayer
7 was claiming it was entitled to the refund, the
8 Department might simply address those reasons. It might
9 not address alternative arguments.

10 Q. So they wouldn't -- so the Department would
11 not -- it would be the Department's policy not to tell
12 the taxpayer or not to tell a taxpayer all of the
13 reasons why it felt a refund claim were not --

14 MR. GREEN: Objection as to form.

15 THE WITNESS: The Department would tell --
16 the Department's determination would address issues
17 raised by a taxpayer. There could be other reasons
18 that -- you know, both parties might be in agreement
19 that, you know, it wouldn't -- let me stop and rephrase
20 that. There might be situations where not every --
21 where it might not be necessary to address every reason
22 that a refund would be denied.

23 BY MR. TRESH:

24 Q. If the Department thought that a matter was
25 settled, would they typically tell a taxpayer that?

1 Denying its refund claims? In other words, if a
2 taxpayer were to make a claim for a refund and the
3 Department felt like the statute of limitations was
4 closed or otherwise settled, would the Department
5 typically tell the taxpayer that in issuing a
6 determination and denying a refund claim?

7 MR. GREEN: Object as to form.

8 THE WITNESS: If the Department felt the
9 refund were outside of the statute, I believe that in
10 general they would advise the taxpayer that that's --
11 that in addition to other reasons it was outside the
12 statute.

13 BY MR. TRESH:

14 Q. Okay.

15 A. I can't speak for counsel's office.

16 MR. TRESH: Can we take a two-minute break?
17 Go off the record.

18 MR. GREEN: Sure.

19 (A recess transpired.)

20 MR. TRESH: We've concluded the deposition.
21 Did you have any questions?

22 MR. GREEN: No, I do not.

23 (The deposition concluded at 1:02 p.m.)
24
25

Jan Urban 12/21/2011

78

1 SIGNATURE OF DEPONENT

2

3 I, the undersigned, JAN URBAN, do hereby
4 certify that I have read the foregoing deposition and
5 find it to be a true and accurate transcription of my
6 testimony, with the following corrections, if any:

7 PAGE LINE CHANGE REASON

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JAN URBAN DATE

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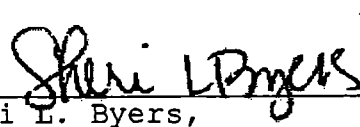
CERTIFICATE OF REPORTER

I, Sheri L. Byers, Registered
Professional Reporter and Notary Public for the
State of South Carolina at Large, do hereby certify:

That the foregoing deposition was
taken before me on the date and at the time and
location stated on page 1 of this transcript; that
the deponent was duly sworn to testify to the truth,
the whole truth and nothing but the truth; that the
testimony of the deponent and all objections made at
the time of the examination were recorded
stenographically by me and were thereafter
transcribed; that the foregoing deposition as typed
is a true, accurate and complete record of the
testimony of the deponent and of all objections made
at the time of the examination to the best of my
ability.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal this 28th day of December,
2011, at Columbia, Richland County, South Carolina.



Sheri L. Byers,
Registered Professional Reporter,
Notary Public
State of South Carolina at Large
My Commission expires:
January 5, 2014



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DEPARTMENT OF REVENUE
 IT: INCOME TAX & LICENSE FEE

FS-54

TAXPAYER: DUKE POWER COMPANY
 ADDRESS: 422 S. CHURCH ST.
 CHARLOTTE, NC 28242-001

FEI #: 56-0205520
 FILE #: 20090024-9
 PERIOD: 12/78-12/94
 DATE: 8/8/02

INTEREST COMPUTED TO:

8/14/02

00/36/ 5258

DUKE POWER COMPANY

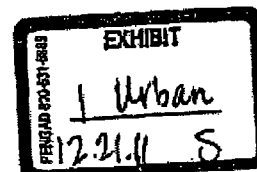
78-94

TAX	INTEREST	PENALTY	TOTALS
1,189	(7,434,600)	0	(9,385,789)
1,685	\$2,757,796		\$3,593,481
504	-\$4,676,804	\$0	-\$5,792,308
	-\$132,889		-\$132,889
504	-\$4,809,693	\$0	-\$5,925,197
66	\$1,070,657		\$2,796,623
	\$60,871		\$60,871
TOTAL THRU 8/14/02		\$1,725,966	\$1,131,528
			\$2,857,494
INCOME & LICENSE NETTED AGAINST SALES & USE TAX:			-\$3,067,703

Net Refund

Rita: This assessment for sales/use tax was netted against a refund of corp. income tax and license fee that we issued to Duke on 8/14/02. Please make sure our auditors get credit for the collection. Audit file will follow soon.

Thanks,
 John Comer



SCDOR00021785

From: JOHN COMER
To: MURRAH, RITA
Date: 8/19/02 2:11PM
Subject: Re: DUKE ENERGY

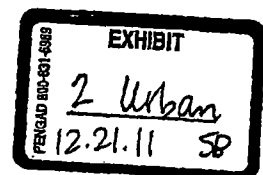
That is correct

From: RITA MURRAH
To: COMER, JOHN
Date: 8/19/02 2:02PM
Subject: DUKE ENERGY

JOHN

I NEED TO GIVE CREDIT FOR THIS PAYMENT OF 2,857,494.79 DO I GIVE THE 6 PEOPLE ON THE FRONT CREDIT AT PERRY 50% AND THE OTHER FIVE AT 10%? I AM JUST MAKING SURE.

THANKS
RITA



SCDOR0002178



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
**OFFER OF WAIVER OF RESTRICTIONS ON
ASSESSMENT AND COLLECTION OF ADDITIONAL
TAX OR ACCEPTANCE OF OVERASSESSMENT**

SC870AD
(Rev. 7/97)
3310

Taxpayer Name(s) Duke Energy Corporation
(Please type or print)
Doing Business As _____
Street Address PO Box 1642
City Houston State Texas ZIP Code 77251-1642
Identification Number (SSN, FEI, etc.) 56-0205520

Increase (Decrease) in Tax, Interest and Penalties (Use separate section for each type of tax)	
Type of Tax <u>Sales & Use</u>	
Period Covered <u>1/1/1991 through 12/31/2001</u>	
Tax \$ <u>\$1,725,866.09</u>	Penalties \$ _____
Type of Tax _____	
Period Covered _____	
Tax \$ _____	Penalties \$ _____

Total due \$ 2,857,494 if paid by August 14, 2002 including interest.

This information was prepared by Isa Sorensen Crangle, CPA Telephone Number 803 898-5616

**Consent To Assessment and Collection of Additional Tax
or Acceptance of Refund Determination**

The undersigned consents to the assessment and collection of any additional tax and penalties or accepts any decrease in tax and penalties shown above, plus any interest provided by law. This offer is subject to acceptance by the Department of Revenue. If this offer is accepted, no claim for refund can be filed or pursued and it will not be reopened in the absence of conditions stated in the general information and instructions.

Taxpayer's Signature _____ Date _____

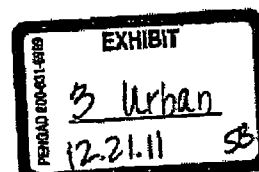
Spouse's Signature _____ Date _____

Corporation Name (if applicable) Duke Energy Corporation

By [Signature] Title Sr. Vice President Date August 13, 2002
Signature

Commission Approval of Waiver By [Signature]

(See reverse side)



SCDOR00021800



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
**WAIVER OF RESTRICTIONS ON ASSESSMENT
AND COLLECTION OF ADDITIONAL TAX OR
ACCEPTANCE OF OVERASSESSMENT**

SC870
(Rev. 7/97)
3309

Taxpayer Name(s) _____
(Please type, or print)
Doing Business As _____
Street Address _____
City _____ State _____ ZIP Code _____
Identification Number (SSN, FEI, etc.) _____

Increase (Decrease) in Tax, Interest and Penalties (Use separate section for each type of tax)	
Type of Tax _____	
Period Covered _____	
Tax \$ _____	Penalties \$ _____
Type of Tax _____	
Period Covered _____	
Tax \$ _____	Penalties \$ _____

Total due \$ _____ if paid by _____ Including interest.
This information was prepared by _____ Telephone Number _____

PLEASE READ THE INSTRUCTIONS ON THE REVERSE SIDE BEFORE SIGNING.

**Consent To Assessment and Collection of Additional Tax
or Acceptance of Overassessment**

I have read and understand the instructions on the reverse side. I consent to the assessment and collection of any additional tax and penalties or accept any decrease in tax and penalties shown above, plus any interest provided by law. I understand that by signing this waiver, I consent to the above determination amounts(s) and, must pay the additional amounts prior to contesting this matter any further.

Taxpayer's Signature _____ Date _____
Spouse's Signature _____ Date _____
Corporation Name (if applicable) _____
By _____ Title _____ Date _____
Signature

(See reverse side)

GENERAL INFORMATION AND INSTRUCTIONS
SC870 (Rev. 7/97)

IMPORTANT: By signing this form, the taxpayer (1) agrees to pay the tax, interest, and penalties stated to be due; and (2) gives up the right to appeal this matter further. Interest and applicable penalties will continue to accrue until the balance due the Department is paid in full. Signing this form does not affect your right to file a claim for refund and does not prevent the Department from assessing additional tax found to be due at a later date.

NOTE: If you wish to give up your right to file a claim for refund and prevent the Department from assessing additional amounts at a later date, a SC870AD should be executed in lieu of this SC870.

CLAIM FOR REFUND

Executing this document does not prevent you from seeking a refund of State taxes paid. The refund claim must be filed within three years from the date the return was filed, or two years from the date of payment of the tax, whichever is later. See the SC Information Guide about the claim for refund procedure for additional information.

EXECUTING THIS FORM

If this waiver relates to a joint individual income tax return, both husband and wife must sign the waiver.

If the SC870 is executed on behalf of a corporation, the waiver must include the corporation's name as well as the signature and title of the corporate officer executing this document.

If this waiver is associated with an income tax examination of a partnership or "S" corporation, each partner or shareholder must execute a separate form.

If this waiver is signed by someone acting in a fiduciary capacity (e.g. a personal administrator or trustee), Internal Revenue Service Form 56, Notice Concerning Fiduciary Relationship, must accompany this form unless previously provided.

An attorney, CPA, or other agent may execute this form on behalf of a client provided such authority is granted in a power of attorney. The power of attorney must accompany this form unless previously provided.

GENERAL INFORMATION

We have an agreement with the Internal Revenue Service which provides for the exchange of tax information. If this change affects returns filed with the Internal Revenue Service, amended federal return(s) may need to be filed.

If you have any questions about this waiver, please contact the preparer.

State of South Carolina
Department of Revenue
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214

SC REVENUE PROCEDURE #95-6

SUBJECT: Department of Revenue Internal Appeals Process and Procedures

EFFECTIVE DATE: This document is effective August 1, 1995

SUPERSEDES: SC Revenue Procedures #92-1, 95-3, and all previous documents and any oral directives in conflict herewith.

AUTHORITY: S.C. Code Section 12-4-320 (Supp. 1994)
SC Revenue Procedure #94-1

SCOPE: A Revenue Procedure is a statement which provides information of a procedural nature. It is valid and remains in effect until superseded or modified by a change in the statute or regulations or a subsequent court decision or Revenue Procedure.

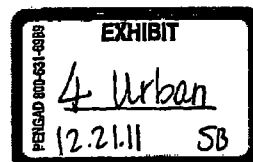
I. Introduction

This document contains procedures for handling disputed matters within the jurisdiction of the Department of Revenue, including disputes concerning penalties and denials and revocations of licenses, through the Department Determination.

These procedures are intended to ensure public confidence in the integrity and fairness of the Department, to comply with both the letter and the spirit of the South Carolina Taxpayers' Bill of Rights, and to resolve disputes where possible without the expense of going to a formal hearing or court.

All time limits contained in this Revenue Procedure, except those mandated by statute or regulation, may be extended by mutual agreement of the person appealing and the appropriate Department employee.

To understand the appeals process, this Revenue Procedure must be read in conjunction with the South Carolina Revenue Procedures Act, Chapter 60 of Title 12 of the South Carolina Code, and the Rules of Procedure for the Administrative Law Judge Division. The Rules of Procedure are available from the Administrative Law Judge Division, Edgar A. Brown Building, Second Floor, 1205 Pendleton Street, Columbia, South Carolina 29201, (803) 734-0550.



II. Definitions

A. Appeals - The employees designated by Field Services Division, Office Services Division, Property Division, and Division of Motor Vehicles to carry out the responsibilities and duties assigned to Appeals in this Revenue Procedure.

B. Audit Supervisor - The employees designated by the Field Services Division, the Office Services Division, the Property Division, and the Division of Motor Vehicles to carry out the responsibilities and duties assigned to the Audit Supervisor in this Revenue Procedure.

C. Contested Case Hearing - A hearing defined in Section 1-23-310 of the S.C. Code, and conducted pursuant to Article 3, Chapter 23 of Title 1, the South Carolina Administrative Procedures Act. It includes hearings conducted by:

1. The Administrative Law Judge Division to review Department Determinations other than DMV Matters; and
2. The DMV Hearing Officers to review Department Determinations regarding DMV Matters.

D. Department - The Department of Revenue.

E. Department Determination - The final determination of an appeal by the Department made in accordance with this Revenue Procedure. This determination may be appealed to the Administrative Law Judge Division, or, for DMV Matters, to the Hearing Officers of the Department of Public Safety.

F. Department Representative - The person appointed by the Department's General Counsel to prepare the Department's determination and represent the Department at the Contested Case Hearing.

G. Director - The Director of the Department.

H. Division - The appropriate division or divisions of the Department. Divisions of the Department which are affected by this Revenue Procedure include the Field Services Division, the Office Services Division, the Property Division, the Division of Motor Vehicles, and the Office of the General Counsel.

I. DMV Hearing Officers - The Department of Public Safety's hearing officers.

J. DMV Matters - Matters related to driver licenses, motor vehicle registrations, and motor vehicle titles.

K. Final Assessment or Assessment - For the purposes of this Revenue Procedure:

1. Except for property taxes, an Assessment is the determination of any tax due.
2. For property tax purposes an Assessment is the determination of the value of the property multiplied by the assessment ratio. The property tax due is later determined by multiplying the Assessment by the millage levied by the taxing authority. An Assessment for property taxes of airlines and private car lines will include determination of the equalized assessment ratio, the millage and the tax due.

3. Assessments include the determination of any penalty or interest due and owing.

L. Proposed Assessment - The first written notice sent or given to a person stating that a Division within the Department has concluded that any tax is due. For property tax purposes, it includes the first notice stating the value and/or assessment ratio of certain property as determined by the Department. The term Proposed Assessment does not include the auditor's work papers or draft audit reports, or any document that specifically states it is not intended as a proposed assessment.

If a document is consistent with this definition, it will be deemed to be a Proposed Assessment for the purposes of this Revenue Procedure even if it is called something else; for example, even if it is called an assessment, notice of assessment, assessment notice, assessment notice and tax bill, notice of appraisal and assessment, proposed notice of assessment, notice of adjustment, or if it looks like an invoice.

M. Regulatory Violation - A Regulatory Violation is a violation of a statute or regulation which controls the conduct of alcoholic beverage licensees, bingo licensees, or coin operated device licensees, including a violation which may result in the suspension or revocation of a license. It does not include taxes or interest on taxes or monetary penalties in Chapter 54 of Title 12.

N. Tax or Taxes - Unless the context clearly requires otherwise, taxes include all taxes, licenses, permits, fees, or other amounts, including interest and penalties, imposed by Title 12 of the S.C. Code, or subject to assessment or collection by the Department.

O. Waiver of Restrictions on Assessments, Forms SC870 and SC870AD

1. Form SC870 C A taxpayer may sign this form if he wants to have the Department generate a Final Assessment showing the total tax, interest and penalty (if any) due so that the taxpayer can pay the Proposed Assessment and stop the accumulation of interest. This form does not prevent the Department from assessing additional taxes, or the taxpayer, where otherwise allowed, from filing a claim for refund.

2. Form SC870AD C A taxpayer may sign this form when he wants to resolve a dispute. It is not effective until it is accepted by a Division Assistant Administrator or his designee. If accepted by the Department, the taxpayer cannot file or prosecute a claim for refund or credit and the Department will not reopen the case except for fraud, malfeasance, concealment or misrepresentation of material fact, or an important mistake in mathematical calculation.

III. Assessments and Proposed Assessments

A. Taxes other than Property Taxes

1. If the taxpayer files a written protest with the Department within thirty (30) days of the date of the Proposed Assessment, the Department will not make any effort to collect the tax until the matter is resolved within the Department or a Contested Case Hearing decision is rendered. This suspension of collection

efforts does not apply to jeopardy or termination assessments or if paragraph B or C below is applicable.

2. If the taxpayer does not file a written protest with the Department within thirty (30) days of the date of the Proposed Assessment, the Department will issue a Final Assessment and begin collection activities if payment is not made.

3. The Taxpayers' Rights Advocate may suspend the Department's collection efforts pursuant to Section 12-54-730 of the S.C. Code if the Advocate determines that those efforts will cause the taxpayer to suffer an irreparable loss.

B. Property Taxes Assessed by the Department

1. If the taxpayer files a written protest with the Department within thirty (30) days of the date of the Proposed Assessment and the matter is unlikely to be resolved prior to December 31 of the same year, the taxpayer will receive a tax bill based upon 80% of the disputed assessed value, or a greater amount if the taxpayer agrees in writing. Additional taxes will be billed or a refund made after the matter is resolved.

2. If the taxpayer does not file a written protest with the Department within thirty (30) days of the date of the Proposed Assessment, then (except for airlines and private car lines) the Department will certify its Assessment to the appropriate county or counties and the county or counties will issue the tax bills.

For airlines and private car lines, if a protest is not filed within thirty (30) days of the date of the Proposed Assessment and payment is not made when due, the Department will begin collection activities.

3. If a protest of a Proposed Assessment is not made within thirty (30) days of the date of the Proposed Assessment, the tax must be paid.

C. All Taxes and Revocation of Licenses

If the taxpayer fails to make a timely response or fails to comply with the procedures outlined in this Revenue Procedure, the Department may decide the appeal against the taxpayer and immediately issue the Department Determination. If an appeal is filed with the Administrative Law Judge Division, the Department will likely argue that the taxpayer failed to exhaust his "pre-hearing remedies" as defined in Section 12-60-30(16) of the S.C. Code.

After payment, where otherwise allowed the taxpayer can file a claim for a refund.

IV. Procedure for Taxes, other than Property Taxes, where Dispute Arises from an Audit

A. Audit (other than Office Audits)

1. The auditor will discuss the draft audit report with the taxpayer, determine the facts and issues with which the taxpayer agrees and disagrees, and strive to resolve all issues. Resolutions made at the audit level must be consistent with Department policy and may not be based upon the hazards of litigation.

2. The taxpayer may request a Technical Advice Memorandum on the legal issues involved in the audit. See S.C. Revenue Procedure 94-1.
3. Each audit file must contain an audit report, the contents of which are set forth in Exhibit B.
4. The case file will be forwarded to the Audit Supervisor.

B. Audit Supervision

1. **Purpose.** The primary purpose of audit supervision is to facilitate administration of the State's tax laws by establishing and ensuring adherence to uniform auditing and enforcement standards.

2. **Organization.** The Field Services Division, Office Services Division, Property Division, and Division of Motor Vehicles will each designate one or more Audit Supervisors who will provide audit supervision.

3. **Procedures - Except for Proposed Assessments arising from office audits.** If the Audit Supervisor agrees with the position of the taxpayer on all issues, the file will be adjusted, the taxpayer notified, and the file closed. Resolutions made at this level must be consistent with Department policy and may not be based upon the hazards of litigation.

If the Audit Supervisor determines that additional tax is due, she will supervise the preparation of a Proposed Assessment and have it sent to the taxpayer. The Proposed Assessment will contain the following:

- (a) Instructions explaining how a taxpayer can file a written protest if he disagrees with the proposed assessment, and an explanation of the taxpayer's further appeal rights.
- (b) A standard form to be used at the taxpayer's option for filing a "written protest."

Upon receipt of a written protest from the taxpayer, if the Audit Supervisor agrees with the taxpayer, she will notify the taxpayer and close the file. If she does not agree with the taxpayer, she will forward the file to Appeals.

4. **Procedures C For Proposed Assessments arising from office audits (including office audits arising from Internal Revenue Service Agent's Reports).** The following procedures are to be followed by the audit sections and Audit Supervisor:

- a) The Audit Supervisor of the appropriate section of the Office Services Division of the Department will prepare or have prepared a Proposed Assessment and forward it to the taxpayer. The Proposed Assessment will contain the following:
 - (1) Instructions explaining how a taxpayer can file a written protest if he disagrees with the Proposed Assessment.

(2) A copy of the section's report supporting the Proposed Assessment. See Exhibit C for the contents of the audit section's report.

b) The Audit Supervisor of the section which sent the Proposed Assessment will receive the protest.

(1) If the Audit Supervisor agrees with the taxpayer on all issues, the taxpayer will be notified and the file closed.

(2) If the Audit Supervisor does not agree with the taxpayer, the Audit Supervisor or her designee will try to resolve the matter consistent with current Department policy. Resolutions made at this level may not be based upon the hazards of litigation.

(3) If the Audit Supervisor cannot resolve the matter within sixty (60) days of the original receipt of the protest, she will adjust the file for any issues with which she does agree and send the file to Appeals.

C. Appeals

1. Purpose, Organization and Procedures

a) **Purpose.** Appeals' purpose is to resolve controversies where possible without litigation on a basis which is fair and impartial to both the taxpayer and the State in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Department.

b) **Function.** Taxpayers may appeal any dispute to Appeals except for those such as denial of an installment payment agreement, revocation of licenses, and jeopardy and termination assessments, which have a different procedure set forth below.

c) After receipt of a protested file from the Audit Supervisor, Appeals will follow these procedures:

(1) If the file is incomplete, Appeals will return the file to the Audit Supervisor. If the protest is improper and cannot be corrected, Appeals will have the tax assessed and send the taxpayer a demand for payment, an explanation of why the protest was not acceptable, and an explanation of the refund procedure.

(2) If the file is complete and the protest is proper, Appeals will advise the taxpayer or the taxpayer's representative by letter that the file is in Appeals, and

¹If the Audit Supervisor needs more than sixty (60) days, she will give Appeals a summary of the issues and the date she estimates the file will be resolved or sent to Appeals.

- (a) Offer the taxpayer a conference with Appeals;
 - (b) Explain the purpose and procedures involved in a conference with Appeals (see below), and the procedure if the conference with Appeals is refused; and
 - (c) Provide a list of proposed facts and a statement of the issues in controversy.
- (3) At any time, if the statute of limitations has not run, Appeals may amend the Proposed Assessment. If Appeals makes an amendment, it will send the amended Proposed Assessment to the taxpayer, and the taxpayer will be given thirty (30) days to amend his protest.
- (4) If the protest raises new facts, or the taxpayer raises new facts with Appeals, Appeals will notify the Audit Supervisor or auditor if any help is needed in investigating the facts.
- (5) If Appeals agrees with the taxpayer, it will notify the taxpayer and send a copy of its Resolution Report to the Audit Supervisor. See Exhibit F for the contents of the Resolution Report. This report will end the matter.

d) Conference with Appeals

(1) **Purpose.** The purpose of the conference with Appeals is to attempt to resolve any and all disputed matters prior to a Contested Case Hearing, to reconcile any differences concerning the facts or legal principles, and to provide an opportunity for the taxpayer to submit any new arguments and/or information, if any.

(2) **Procedures.**

- (a) The conference will be held in an informal manner.
- (b) The taxpayer is entitled to have his or her attorney, accountant and others present.
- (c) Appeals and the taxpayer will stipulate the facts upon which they agree.
- (d) The taxpayer and Appeals may raise any new issues, facts and arguments at this conference.
- (e) Appeals may discuss the appeal with the auditor, Audit Supervisor, or both, to the extent necessary to fully understand the legal and factual arguments in the appeal. Where practical the Audit Supervisor will be invited to the conference.

(f) The taxpayer and Appeals will attempt to settle the case. (See Sections C.2., "After the conference with Appeals," and C.3., "Settlements.")

(3) If the conference with Appeals is refused. If the taxpayer does not wish to take advantage of the conference with Appeals, Appeals will inform the taxpayer of the last date the taxpayer may submit new information for Appeals to consider. The taxpayer may send an amended protest or brief and respond to any assertions, arguments or conclusions made by Department employees.

2. After the conference with Appeals. The following procedures are to be followed upon completion of the conference with Appeals, or after the time for the taxpayer to submit additional information, if the conference is refused.

a) If Appeals Agrees with the Taxpayer or All Issues are Settled. If Appeals agrees with the taxpayer or all issues are settled at the conference, Appeals will prepare a Resolution Report. See Exhibit F for the contents of the Resolution Report.

If necessary, a Waiver of Restrictions on Assessments (Form SC870 or SC870AD) will be sent to the taxpayer for his signature.

b) If All Issues Are Not Settled At Informal Conference with Appeals. If all issues are not settled at, or soon after, the conference with Appeals, then Appeals will prepare Appeals' Report, and forward the file to the Department's General Counsel. See Exhibit D for the contents of Appeals' Report.

3. Settlements - Appeals will attempt to settle the case in a fair and impartial manner; *i.e.*, one which reflects the probable result in the event of litigation.

a) Appeals has the authority to settle any case based upon its findings of the facts and its determination of the law. No settlement of a Division is binding until it is approved by the Assistant Administrator of the Division.

b) Subject to the following procedures and limitations, Appeals has the authority to settle cases based upon the hazards of litigation. Appeals may refuse to settle a case based upon the hazards of litigation if it believes that State tax policy would be better served with a judicial resolution. Such settlements should reflect, on an issue by issue basis, the probable result in the event of litigation, or mutual concessions for the purpose of settlement based on the relative strength of the opposing positions where there is a substantial uncertainty of the result in the event of litigation.

Appeals will consider:

- (1) The quality of the evidence likely to be presented,
- (2) The credibility of witnesses,
- (3) The availability of witnesses,

- (4) The ability of the taxpayer to carry his burden of going forward with the evidence,
- (5) The likelihood that the evidence the taxpayer can present will carry his burden of proof,
- (6) The doubt as to an issue of fact, and
- (7) The doubt as to a conclusion of law.

c) If the settlement is based on the hazards of litigation, it must be approved in the manner described below.

4. Hazards of Litigation. Because settlements based upon the hazards of litigation must be uniformly made, to settle a case based upon the hazards of litigation, Appeals must send its recommendation to the Department's General Counsel. The recommendation must be based upon the principles in this Revenue Procedure. The Department's General Counsel will discuss the recommendation with the Chief Counsel for Policy and the Chief Counsel for Revenue or Regulatory Litigation, as appropriate, and then either reject it or recommend it to the Director who may authorize the settlement. If the settlement is rejected, the Department's General Counsel may make suggestions for changes which would make it acceptable. If Appeals concurs with the changes, Appeals may resubmit the recommendation after the changes are made.

D. Department Representatives. If the case is not settled, Appeals will forward the file to the Department's General Counsel who will assign it to a Department Representative. The Department Representative will review the file and either:

- 1. Discuss the file with the Director, and then prepare the Department's Determination; or
- 2. Return the file to Appeals if the taxes, interest, penalties or other relief requested by Appeals is not adequately supported by the file or by the Proposed Assessment, or if directed to do so by the Director. After discussing the file with the Department Representative, Appeals may amend the file and return it to the Department Representative, or close the file.

The Department Representative will send the Department's Determination to the taxpayer or his representative with:

- 1. The choice to pay any tax, penalties and interest due, or to request a Contested Case Hearing; and
- 2. A statement explaining that a request for a Contested Case Hearing must be made to the Department Representative within 30 days of the date the Department Determination is sent to the taxpayer, and an explanation of how to request a hearing.

The Department Representative will prepare the transmittal to the Administrative Law Judge Division or the DMV Hearing Officers and represent the Department at the hearing. Administrative Law Judge Division hearings are conducted pursuant to the

Administrative Law Judge Division rules which are available from the Administrative Law Judge Division.

V. Procedure for Property Tax Appeals where the Department is the Assessor

A. Except to the extent different rules are provided, property tax procedures are the same as the procedures provided for other taxes. The Property Division will designate one of its employees to perform the functions of the Audit Supervisor. Although this person may have different titles depending upon the type of property tax, the type of taxpayer involved, or whether an exemption is at issue, for purposes of this Revenue Procedure, this person will be referred to as the "appropriate Property Division employee."

B. Property other than the Business Personal Property audited by the Field Services Division.

1. Appropriate Property Division employees will review the property tax returns and, when necessary, issue Proposed Assessments.
2. If the taxpayer files a protest, the appropriate Property Division employee will review the protest, and
 - a) If, based on the letter of protest and other information, the appropriate Property Division employee agrees with the taxpayer, he will notify the taxpayer and close the file.
 - b) If the appropriate Property Division employee does not agree with the taxpayer, he will meet with the taxpayer and strive to resolve all issues. If it is not possible to resolve all issues, the appropriate Property Division employee will, to the extent possible, determine the facts and issues with which the taxpayer agrees and disagrees. Resolutions must be consistent with Department policy. Settlements based upon the hazards of litigation may not be made at this level.
3. If the appropriate Property Division employee cannot resolve the matter within two months of receiving the protest, he will transfer the file to Appeals.

The Property Division will appoint one or more persons to act as Appeals. It may appoint different persons to perform the Appeals function depending upon the type or location of the property being taxed.

4. If Appeals cannot settle the matter within three months of the receipt of the protest and valuation of property is at issue, the appropriate Property Division employee will prepare a formal appraisal. This appraisal will be completed within four months of receiving the protest.

5. Appeals and its Report

- a) If Appeals resolves the case, it will prepare a corrected Assessment and send it to the auditor of the county where the property is located.
- b) If Appeals cannot resolve the case, it will prepare its report. Appeals' report, responsibilities and duties will be the same as Appeals' report,

responsibilities and duties for Proposed Assessments arising from an office audit, except the file which is forwarded will also contain the Division's appraisal if valuation is at issue, and any appraisals submitted by the taxpayer or others.

6. The remainder of the procedure will be the same as for non-property tax cases.

VI. Procedure for Appeal of Property Tax Exemptions

The appropriate section of the Property Division will review and make a determination on all claims for property tax exemptions. If the exemption is denied or a previously granted exemption is revoked, and a protest is received, the Property Division will treat the matter as a protest of a Proposed Assessment and follow the procedures outlined above.

VII. Procedure for Jeopardy Assessments

Jeopardy assessments will be handled in accordance with Sections 12-60-910 and 12-60-920 of the S.C. Code. Unless specifically directed otherwise, a taxpayer subject to a jeopardy assessment should deal directly with the Department's General Counsel.

VIII. Procedure for appeal of denial of installment agreement

Appeals of denials to pay a tax in installments will be made to the Assistant Administrator of the Office Services Division or such other person designated by the Director of the Department. The designated person will discuss the appeal with the Director. He will then prepare and issue the Department's Determination.

IX. Procedure for appeal of, revocation of, or the refusal to issue, licenses, and penalties for regulatory violations

A. Revocation of Retail Sales Licenses C If a person receives a notice from a Division stating that his retail sales license will be revoked, he has thirty (30) days from the date of the notice to protest the proposed revocation. Unless the Director directs otherwise, appeals of proposed revocations of retail sales licenses must be filed with the District Manager who signed the proposed revocation. If the District Manager cannot resolve the matter, he will forward the file to the Department's General Counsel.

B. Regulatory Violations and Licenses other than Revocation of Retail Sales Licenses C Except for the revocation of retail sales licenses (see paragraph A. above,) if a person receives a Proposed Assessment of penalties for Regulatory Violations, or a notice from a Division stating that his license will be revoked, or both, or a notice stating that his application for a license (including a retail sales license) has been denied, he has thirty (30) days from the date of the notice to protest the proposed assessment, revocation, or denial. The protest of any one or more of these items will be treated as a protest of a Proposed Assessment under Section IV B or C above and follow the procedures in the appropriate section (the denial of a license will be deemed to be from an office audit), except that Appeals will generally not contact the taxpayer. It will merely prepare its report from the file, including the protest. Appeals will only contact the taxpayer and

request a conference, if a review of the file indicates that a settlement is likely, or significant time could be saved by stipulating some of the facts at the Appeals level.

Provided, however, that if an application for an alcoholic beverage license would have been granted by the Department but for the objection of one or more members of the public, the denial shall allow the applicant to waive his right to further review within the Department and to consider the denial as the Department Determination. If he does so, he may request a Contested Case Hearing within thirty (30) days of the notice of denial.

C. All Licenses - Appeals of a Department Determination revoking or denying a license are appealable to the Administrative Law Judge Division, except for revocations or denials of drivers' licenses, or motor vehicle titles or registrations which are appealable to the DMV Hearing Officers.

It should be noted that this Revenue Procedure does not apply to any revocation or proposed revocation of a driver license by the Department of Public Safety.

X. Procedure for Claims for Refund

A. For tax matters other than property tax matters, the section of Office Services with the responsibility for claims for refund will consider the claim or, if appropriate, refer it to Field Services. If Office Services denies the refund and a protest is received, it will be treated as a protest of a Proposed Assessment sent to Office Services and the procedures outlined above will be followed. If Field Services denies the refund and a protest is received, it will be treated as a protest of a Proposed Assessment coming to Field Services and the procedures outlined above will be followed.

B. For property tax matters, the appropriate Property Division employee will review and strive to resolve the claim for refund. If the claim for refund is denied and a protest is received, the Property Division will treat the matter as a protest of a Proposed Assessment sent to the Property Division and follow the procedures outlined above.

C. For motor vehicle matters, the Division of Motor Vehicles will consider the claim. If the Division of Motor Vehicles denies the refund, a protest must be filed with the Assistant Administrator of the Division of Motor Vehicles. If the Assistant Administrator cannot resolve the matter, he will forward the file to the Department's General Counsel.

XI. Procedure for Release of Liens

If the Division denies a request for the release of a lien, the taxpayer will be given the opportunity to protest the denial. The taxpayer's protest will be treated as a protest of a Proposed Assessment and follow the procedures outlined above.

If the Division is preparing to sell the property, the taxpayer can request a stay from the Taxpayers' Rights Advocate.

XII. Procedure when a Case is Returned for Failure to Exhaust Administrative Remedies

If a case is returned by the Administrative Law Judge Division because a taxpayer failed to exhaust his "pre-hearing remedies" as defined in Section 12-60-30(16) of the S.C. Code, the case will be sent to the Audit Supervisor of the appropriate Division. The Audit

Supervisor will treat the matter in the same manner as a protest of a Proposed Assessment and the procedures outlined above will be followed.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank

Burnet R. Maybank, III, Director

Columbia, South Carolina

October 19, 1995

Exhibit A C Written Protest

A person who wishes to appeal must file a written protest that contains:

1. The person's name;
2. The appropriate taxpayer identification number or other appropriate numbers;
3. The period(s) involved; *e.g.* the period(s) for which the tax was proposed;
4. The matter in dispute; *e.g.* the nature and kind of tax in dispute; and
5. All of the reasons why the person disagrees with the Proposed Assessment or other Division determination.
6. Protests of property tax Proposed Assessments must also include the valuation and Assessment which the owner deems to be the fair market value and Assessment of the property. See S.C. Code Section 12-4-770 and Regulation 117-111.

Exhibit C - Audit Section's Report

The Audit Section's report will contain the following information:

1. The person's name, address, and appropriate identifying numbers (*e.g.*, single identification number, social security number, FEI number, Department file number, retail license number, etc.);
2. The period(s) involved;
3. The matter in dispute; *e.g.*, the nature and kind of tax in dispute;
4. The type and amount of the tax, interest and penalty (if any) determined to be due;
5. A description of the reasons for determining that the tax, interest and penalty (if any) are due; and
6. Any other information deemed important by the section.

Exhibit D C Appeals' Report

Appeals' Report will contain the following information:

1. The person's name, address, and appropriate identifying numbers (e.g. single identification number, social security number, FEI number, Department file number, retail license number, etc.);
2. The period(s) involved;
3. The matter in dispute; *i.e.*, the nature and kind of tax in dispute;
4. Facts*
 - a) A numbered list of all facts Appeals determines are relevant to resolve the contested issues.
 - b) To the extent Appeals is aware that the person disagrees with any of these facts, a statement concerning the person's view and why Appeals did not adopt the person's view of the facts.
5. Discussion of legal issues*
 - a) A statement as to each legal issue which has been resolved.
 - b) A statement as to each legal issue Appeals determines to be relevant to resolve the contested issues and the reasons for Appeals' beliefs. Any issues not included will be deemed decided in the person who is appealing's favor.
 - c) To the extent Appeals is aware that the person disagrees with any of these issues, an argument supporting Appeals' view, a statement concerning the person's view, and why Appeals did not adopt the person's view of the issue.
 - d) This discussion of legal issues will apply relevant statutes, regulations, cases and rulings to the person's facts and explain why this law and these facts support Appeals' position.
6. Any other information deemed important by Appeals, including items the person considers relevant which Appeals considers irrelevant with an explanation of Appeals' determination that these facts or issues were irrelevant.

*Provided, that for regulatory violations, the "facts" and "discussion of legal issues" sections of Appeals report can be deleted if the report contains: (1) a copy of the written violation that contains enough information to determine the relevant facts, (2) a brief response to any issues raised in the protest, and (3) a list of possible witnesses with a brief summary of their expected testimony.

Exhibit E C Department's Determination

The Department's Determination will contain the following information:

1. The person's name, address, and appropriate identifying numbers (e.g. single identification number, social security number, FEI number, Department file number, retail license number, etc.);
2. The period(s) or date(s) involved;
3. The matter in dispute; e.g., the nature and kind of tax in dispute;
4. A numbered list of all facts the Department determines are relevant to resolve the contested issues; provided, that for a regulatory violation a copy of the written violation that contains enough information to determine the relevant facts is sufficient.
5. A statement as to each legal issue the Department determines is relevant to resolve the contested issues and the reasons for the Department's beliefs; provided, that for a regulatory violation a list of the sections the person is charged with violating, the proposed penalty, and a response to any issues raised in the protest is sufficient.
6. The Department may include any other information it determines should be included.

Exhibit F C Resolution Report

The Resolution Report will contain the following information:

1. The person's name, address, and appropriate identifying numbers (*e.g.* single identification number, social security number, FEI number, Department file number, retail license number, audit number etc.);
2. The period(s) involved;
3. The matter in dispute; *e.g.*, the nature and kind of tax in dispute;
4. The type and amount of the tax (or assessment for certain property tax purposes), interest and penalty (if any) the person agrees to pay; and
5. A brief statement of the issues and facts upon which the issues were resolved and the reasons for the resolution.

Exhibit G C Case File

The case file should contain a table of contents with the following items tabbed:

1. The Proposed Assessment
2. The taxpayer's protest and additional material submitted by the taxpayer after the protest
3. The audit report or audit section's report
4. Power(s) of Attorney
5. All waivers of Statute of Limitations
6. Copies of pertinent documents, such as contracts, lease agreements, appraisals, wills, etc. These documents will be indexed, numbered and tabbed.
7. Appeals' Report
8. The Department's Determination

FS-54

**SOUTH CAROLINA DEPARTMENT OF REVENUE
REPORT OF FIELD AUDIT: INCOME TAX & LICENSE FEE**

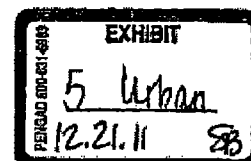
TAXPAYER: DUKE POWER COMPANY
ADDRESS: 422 S. CHURCH ST.
CHARLOTTE, NC 28242-001

FEI #: 56-0205520
FILE #: 20090024-9
PERIOD: 12/78-12/94
DATE: 8/8/02

INTEREST COMPUTED TO:

8/14/02

<u>INCOME TAX:</u>				
<u>PERIOD ENDED:</u>	<u>INCOME TAX</u>	<u>INTEREST</u>	<u>PENALTY</u>	<u>TOTALS</u>
12/78-94	(1,951,189)	(7,434,600)	0	(9,385,789)
<u>LICENSE TAX:</u>				
12/84-94	\$835,685	\$2,757,796		\$3,593,481
<u>SUBTOTAL THRU 3/29/02</u>	-\$1,115,504	-\$4,676,804	\$0	-\$5,792,308
<u>UPDATE INTEREST: 3/29 TO 8/14</u>		-\$132,889		-\$132,889
<u>SUBTOTAL THRU 8/14/02</u>	-\$1,115,504	-\$4,809,693	\$0	-\$5,925,197
<u>SALES & USE TAX:</u>				
<u>TAX & INTEREST THRU 4/05/02</u>	\$1,725,966	\$1,070,657		\$2,796,623
<u>UPDATE INTEREST: 4/5-8/14</u>		\$60,871		\$60,871
<u>SUBTOTAL THRU 8/14/02</u>	\$1,725,966	\$1,131,528		\$2,857,494
<u>INCOME & LICENSE NETTED AGAINST SALES & USE TAX:</u>				-\$3,067,703



SCDOR00021780

**NEXSEN PRUET
JACOBS POLLARD & ROBINSON, LLC
ATTORNEYS AND COUNSELORS AT LAW**

Burnet R. Maybank
MEMBER

DIRECT DIAL
(803) 253-8228
(843) 730-1768
BMaybank@NJPJ.COM

March 20, 2002

Mr. John A. Swearingen
Audit Supervisor
Department of Revenue
301 Gervais Street
Columbia, SC 29201

Jan Steensen Crangle, CPA
Manager, Office of Appeals
South Carolina Department of Revenue
Post Office Box 125
Columbia, SC 29214

Re: Selected Duke State and Local Tax Issues.

Dear John and Jan:

The Duke crowd and I met in Charleston (natch) to discuss the settlement proposals contained in your fax of March 18. We have the following counter-proposal.

First, Duke naturally needs to check your figures. (They had not seen your fax prior to the meeting.) I know there have been issues in the past regarding the calculation of interest, but assuming Duke confirms your figures, we offer the following:

SALES TAX

Duke would like to settle the sales tax liability through 2001, using the methodology and quarterly tax liability contained in your fax. (This has the effect of reducing the amount of our refund.) Duke proposes to execute a SC870AD regarding the sales and use tax liability through 2001.

LICENSE TAXES

Subject to verifying the figures, as stated above, Duke proposes accepting the DOR's proposal and executing a SC870AD for license taxes for the years contained in your proposal. (December 1984 to December 1994.)

INCOME TAXES

Subject to verifying the figures, as stated above, Duke proposes accepting the DOR's proposal except that it would agree to execute a SC870, rather than a SC870AD. This would have the effect of keeping the years open for both the DOR and the State until the end of this year, unless the DOR and Duke jointly agree to execute another waiver.

NPCHAR1:--(1)

1441 MAIN STREET, SUITE 1500, COLUMBIA, SC (29201) • POST OFFICE DRAWER 2426, COLUMBIA, SC (29202)
803-771-8900 • FAX 803-253-8277
www.NJPJ.com

OFFICES ALSO IN:

CHARLESTON, SC

CHARLOTTE, NC

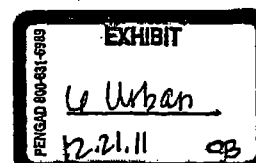
GREENVILLE, SC

HILTON HEAD, SC

MYRTLE BEACH, SC

SCDOR00021809

3440



March 20, 2002
Page 2

Duke is examining the possibility of filing amended returns for the purposes of claiming tax incentives, as well as possibly other adjustments. In addition, the files are so stale and the number of years open are so large that Duke is reluctant to close out some 16 years without at least some due diligence, which they have not performed.

CONCLUSION

Duke is actively in the process of verifying the figures contained in your fax, which verification is expected to be completed in the next few days. Please let me know what you think about the other points.

Yours very truly,



Burnet R. Maybank

BRM 

cc: Mr. Harley Priesmeyer/Duke Energy

NPCHAR1:181282.1-LT-(BRM) 011413-00041

SCDOR00021810

NEXSEN PRUET JACOBS & POLLARD, LLC
ATTORNEYS AND COUNSELORS AT LAW

BURNET R. MAYBANK III
MEMBER

DIRECT DIAL
803-253-8228
BMaybank@NPJP.com

July 2, 2002

Mr. John A. Swearingen
Audit Supervisor
Department of Revenue
301 Gervais Street
Columbia, South Carolina 29201

Jan Steensen Crangle, CPA
Manager, Office of Appeals
South Carolina Department of Revenue
Post Office Box 125
Columbia, South Carolina 29214

Re: Proposed Duke Settlement

Dear John and Jan:

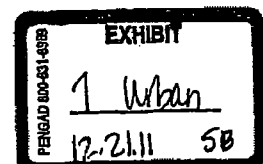
Duke offers the following settlement proposal:

SALES TAX

Duke would like to settle the sales tax liability through 2001, using the methodology and quarterly tax liability contained in your fax. (See attached Exhibit 1.) This includes accepting the DOR's interest rate calculation. Duke proposes to execute a SC870AD regarding the sales and use tax liability through 2001. We understand this equals approximately (\$2,796,623) with interest calculated through April 5, 2002.

INCOME AND LICENSE TAXES

Duke proposes accepting the DOR's proposal except that it would agree to execute a SC870, rather than a SC870AD. We understand this would have the effect of keeping the years open for both the DOR and the State until the end of the waiver period (12/31/2002), unless the DOR and Duke jointly agree to execute another waiver. As previously indicated, Duke is examining the possibility of filing amended returns.



SCDOR00021667

John A. Swearingen
Jan Steensen Crangle, CPA
July 2, 2002
Page 2

We understand that this equals a refund of \$5,891,208 (with interest calculated through July 2, 2002.)

We would also like to accept your proposal that the DOR would issue a FAD (at our request) on the calculation of interest on the income and license taxes so that we could contest the interest rate calculations. (Duke may not contest the matter, but we would like to retain the option.)

CONCLUSION

We have pretty well agreed to all of the DOR proposals, so I trust you find this satisfactory. Duke would like to have the attached schedule (Exhibit 2) re-calculated with interest brought forward to no later than July 15th. Additionally, Duke would like for all these matters to be combined for settlement purposes and the DOR issue a refund in a timely manner for the net amount.

If the attached accurately reflects your understanding, please execute a copy of this letter and return it to us. We look forward to receiving the 870 and the 870AD which we will execute and return to you.

With kind regards, I am

Yours very truly,


Burnet R. Maybank III

BRM/kc
cc: Mr. Harley Priesmeyer/Duke Energy


John Swearingen
DOR

July 8, 2002

SCDOR00021668

From: JAN CRANGLE
To: Maybank, Burnet
Date: 3/28/02 9:44AM
Subject: Re: Duke Settlement Proposal

Burnie,

I have faxed the interest calculations for the 1978 tax year to your Columbia office. (In the cover memo I see I incorrectly referenced the due date of the return in 1979.) If you need additional info, or if you're in Charleston today and want me to fax it there, just let me know.

Also John Comer is working up the numbers to bring the matter through current years as you requested. I hope to have those figures shortly and will at that time send you the final report along with an 870AD for sales/use taxes and an 870 for the income/license matters.

Appreciate your keeping this one "on track" for us all.

Jan

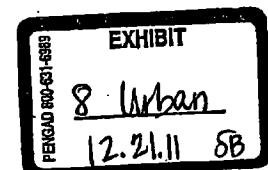
>>> "Burnet Maybank" <BMaybank@NPJP.com> 03/27/02 04:46PM >>>

With minor differences (which we are prepared to overlook) our figures jive with yours; we remain way apart, however, on the interest; we show the state owing almost \$2 million more in interest; I am sure we are making a fundamental calculating error - could you furnish us with your calculations/methodology? I suspect if you gave us just one year's worth we could figure what we are doing wrong

NEXSEN PRUET JACOBS & POLLARD, LLP
1441 Main Street, Suite 1500
Columbia, SC 29201
803-771-8900

www.NPJP.com

CC: ANDERSON, ROBERT; COMER, JOHN; SWEARINGEN, JOHN



SCDOR00022041

From: "Burnet Maybank" <BMaybank@NPJP.com>
To: <CRANGLJ@sctax.org>
Date: 6/20/02 4:47PM
Subject: Re: Waiver of Statute of Limitations

I just talked with Harley and he will forwarding John a waiver; let me know if you need something else; we should also be forwarding a settlement counter proposal in the next few days

.....
NEXSEN PRUET JACOBS & POLLARD, LLP
1441 Main Street, Suite 1500
Columbia, SC 29201
803-771-8900

www.NPJP.com
.....

>>> <CRANGLJ@sctax.org> 06/19/02 10:02AM >>>

I talked to Harold Crawford and several members of the reprieve team prior to our last conversation on the topic, but haven't spoken with Bill Bray.
I'll make it a point to get with him.

It's been several years since I ate at the Boathouse. With Atlanticville, Station 22, and Dunteavys all in walking distance, we usually don't venture far. Avoids designated driver issues :-)

>>> "Burnet Maybank" <BMaybank@NPJP.com> 06/19/02 09:43AM >>>

we discussed at length and have a counter -proposal coming to you; I also chatted with Bill Bray about the application of the reprieve program; has he had a chance to talk with you?

Sullivan's Isl will be wonderful; the Boathouse restaurant is all the rage but very crowded

.....
NEXSEN PRUET JACOBS & POLLARD, LLP
1441 Main Street, Suite 1500
Columbia, SC 29201
803-771-8900

www.NPJP.com
.....

>>> <CRANGLJ@sctax.org> 06/19/02 09:36AM >>>

Burnie,

In order to protect the statute, I have asked John Swearingen to issue the proposed assessment on the corporate income and license fee matter. This will give you an additional 90 day period under section 12-54-85(g)(2). John Comer advised me he is reviewing the sales tax calculations, but I wouldn't expect that we will have a lot of flexibility there.

I will be on vacation (Sullivan's Island) next week and John Comer will be following up with me the first week in July. Hopefully we will be able to move forward with either an agreement or by agreeing to disagree in early July.

SCDOR00022025

Thanks for your help.

Jan

>>> "Burnet Maybank" <BMaybank@NPJP.com> 06/10/02 03:46PM >>>
yes, we are talking by conf call tomorrow; Duke people were on vacation last week so I didnt get a chance
to talk with them; I will call or e-mail
you by Wed

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1441 Main Street, Suite 1500
Columbia, SC 29201
803-771-8900

www.NPJP.com

>>> <CRANGLJ@sctax.org> 06/10/02 03:46PM >>>
John has informed me the waiver on the corporate license fee issue expires June 30th. Can you get back
with us by the end of the week with the
taxpayer's decision on how to proceed? Thanks.

CC: <ANDERSR@sctax.org>, <BrayB@sctax.org>, <COMERJ@sctax.org>,
<SWEARIJ@sctax.org>

SCDOR00022026

From: JOHN SWEARINGEN
To: COMER, JOHN; CRANGLE, JAN
Date: 7/1/02 5:44PM
Subject: Re: Duke

I faxed Burnie the recomp info with interest to 3/29/02.

Net refund due: 3,588,544

Also an 870 & 870AD

>>> "Burnet Maybank" <BMaybank@NPJP.com> 07/01/02 04:38PM >>>

We are putting the final touches on our settlement proposal which I am confident you will find acceptable; (I almost sure we will accept your interest rate calcs; could you fax me a complete copy of a blank SC 870 and SC870AD; they are not in the package X or on the website and I'd like to see what we will be signing; I would like to get our letter to you tomorrow (Tues) so I would appreciate if you could fax the forms

.....
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Columbia, SC 29201
803-771-8900

www.NPJP.com
.....

SCDOR00022024

From: JOHN SWEARINGEN
To: Maybank, Burnet
Date: 7/2/02 2:30PM
Subject: Re: Duke

Burnie,

I have not been able to get in touch with John Comer. Attached is spreadsheet with interest thru 7/10.

John

>>> "Burnet Maybank" <BMaybank@NPJP.com> 07/02/02 01:38PM >>>
why dont we say next Wed

.....
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1441 Main Street, Suite 1500
Columbia, SC 29201
803-771-8900

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.....

>>> <SWEARIJ@sctax.org> 07/02/02 01:37PM >>>
What is our target date for the settlement? I would like to run the interest thru a certain date.

>>> "Burnet Maybank" <BMaybank@NPJP.com> 07/02/02 01:20PM >>>
thanks!

.....
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803-771-8900

www.NPJP.com
.....

>>> <SWEARIJ@sctax.org> 07/02/02 01:19PM >>>
I do not have the sales #s thru 2001, will check with Jan & John

>>> "Burnet Maybank" <BMaybank@NPJP.com> 07/02/02 12:52PM >>>
I e-mailed your numbers to Duke and they replied with the following: "Burnie - John's numbers for the sales tax piece is off. We are now settling thru 2001. The number I have with interest thru 4/5/2002 is \$2,795,623."

Do you concur?

.....
NEXSEN PRUET JACOBS & POLLARD, LLP
1441 Main Street, Suite 1500
Columbia, SC 29201

SCDOR00022020

803-771-8900

www.NPJP.com

>>> <SWEARIJ@sctax.org> 07/01/02 05:27PM >>>

I have an interest calculation thru 3/29/2002 for the corp audit.

Tax: \$1,115,504 refund

Interest: \$4,676,804 refund

Netted against sales tax and interest of \$2,223,664

Net refund \$3,568,644

>>> "Burnet Maybank" <BMaybank@NPJP.com> 07/01/02 05:10PM >>>

257-8228

also, we are going to be agreeing to your figures; could you refax those as well (my file is huge); we realize you will need to update the interest rate calcs; you dont need to worry about that

NEXSEN PRUET JACOBS & POLLARD, LLP
1441 Main Street, Suite 1500
Columbia, SC 29201
803-771-8900

www.NPJP.com

>>> <SWEARIJ@sctax.org> 07/01/02 04:51PM >>>

What is fax#?

>>> "Burnet Maybank" <BMaybank@NPJP.com> 07/01/02 04:38PM >>>

We are putting the final touches on our settlement proposal which I am confident you will find acceptable; (I almost sure we will accept your interest rate calcs; could you fax me a complete copy of a blank SC 870 and SC870AD; they are not in the package X or on the website and I'd like to see what we will be signing; I would like to get our letter to you tomorrow (Tues) so I would appreciate if you could fax the forms

NEXSEN PRUET JACOBS & POLLARD, LLP
1441 Main Street, Suite 1500
Columbia, SC 29201
803-771-8900

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SCDOR00027021

From: JAN CRANGLE
To: COMER, JOHN
Date: 7/8/02 3:38PM
Subject: Duke

Just to keep everyone posted - I've faxed the 870s to Burnie and he is to sign and return to me. We are planning to order the refund on Wed after receiving the 870s. I'll return the S&U audit folder when we get everything signed and issued.

Thanks for all your help.

CC: ANDERSON, ROBERT; SWEARINGEN, JOHN

SCDOR000220191)

From: "Burnet Maybank" <BMaybank@NPJP.com>
To: <CRANGLJ@sclax.org>
Date: 7/9/02 11:50AM
Subject: faxed the 870s to Duke yesterday; should have signed copy for you today or tomorrow;
are the terms I

faxed the 870s to Duke yesterday; should have signed copy for you today or tomorrow; are the terms in
my letter satisfactory to you? If so, pls execute and return

onto Montana for me!

NEXSEN PRUET JACOBS & POLLARD, LLP
1441 Main Street, Suite 1500
Columbia, SC 29201
803-771-8900

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SCDOR00021665

----- Forwarded by Harley H Priismeyer/Tax/PSC/PEC on 07/10/2002 11:02 AM

Harley H
Priismeyer
07/09/2002
05:34 PM

To: cranoll@sclax.org
cc: bmaybank@npjp.com
Subject: Form SC870

Jan - my lawyers would feel much more comfortable if we can add the following to the instructions on the back of the SC870 form:
"Executing this document does not prevent you from seeking a refund of State taxes paid. The refund claim must be filed within three years from the date the return was filed, (strikethrough: or)two years from the date of payment of the tax or anytime before the expiration of the waiver (12/31/2002), whichever is later.

I think this was the intention of both parties, but I wanted to run this by you before we make this change. Other than this small change, we are prepared to sign the forms and send over to you, probably by tomorrow, if I can find an officer to sign them.

Harley Priismeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhpriismeyer@duke-energy.com

CC: bmaybank@NPJP.com; SWEARINGEN, JOHN

SCDOR00021662

From: "Harley H Priesmeyer" <hhpriesmeyer@duke-energy.com>
To: <cranglj@sctax.org>
Date: 7/10/02 4:16PM
Subject: Form SC870

Jan - alternatively, we could do without the SC870 for income/license fee
If you guys are agreeable to pay us the net amount of approximately \$3
million and we get a FAD for the interest calculation. If you are in
agreement with this arrangement, let me know and we'll revise the
settlement letter.

.....
Harley Priesmeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhpriesmeyer@duke-energy.com

--- Forwarded by Harley H Priesmeyer/Tax/PSC/PEC on 07/10/2002 12:04 PM

Harley H
Priesmeyer To: cranglj@sctax.org
cc: bmaybank@npjp.com
07/10/2002 Subject: Form SC870
11:08 AM

Jan - I received your voice mail re why we needed to do a SC870 instead of
a SCAD870 form. There are two reasons for it. One, Duke wants to reserve
the right to contest the interest computation on the income/license fee and
secondly, Duke is planning on tiling amended returns for some credits and
other deductions/adjustments that were previously not taken for these
years.

Hopefully, this will aid you re this matter. I remember seeing some
previous correspondence from Burney in which you were ok with Duke signing
an 870 form.

If you need anything else on this, please let me know.

.....
Harley Priesmeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

SCDOR00021663

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhpriesmeyer@duke-energy.com

----- Forwarded by Harley H Priesmeyer/Tax/PSC/PEC on 07/10/2002 11:02 AM

Harley H
Priesmeyer To: cranglj@sctax.org
cc: bmaybank@npj.com
07/09/2002 Subject: Form SC870
05:34 PM

Jan - my lawyers would feel much more comfortable if we can add the following to the instructions on the back of the SC870 form:
"Executing this document does not prevent you from seeking a refund of State taxes paid. The refund claim must be filed within three years from the date the return was filed, (strike through: or)two years from the date of payment of the tax or anytime before the expiration of the waiver (12/31/2002), whichever is later.

I think this was the intention of both parties, but I wanted to run this by you before we make this change. Other than this small change, we are prepared to sign the forms and send over to you, probably by tomorrow, if I can find an officer to sign them.

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Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhpriesmeyer@duke-energy.com

CC: <bmaybank@npj.com>

SCDOR00021664

From: JAN CRANGLE
To: Priemeyer, Harley H
Date: 7/10/02 5:08PM
Subject: Re: Form SC870

Harley,

Generally we would use an SC870AD at this level and I'm receiving some serious questions about why we should make an exception and execute an SC870.

If I remember correctly, we discussed this back in March or thereabouts and you indicated that you needed additional time to review some of the later years computations. Generally we would be expected to have resolved these issues during the 3 months that have passed and the matter has been under review.

I don't have a problem with respect to adding language that will hold the periods open to address the interest computation question. It would however be unusual for us to hold all periods open for other credit or deduction adjustments.

I suggest that we arrange a conference call for Thursday morning. (John Swearingen will be leaving on vacation later on Thursday, so we need to resolve it in the morning if possible to avoid additional delay.) Would 10:30AM EDT work for you? If so, please call or e-mail me and I'll set it up at this end and see if we can get this closed.

Thanks.

Jan

1/11/2002 - Harley Priemeyer, Pat Hobson, John Swearingen + Jan Crangle conference call. TP wants to hold all periods open for income + license. Indicated that our earlier understanding was they only needed to review later years. Advised me we agreed to \$70,000 in sales + tax however it is not prepared to cut a check for \$4k. They want until 12/31/02 to complete review. Requested that they clarify position & get back with us.

>>> "Harley H Priemeyer" <hhpriemeyer@duke-energy.com> 07/10/02 12:06PM >>>

Jan - I received your voice mail re why we needed to do a SC870 instead of a SCAD870 form. There are two reasons for it. One, Duke wants to reserve the right to contest the interest computation on the income/license fee and secondly, Duke is planning on filing amended returns for some credits and other deductions/adjustments that were previously not taken for these years.

Hopefully, this will aid you re this matter. I remember seeing some previous correspondence from Burney in which you were ok with Duke signing an 870 form.

If you need anything else on this, please let me know.

Harley Priemeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhpriemeyer@duke-energy.com

SCDOR00021661 |

From: JAN CRANGLE
To: URBAN, RON
Date: 7/11/02 11:34AM
Subject: Duke settlement proposal

Would you have some time to discuss this with John and I. The taxpayer is in full agreement with the sales and use tax audit with a balance due of \$2.7 million. They want to net this against the refund due on the income and license fee audit, however the tp disagrees with our interest calculations on the income and license audit. The question involves whether simple interest and tax are combined on 9/1/85 (when we adopted compounded interest) and the compounded interest computed on the total. We feel strongly that the DORs administrative practice of compounding only on the outstanding tax balance as of 9/1/85 is proper; however, the taxpayer would like to preserve their right to protest this issue.

The taxpayer also wants preserve their right to file a claim for refund for other deductions and credits. We wanted to close up these years and have them execute an SC870AD so we don't see them again. Since the periods involved date back to 1978 as the result of outstanding IRS RAR adjustments, and most of the early years involve refunds, I want to make sure we are in agreement on how the statute of limitations on refund claims will apply if they don't execute an 870AD.

Thanks.

CC: ANDERSON, ROBERT; COMER, JOHN; SWEARINGEN, JOHN

SCDOR00021660

2/10/52

From: JOHN COMER
To: CRANGLE, JAN
Subject: Duke

Good morning! Any word yet on the 870AD for the sales tax audit? Bill Perry and Carol Solomons are sort of dangling.

I'm also working with Duke on a Special 19 audit for a current construction project. Some of the positions they are suggesting would further widen the strike zone. That makes me a little nervous about the 91-98(01) audit. We really would like to get that one wrapped up. Thanks!

SCDOR00022016

From: JAN CRANGLE
To: URBAN, RON
Date: 7/11/02 11:34AM
Subject: Duke settlement proposal

Would you have some time to discuss this with John and I. The taxpayer is in full agreement with the sales and use tax audit with a balance due of \$2.7 million. They want to net this against the refund due on the income and license fee audit, however the tp disagrees with our interest calculations on the income and license audit. The question involves whether simple interest and tax are combined on 9/1/85 (when we adopted compounded interest) and the compounded interest computed on the total. We feel strongly that the DORs administrative practice of compounding only on the outstanding tax balance as of 9/1/85 is proper; however, the taxpayer would like to preserve their right to protest this issue.

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Thanks.

CC: ANDERSON, ROBERT; COMER, JOHN; SWEARINGEN, JOHN

SCDOR00021018

From: JAN CRANGLE
To: COMER, JOHN
Date: 7/12/02 7:40AM
Subject: Re: Duke settlement proposal

It's still in limbo. They are willing to sign the SC870AD on the sales tax, but they don't want to cut the check. I think we'd be OK just having the 870AD executed with the caveat that the payment would be made at the time the income tax matter is resolved. That way it's closed and we are just waiting for payment. What are your thoughts?

>>> JOHN COMER 07/11/02 01:34PM >>>

Jan: Did we get the 870AD signed on the sales tax audit yet, or is it still in limbo depending on the income tax situation?

CC: ANDERSON, ROBERT; SWEARINGEN, JOHN

SCDOR00822017

NEXSEN PRUET JACOBS & POLLARD, LLC
MEMORANDUM

TO: Jan Crangle
John Swearingen, DOR

FROM: Burnet R. Maybank III

DATE: July 25, 2002

RE: Duke Settlement

CLIENT-MATTER NO.: 11413-41

Although Duke is prepared to sign the 870 and 870AD which you have submitted. I didn't think it was a good idea to do so while we were in apparent disagreement over what the proposed settlement meant.

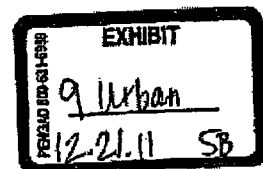
As I understand it, there is some concern over Duke's ability to file amended returns for pre-85 years. Duke's ability to file amended returns results not (exclusively) from the RARs, but rather from the Waivers which it has executed each year at the request of the DOR. Duke consequently has the right to file amended returns for pre-85 years regardless of the execution of the 870 and the 870AD. Stated another way, the execution of the 870s does not confer any new, or greater, right to file amended returns than Duke otherwise has. I also understand that it may possibly be the DOR's position that amended returns may relate only to RAR adjustments. Again, the execution of the 870s in no way impacts, or even, relates to the substance of the amended returns, or the DOR's position relative thereto.

Duke offered to settle the sales taxes as an accommodation to the DOR so that the amount of the refund check would be smaller. We did not intend to slow things down or complicate matters.

From Duke's perspective, they have been paying me for almost a year to recover license and income taxes from the State that the DOR seems to acknowledge is owed. Presumably a taxpayer does not have to beg or plead for money that it is concededly owed. I realize that there was a disagreement over how interest is calculated and the DOR very nicely agreed to issue a FAD on this issue in the event Duke decided to appeal. Consequently, this is no longer an issue.

In summary, we would like to re-reach a meeting of the minds over the settlement. I believe Duke would be willing to settle this matter with or without the sales tax component. Why don't we chat on Monday.

BRM/kc



NPCOL1:578904.1-MM-(BRM) 011413-00041

SCDOR00021807

NEXSEN PRUET JACOBS & POLLARD, LLC
MEMORANDUM

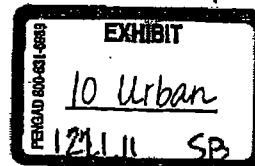
TO: John Swearingen
Jan Crangle
FROM: Burnet R. Maybank III
DATE: August 12, 2002
RE: Duke Settlement

CLIENT-MATTER NO.: 11413-41

Attached is a fax executed copy of the SC 870AD (Sales and Use Taxes.) I should have
the original to you shortly.

BRM/kc

Attachment



NPCOL1:582135.1-MM-(BRM) 011413-00041

SCDOR0002178



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
**OFFER OF WAIVER OF RESTRICTIONS ON
ASSESSMENT AND COLLECTION OF ADDITIONAL
TAX OR ACCEPTANCE OF OVERASSESSMENT**

SC870AD

(Rev. 7/97)
3310

Taxpayer Name(s) Duke Energy Corporation
(Please type or print)
Doing Business As _____
Street Address PO Box 1642
City Houston State Texas ZIP Code 77251-1642
Identification Number (SSN, FEI, etc.) 56-0205520

Increase (Decrease) in Tax, Interest and Penalties (Use separate section for each type of tax)	
Type of Tax <u>Sales & Use</u>	
Period Covered <u>1/1/1991 through 12/31/2001</u>	
Tax \$ <u>\$1,725,466.09</u>	Penalties \$ _____
Type of Tax _____	
Period Covered _____	
Tax \$ _____	Penalties \$ _____

Total due \$ 2,857,494 if paid by August 14, 2002 including interest.

This information was prepared by Jan Steensen Crangle, CPA Telephone Number 803 898 5616

**Consent To Assessment and Collection of Additional Tax
or Acceptance of Refund Determination**

The undersigned consents to the assessment and collection of any additional tax and penalties or accepts any decrease in tax and penalties shown above, plus any interest provided by law. This offer is subject to acceptance by the Department of Revenue. If this offer is accepted, no claim for refund can be filed or pursued and it will not be reopened in the absence of conditions stated in the general information and instructions.

Taxpayer's Signature _____ Date _____

Spouse's Signature _____ Date _____

Corporation Name (if applicable) Duke Energy Corporation

By [Signature] Title Sr. Vice President Date August 13, 2002
Signature

Commission Approval of Waiver by [Signature]

(See reverse side)

SCDOR00021800

SOUTH CAROLINA DEPARTMENT OF REVENUE
454 South Anderson Road, Suite 202
Post Office Box 12099
Rock Hill, South Carolina 29731

December 19, 2002

Duke Energy Corporation
Attn: Mr. Harley H. Priesmeyer
P. O. Box 1642
Houston, TX 77251-1642

Ref: Sales/Use Tax Audit # 06/21/1231
January 1, 1991 through December 31, 2001

Dear Mr. Priesmeyer:

In accordance with our agreement noted by form SC870AD, dated August 13, 2002, you may consider the above referenced audit as paid-in-full. As agreed, the amount due for the above periods was offset against corporate income tax refunds that were due to you on the date of the signing of the aforementioned form.

I would like to thank you for your efforts in helping to bring this audit up-to-date for the first time in many years. It has been a pleasure working with you and Greg Masters.

Please let us know if at any time we may be of assistance.

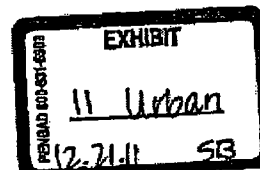
Sincerely,

John S. Comer III, Audit Manager
Phone (803)324-7641, fax (803)324-8289

No DLN will come back it is not on accounting because payment was taken out of Refund.
Credit was given in August 2002.

Rm

3463



SCDOR00021782

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Anonymous Taxpayer,

Petitioner,
vs.

South Carolina Department of Revenue,

Respondent.

CONSENT ORDER

DOCKET NO. 03-ALJ-17-0094-CC

This matter came before the Court from an appeal by the Petitioner, Anonymous Taxpayer, of a final agency determination of the Respondent, the South Carolina Department of Revenue (the "Department") regarding the calculation of interest on an agreed refund of corporate income tax due to Petitioner for periods prior to September 1, 1985.

(1)
A hearing was initially scheduled in this matter for December 18, 2003. This hearing date and all discovery deadlines were postponed at the request of both parties upon their notification to the Court that settlement negotiations were underway. The parties have now reached an agreement resolving this matter on the following terms and conditions:

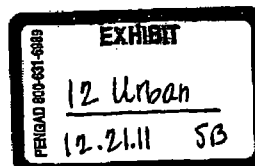
1. The Department agrees to allow tax credits against the South Carolina corporate income tax and license fees of Petitioner in the amount of \$554,244 for the tax year ending 2002, \$554,244 for the tax year ending 2003, and \$554,244 for the tax year ending 2004. In the event the tax credits are not fully utilized in any one year, they may be carried forward to future years until fully utilized.

2. The parties further acknowledge and agree that the Petitioner has certain refund claims pending before the Department which also relate to tax years prior to September 1, 1985. The settlement of this matter shall not constitute a resolution of the substantive issue of the

FILED

AUG 08 2003

3464

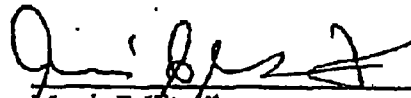


DE00009356

calculation of interest for pre-September 1, 1985 tax periods and shall not be binding on either party with respect to Petitioner's pending claims.

Having reviewed this Agreement in Settlement and Compromise, I hereby order its adoption and dismiss the Petition in this matter with prejudice.

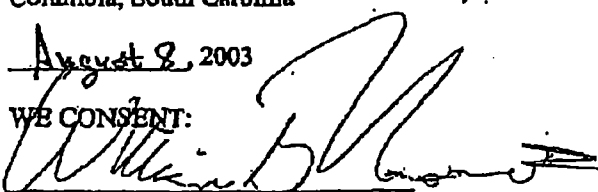
IT IS SO ORDERED.


Marvin F. Kittrell
Chief Administrative Law Judge

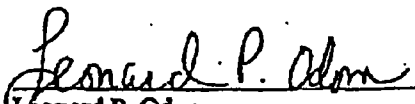
Columbia, South Carolina

August 8, 2003

WE CONSENT:


William G. Newsome III
Nexsen Pruet Jacobs & Pollard, LLC
1441 Main Street, Suite 1500
Columbia, SC 29201
(803) 771-8900

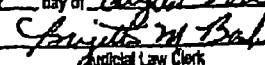

Attorney for Petitioner


Leonard P. Odom
Counsel for Revenue Litigation
State of South Carolina
Department of Revenue
Law & Compliance Division
301 Gervais Street
Columbia, SC 29214

Attorney for Respondent

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 11th day of August 2003
By: 
Judicial Law Clerk

State of South Carolina
Department of Revenue
Office of General Counsel for Litigation
301 Gervais Street, P.O. Box 12265, Columbia, South Carolina 29211
Telephone (803) 898-5130 Telecopier (803) 898-5147

February 4, 2010

Burnet R. Maybank, III, Esquire
James F. Reames, III, Esquire
Nexsen Pruet, LLC
PO Drawer 2426
Columbia, SC 29202

Re: Department Determination
Duke Energy Corporation

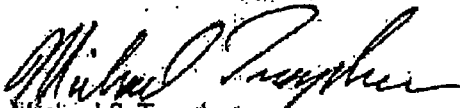
Dear Messrs. Maybank and Reames:

Enclosed is the South Carolina Department of Revenue's Determination in the above-referenced matter. If you disagree with the Determination, you may request a contested case hearing before an Administrative Law Judge. If you choose to pursue such remedy, you must do so within 30 days of the date of this letter. If you fail to respond within this time limitation, you will lose your right to appeal the Department Determination and your protest will be ended. Should you desire a contested case hearing, you must complete the enclosed request form and mail it, along with a \$100 filing fee, to the Administrative Law Court at the address stated on the form's instruction sheet.

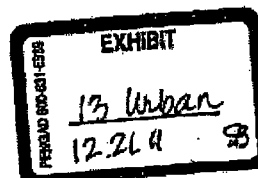
The Administrative Law Court rules require that you also send me a copy of your request. My address is as follows: PO Box 12265, Columbia, SC 29211.

Yours truly,

OFFICE OF GENERAL COUNSEL FOR LITIGATION


Michael S. Traynham
Counsel for Litigation

MST:lbc
Enclosures



DEPARTMENT DETERMINATION

Taxpayer:

Duke Energy Corporation
PO Box 1642
Houston, TX 77251-1642

Periods Involved:

Corporate Income Tax Years 1978 through 2001

Matters in Dispute:

1. Is the taxpayer entitled to utilize a single gross receipts factor apportionment formula in the calculation of its South Carolina corporate income tax?
2. Is the taxpayer entitled to include return of principal from the sale of short-term financial instruments in the denominator of its gross receipts factor?
3. Is the taxpayer's claim for refund timely?

Refund amount at issue:

Duke Income Tax:	\$125,142,447.
Crescent Income Tax:	<u>1,098,198.</u>
Total:	\$126,240,645.*

*Total is exclusive of interest. Any refund owed would be subject to a statutory interest rate pursuant to S.C. Code Ann. § 12-54-25 (Supp. 2008).

Determinations:

1. The taxpayer is not entitled to utilize a single-factor formula for apportioning its taxable income.
2. The taxpayer may not include its return of principal from the sale of short-term investments in calculating its gross receipts factor.
3. The taxpayer's claim for refund is untimely for some of the periods in question.

Relevant Facts:

1. Duke Energy Corporation (Duke or taxpayer), formerly known as Duke Power Company, is a multi-state power provider with operations in South Carolina.

2. In December 2002, Duke filed amended South Carolina corporate income tax returns for income tax years 1978 through 2001 requesting a substantial refund.
3. The taxpayer relied on waivers of the statutory time limit for filing amended returns (taxpayer's claim for refund). These waivers were provided by an employee of the Department of Revenue (Department) due to ongoing audit issues. The first of these waivers was issued on August 16, 1988.
4. The taxpayer raised three primary arguments in support of its claim for refund: (A) the taxpayer is not required to calculate its income tax on a three-factor formula pursuant to S.C. Code Ann. § 12-6-2250 (2008); (B) the taxpayer is entitled to include sales of short-term investments in the denominator of its gross receipts factor; and (C) the income and expense of Crescent Resource Corporation was not properly allocated in the original return.
5. The Department denied the requested refunds by letter dated February 12, 2003.
6. The taxpayer filed a timely protest of this denial by letter dated March 12, 2003.

Analysis:

I. The taxpayer is not entitled to use a single-factor gross receipts formula.

Pursuant to S.C. Code Ann. § 12-6-2290 (Supp. 2008), "[i]f the principal profits or income of a taxpayer are derived from sources other than those described in Section 12-6-2250 or Section 12-6-2310,"¹ the taxpayer must utilize a single factor apportionment ratio (gross receipts formula). The taxpayer argues it is entitled to utilize this formula because it is not a taxpayer described in either of the other code sections referenced by § 12-6-2290.

Section 12-6-2250(A) provides as follows:

A taxpayer whose principal business in this State is (i) manufacturing or a form of collecting, buying, assembling, or processing goods and materials within this State, or (ii) selling, distributing, or dealing in tangible personal property within this State, shall make returns and pay annually an income tax that includes its income apportioned to this State. Its income apportioned to this State is determined by multiplying the net income remaining after allocation pursuant to Sections 12-6-2220 and 12-6-2230 by a fraction, the numerator of which is the property ratio, plus the payroll ratio, plus twice the sales

¹S.C. Code Ann. § 12-6-2310 (2000) is not relevant to the facts of this case.

ratio, and the denominator of which is four. However, where the sales ratio does not exist, the denominator of the fraction is the number of existing ratios, and where the sales ratio exists but the payroll ratio or the property ratio does not exist, the denominator of the fraction is the number of existing ratios plus one. The property, payroll, and sales ratios must be determined in accordance with Sections 12-6-2260, 12-6-2270, and 12-6-2280, respectively.

(Emphasis added). The taxpayer's contention that it is not described by § 12-6-2250 is incorrect. The taxpayer is a manufacturer within the meaning of the statute, and must apportion its income according to the prescribed three-factor formula.² It has long been held in South Carolina that "a company engaged in the business of generating electricity is a 'manufacturer' within the meaning of a Statute imposing a tax upon a 'corporation engaged in the business of manufacturing.'" Duke Power Co. v. Bell, 156 S.C. 299, 152 S.E. 865, 868 (1930). South Carolina is hardly alone in this assessment. See, e.g., Hetherington v. Camp Bird Co., 202 P. 1087, 1088, (Colo. 1922); Curry v. Alabama Power Co., 8 So.2d 521 (Ala. 1942); Minn. Power & Light Co. v. Pers. Prop. Tax. Taxing Dist., City of Fraser, Sch. Dist. No. 695, 182 N.W.2d 685, 691 (Minn. 1970). The taxpayer's statements to the public are replete with references to its power generating assets, and its focus on generating power more efficiently. See, e.g., Duke Energy 2008 Summary Annual Report. Put plainly, South Carolina law has long recognized that electricity is something that must be "manufactured" within the meaning of our tax laws, and the generating entity – the taxpayer, in this instance – is the electricity manufacturer. The taxpayer's argument that it is entitled to use a single-factor formula must be rejected.

II. The taxpayer is not entitled to include gross receipts from the sale of short-term investments in calculating its gross receipts or sales factor.

If the Department is correct, and the taxpayer must use the three-factor formula provided by § 12-6-2250, there remains the issue of how it must then calculate its apportionment ratio. The taxpayer argues that it may include all proceeds from short-term investments, including the return of principal, in the denominator of its gross receipts ratio. This argument would apply to the sales factor of the three-factor formula as well. In calculating the sales factor, S.C. Code Ann. § 12-6-2280 (2000) provides that:

(A) The sales factor is a fraction in which the numerator is the total sales of the taxpayer in this State during the

²Moreover, the taxpayer's contention that it does not sell tangible personal property should also fail. "Tangible personal property" is specifically defined to include "services [such as] sales of electricity." S.C. Code Ann. § 12-36-60 (2000). Thus, while the taxpayer is correct that it provides a service, its service is statutorily defined as tangible personal property.

taxable year and the denominator is the total sales of the taxpayer everywhere during the taxable year.

(B) The term "sales in this State" includes sales of goods, merchandise, or property received by a purchaser in this State other than the United States Government. The place where goods are received by the purchaser after all transportation is completed is considered the place at which the goods are received by the purchaser. Direct delivery into this State by the taxpayer to a person designated by a purchaser constitutes delivery to the purchaser in this State.

(C) The word "sales" includes, but is not limited to:

(1) rentals from tangible personal property located in this State which are not separately allocated; and

(2) sales of intangible personal property and receipts from services if the entire income producing activity is within this State. If the income-producing activity is performed partly within and partly without this State, sales are attributable to this State to the extent the income-producing activity is performed within this State.

Based on the calculation of the sales factor, the higher the denominator (total sales from everywhere) results in a lower sales factor which, in turn, results in less income tax owed the state.

The taxpayer has diluted its sales factor by including in its denominator (total sales from everywhere) the return of principal from its short-term investments. As part of its treasury and cash management program, the taxpayer invested in short-term investments for which it received a gain on the investments plus the return of principal. In so doing, taxpayer properly included the interest and gains related to the return from these investments in the denominator of the sales factor. However, by also including the return of principal in the denominator of its sales ratio, the ratio is diluted.

The following language was added to this section effective for tax years beginning after 2006:³

³Subsection (c) was also rewritten to discuss sales made to the United States Government.

(D) For purposes of this section, items included in sales are as provided in Section 12-6-2295. Section 12-6-2295 provides in part:

(B) The terms "sales" as used in Section 12-6-2280 and "gross receipts" as used in Section 12-6-2290 do not include:

(1) repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;

While the statute did not directly speak to the issue prior to 2006, the Department had implemented the long standing administrative practice to include only the net proceeds from investment activities. Income Tax Decision I-D-309 (June 30, 1982) addressed the issue and concluded:

The commission has included royalties and sales of business connected tangible and intangible property in the sales factor. However, sales of tangible and intangible business connected property have been included only to the extent that the sale resulted in a gain. To include the gross sales price tends to distort the sales factor. Thus, through prudent administrative practice, this procedure has been developed.

All that is required of an apportionment formula is that it [sic] provide a reasonable approximation. Covington Fabrics v. South Carolina Tax Commission, 264 S.C. 59, 212 S.E.2d 574 (1975). The Income Tax Division's computation provides a reasonable basis for apportioning income and is thus valid . . .

Again in 1988 in Income Tax Decision I-D-88-11, the practice was reaffirmed. The taxpayer in that matter sought to include the entire proceeds from the sale of foreign exchange contracts. The finding concluded:

The Division has included in the denominator of the sales factor gain resulting from the disposition of the exchange contracts. We find such to be proper. This position has been the practice of the Tax Commission since 1977 and is a longstanding administrative position. Such should not be overturned unless cogent reasons for doing so are found. Emerson Electric Co. v. Wasson, 287 S.C. 394, 339 S.E.2d 118 (1986). We find no cogent reasons to change the practice. It must be noted that the apportionment formula

need not be an exact measure of the taxpayer's business activity but rather must only provide a reasonable approximation. Covington Fabrics v. South Carolina Tax Commission, 264 S.C. 59, 212 S.E.2d 574 (1975). Here inclusion of the gain from the foreign exchange contracts provides a reasonable apportionment approach.

Perhaps the leading case addressing this issue is American Telephone and Telegraph Company v. Director, Division of Taxation, 476 A.2d 800 (1984), cert. denied, 97 NJ 627, 483 A.2d 157 (1984) (AT&T). In AT&T, the court was concerned with the proper treatment of revenues received by AT&T from "investments made with its idle cash" under the New Jersey receipts fraction for its apportionment formula.⁴ The New Jersey receipts fraction divides "New Jersey related receipts from sales, services, etc." by the "total receipts of taxpayer from sales, services, etc." AT&T argued that all revenues from its sale of short-term investments, including returns of principal, should be included in the sale of its short-term obligations, in the receipts fraction.⁵ The court concluded that the term "receipts" for apportionment purposes was limited to the net gain from the sale or redemption of investment paper stating:

We uphold as a general matter the exclusion of gross revenues received by plaintiff from the sale or maturity of investment paper. As Judge Crabtree observed, idle cash can be turned over repeatedly by investment in short term securities. It is no true reflection of the scope of AT&T's business done within and without New Jersey to allocate to the numerator or the denominator of the receipts fraction the full amount of money returned to AT&T upon the sale or redemption of investment paper. To include such receipts 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 AT&T from investment paper was simply its own money. Whatever other justification there is for excluding such revenues from the receipts fraction, it is sufficient to say that to do otherwise produces an absurd interpretation of § 6(B). "It is axiomatic that a statute will not be construed to lead to

⁴The court gave the following explanation of "idle cash": "AT&T maintained a pool of funds which it received primarily as dividends from its subsidiary corporations and from the sale of stock and debt obligations. Money not needed for immediate business use was placed in certificates of deposit or invested in short-term obligations of various types."

⁵The New Jersey Division of Taxation took the position that only interest owed on the investments should be included in the receipts fraction.

absurd results. All rules of construction are subordinate to that obvious proposition. [Even the rule of strict construction] does not mean that a ridiculous result shall be reached because some ingenious path may be found to that end." State v. Provenzano, 34 N.J. 318, 322, 169 A.2d 135 (1961).

Of particular significance is the AT&T court's observation that including the full amount of money returned on the sale of short-term investments without the exclusion of principal would be comparable to "measuring business activity by the amount of money that a taxpayer repeatedly deposited and withdrew from its own bank account." Given that a return of principal on an investment is simply a return of the taxpayer's own money, to allow a taxpayer to recognize the return of principal in the gross receipts factor creates the anomaly that the taxpayer is being allowed to reduce its state taxable income not because of a decrease in business activity in the state but because of the amount of its own money the taxpayer has turned over during the tax period. See also, Sherwin-Williams Company v. Indiana Department of State Revenue, 673 N.E.2d 849 (1996) ("[T]his Court holds that 'gross receipts' for the purposes of the sales factor includes only interest income, and not the rolled over capital or return of principal, realized for the sale of investment securities.").

In Walgreen Arizona Drug Company v. Arizona Department of Revenue, 97 P.3d 896 (2004), the Arizona Court of Appeals cited with favor the opinion of an Arizona Tax Court, which had ruled that the return of principal on short-term investments did not qualify as gross receipts for the state's sales factor:

[D]aily revenue from Walgreen's sales would be considered gross receipts when received. Any excess revenue after payment of debt or other disbursements remains a part of those gross receipts and should be counted as such. However, once that excess revenue is invested in securities or other interest bearing mediums, it loses its characterization as gross receipts and may not be counted a second time as gross receipts simply because the money was withdrawn from an investment in a marketable security or interest bearing account. This is akin to someone taking the \$100 left from their [sic] weekly paycheck[,] which is considered income when it was received, depositing it into an interest bearing account[,] then withdrawing the \$100 one month later and claiming it as income a second time. That \$100 is not income.

In affirming the ruling of the tax court, the Walgreen court, quoting extensively from the N.J. AT&T case, held that "the return of principal from the type of short-term

investments at issue here is not includable in the sales factor denominator calculated pursuant to A.R.S. Section 43-1-145." Walgreen, 97 P.3d at 902.⁶

The taxpayer has argued that the term "sales" includes "sales of intangible personal property . . ." and, thus, would include the proceeds from the sale of short-term investments. However, when the effect of including the return on principal in the gross receipts factor is considered, there is room to go beyond the language. In Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994), the Supreme Court commented thusly on the strict construction of statutes:

However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Based upon the reasoning employed by the New Jersey AT&T and Walgreen courts and the Department's longstanding administrative practice, a taxpayer's return of principal should not be included in the sales factor. Inasmuch as the principal "sales" at issue here are nothing more than an exchange of the taxpayer's own money, they have no substance other than to artificially inflate the denominator of the gross receipts formula, which in turn serves to decrease South Carolina income tax owed. To allow the return on principal to be included in the sales factor, when to do so lessens the South Carolina income subject to tax, and as a consequence unreasonably represents the amount of business done in South Carolina, is plainly absurd as contemplated by the Kiriakides court.⁷ Thus, the return of principal is not properly includable in calculating the taxpayer's South Carolina sales factor.⁸

⁶The Walgreen court also cited a regulation promulgated by the Multi-State Tax Commission (MTC), which defines "gross receipts" to exclude the return of principal on short-term investments, Walgreen, 97 P.3 at 901. See MTC Reg. IV.2(a)(5).

⁷Even in those several cases wherein the deciding court has found that the return of principal is included in "sales" or "gross receipts", those courts have determined that the use of an alternative apportionment formula is appropriate in order to fairly represent the extent of the taxpayer's business within that state. Thus, the return on principal was ultimately excluded from the sales or gross receipts under an alternative apportionment methodology.

⁸In the alternative, the Department could argue that the return of principal should be excluded from the sales factor based on an alternative apportionment formula found in § 12-21-2320(A) as this would more fairly represent the taxpayer's business in South

III. Timeliness of the taxpayer's claim for refund.

A. The waivers provided to the taxpayer are not intended to extend the time for filing a claim for refund.

The taxpayer's refund claim extends over a period of more than 20 years, from 1978 to 2001. In support of its claim, the taxpayer provided numerous copies of waivers provided by a Department employee periodically during that period. These waivers are titled "Consent to Extend the Time to Assess Tax." The language of the waivers state that the agreement "extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of [the South Carolina Code]." The waivers cite different code provisions depending on when they were issued, but all cited code provisions refer to the Department authority, with a taxpayer's consent, to extend the time for assessing a tax. See S.C. Code Ann. § 12-54-85(C)(4) (Supp. 2008). The waivers are not intended to extend the time in which a taxpayer can file a claim for refund. If the Department's examination of a taxpayer reveals that a refund is due, it will be paid, but nothing in the waiver itself grants the taxpayer an extension of time to file a refund claim. Thus, the taxpayer is still constrained by the time limitations for filing a refund contained in § 12-54-85(F), discussed more fully below. Thus, the only years for which the taxpayer's refund claim is timely are 2001, 2000, and 1999.

B. The Department had no authority to extend the time for filing a refund claim before the passage of the Revenue Procedures Act in 1995.

South Carolina law prescribes strict time limitations on the filing of a claim for refund. "Except [in cases involving Internal Revenue Service adjustments,] claims for credit or refund must be filed within three years from the time the return was filed, or two years from the date the tax was paid, whichever is later." Section 12-54-85(F)(1). The General Assembly granted the Department the authority to "extend time limitations provided by [Title 12]" with the passage of the Revenue Procedures Act (RPA) in 1995. S.C. Code Ann. § 12-60-40 (Supp. 2008). Prior to the passage of the RPA, the Department had no statutory authority to extend the time for a taxpayer to claim a refund – only the authority to extend the time for assessing a tax. See, e.g., S.C. Code Ann. § 12-54-80 (Supp. 1988).

Since the Department had no authority to extend the period for filing a refund until 1995, those periods which expired prior to that time could not have been extended by the Department even if the waivers operate as the taxpayer claims. Thus, regardless of what was intended by the Department's waivers, the taxpayer's refund claims for years prior to 1992 cannot be considered timely by the Department.

Carolina. This is the approach that some state courts have taken upon declining to rule that gross receipts do not include the return on short-term investments.

C. The Department cannot extend a filing period which has already expired.

Even if the waivers operate as the taxpayer believes, and the Department's authority to extend the time to assess tax permits it to also extend the time for the filing of a claim for refund by a taxpayer, the Department cannot extend a time period which has already expired. Extensions may only occur, with the taxpayer's consent, only within the period the Department is statutorily authorized to assess tax. See § 12-54-85(C)(4); see also § 12-54-80. The earliest waiver produced by the taxpayer was issued in August of 1988. That waiver could only extend the period for assessing taxes for any period still open under the three year statute of limitations.⁹ Thus, the Department could not extend the time for assessing tax years 1978 through 1983. As a result, the claim for refund as to these years is not timely.

D. The taxpayer's 1998 claim for refund for Crescent Resources is not timely.

The taxpayer filed a claim for refund on behalf of Crescent Resources Corporation for tax years 1998 and 1999. Crescent was a separate entity at this time and apparently received no waivers to extend its time to file refunds, thus a claim for refund for Crescent is subject to the standard statute of limitations, Section 12-54-85(F). Based on the three year statutory look back period, the claim for 1998 is not timely, and cannot be granted by the Department.

February 4, 2010

⁹Moreover, the 1988 waiver only purported to extend the periods for tax years ending December 31, 1983 and later. The prior years were not referenced in a Department waiver until the mid 1990s.

DEPARTMENT OF REVENUE
IIT: INCOME TAX & LICENSE FEE

FS-54

TAXPAYER: DUKE POWER COMPANY
ADDRESS: 422 S. CHURCH ST.
CHARLOTTE, NC 28242-001FEI #: 56-0205520
FILE #: 20090024-9
PERIOD: 12/78-12/94
DATE: 8/8/02

INTEREST COMPUTED TO:

8/14/02

00/36/ 5258

DUKE POWER COMPANY

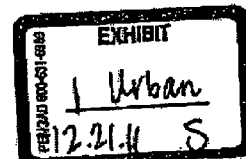
78-94

	TAX	INTEREST	PENALTY	TOTALS
	1,189	(7,434,600)	0	(9,385,789)
	1,685	\$2,757,788		\$3,593,481
504		-\$4,676,804	\$0	-\$5,792,308
		-\$132,889		-\$132,889
504		-\$4,809,693	\$0	-\$5,925,197
66		\$1,070,657		\$2,796,623
		\$60,871		\$60,871
TOTAL THRU 8/14/02		\$1,725,966	\$1,131,528	\$2,857,494
INCOME & LICENSE NETTED AGAINST SALES & USE TAX:				-\$3,067,703

Net Refund

Rate: This assessment for sales/use tax was netted against a refund of corp. income tax and license fee that we issued to Duke on 8/14/02. Please make sure our auditors get credit for the collection. Audit file will follow soon.

Thanks,
John Comer



SCDOR00021785

From: JOHN COMER
To: MURRAH, RITA
Date: 8/19/02 2:11PM
Subject: Re: DUKE ENERGY

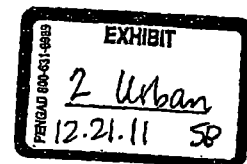
That is correct.

From: RITA MURRAH
To: COMER, JOHN
Date: 8/19/02 2:02PM
Subject: DUKE ENERGY

JOHN

I NEED TO GIVE CREDIT FOR THIS PAYMENT OF 2,857,494.79 DO I GIVE THE 8 PEOPLE ON THE FRONT CREDIT AT PERRY 50% AND THE OTHER FIVE AT 10%? I AM JUST MAKING SURE.

THANKS
RITA



SCDOR0002178



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
**OFFER OF WAIVER OF RESTRICTIONS ON
ASSESSMENT AND COLLECTION OF ADDITIONAL
TAX OR ACCEPTANCE OF OVERASSESSMENT**

SC870AD

(Rev. 7/97)
3310

Taxpayer Name(s) Duke Energy Corporation
(Please type or print)
Doing Business As _____
Street Address PO Box 1642
City Houston State Texas ZIP Code 77251-1642
Identification Number (SSN, FEI, etc.) 56-0205520

Increase (Decrease) in Tax, Interest and Penalties (Use separate section for each type of tax)	
Type of Tax <u>Sales & Use</u>	
Period Covered <u>1/1/1997 through 12/31/2001</u>	
Tax \$ <u>\$1,725,966.09</u>	Penalties \$ _____
Type of Tax _____	
Period Covered _____	
Tax \$ _____	Penalties \$ _____

Total due \$ 2,857,494 if paid by August 14, 2002 including interest.

This information was prepared by Jan Steensen Frangle, CPA Telephone Number 803 898 5616

**Consent To Assessment and Collection of Additional Tax
or Acceptance of Refund Determination**

The undersigned consents to the assessment and collection of any additional tax and penalties or accepts any decrease in tax and penalties shown above, plus any interest provided by law. This offer is subject to acceptance by the Department of Revenue. If this offer is accepted, no claim for refund can be filed or pursued and it will not be reopened in the absence of conditions stated in the general information and instructions.

Taxpayer's Signature _____ Date _____

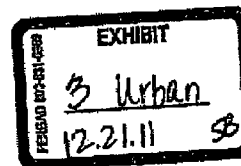
Spouse's Signature _____ Date _____

Corporation Name (if applicable) Duke Energy Corporation

By [Signature] Title Sr. Vice President Date August 13, 2002
Signature

Commission Approval of Waiver by [Signature]

(See reverse side)



SCDOR00021800



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
**WAIVER OF RESTRICTIONS ON ASSESSMENT
AND COLLECTION OF ADDITIONAL TAX OR
ACCEPTANCE OF OVERASSESSMENT**

SC870
(Rev. 7/97)
3309

Taxpayer Name(s) _____
(Please type or print)
Doing Business As _____
Street Address _____
City _____ State _____ ZIP Code _____
Identification Number (SSN, FEI, etc.) _____

Increase (Decrease) in Tax, Interest and Penalties (Use separate section for each type of tax)	
Type of Tax _____	
Period Covered _____	
Tax \$ _____	Penalties \$ _____
Type of Tax _____	
Period Covered _____	
Tax \$ _____	Penalties \$ _____

Total due \$ _____ if paid by _____ including interest.
This information was prepared by _____ Telephone Number _____

PLEASE READ THE INSTRUCTIONS ON THE REVERSE SIDE BEFORE SIGNING.

**Consent To Assessment and Collection of Additional Tax
or Acceptance of Overassessment**

I have read and understand the instructions on the reverse side. I consent to the assessment and collection of any additional tax and penalties or accept any decrease in tax and penalties shown above, plus any interest provided by law. I understand that by signing this waiver, I consent to the above determination amounts(s) and, must pay the additional amounts prior to contesting this matter any further.

Taxpayer's Signature _____ Date _____
Spouse's Signature _____ Date _____
Corporation Name (if applicable) _____
By _____ Title _____ Date _____
Signature

(See reverse side)

DE00012157

GENERAL INFORMATION AND INSTRUCTIONS
SC870 (Rev. 7/97)

IMPORTANT: By signing this form, the taxpayer (1) agrees to pay the tax, interest, and penalties stated to be due; and (2) gives up the right to appeal this matter further. Interest and applicable penalties will continue to accrue until the balance due the Department is paid in full. Signing this form does not affect your right to file a claim for refund and does not prevent the Department from assessing additional tax found to be due at a later date.

NOTE: If you wish to give up your right to file a claim for refund and prevent the Department from assessing additional amounts at a later date, a SC870AD should be executed in lieu of this SC870.

CLAIM FOR REFUND

Executing this document does not prevent you from seeking a refund of State taxes paid. The refund claim must be filed within three years from the date the return was filed, or two years from the date of payment of the tax, whichever is later. See the SC Information Guide about the claim for refund procedure for additional information.

EXECUTING THIS FORM

If this waiver relates to a joint individual income tax return, both husband and wife must sign the waiver.

If the SC870 is executed on behalf of a corporation, the waiver must include the corporation's name as well as the signature and title of the corporate officer executing this document.

If this waiver is associated with an income tax examination of a partnership or "S" corporation, each partner or shareholder must execute a separate form.

If this waiver is signed by someone acting in a fiduciary capacity (e.g. a personal administrator or trustee), Internal Revenue Service Form 56, Notice Concerning Fiduciary Relationship, must accompany this form unless previously provided.

An attorney, CPA, or other agent may execute this form on behalf of a client provided such authority is granted in a power of attorney. The power of attorney must accompany this form unless previously provided.

GENERAL INFORMATION

We have an agreement with the Internal Revenue Service which provides for the exchange of tax information. If this change affects returns filed with the Internal Revenue Service, amended federal return(s) may need to be filed.

If you have any questions about this waiver, please contact the preparer.

State of South Carolina
Department of Revenue
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214

SC REVENUE PROCEDURE #95-6

SUBJECT: Department of Revenue Internal Appeals Process and Procedures

EFFECTIVE DATE: This document is effective August 1, 1995.

SUPERSEDES: SC Revenue Procedures #92-1, 95-3, and all previous documents and any oral directives in conflict herewith.

AUTHORITY: S.C. Code Section 12-4-320 (Supp. 1994)
SC Revenue Procedure #94-1

SCOPE: A Revenue Procedure is a statement which provides information of a procedural nature. It is valid and remains in effect until superseded or modified by a change in the statute or regulations or a subsequent court decision or Revenue Procedure.

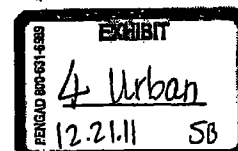
I. Introduction

This document contains procedures for handling disputed matters within the jurisdiction of the Department of Revenue, including disputes concerning penalties and denials and revocations of licenses, through the Department Determination.

These procedures are intended to ensure public confidence in the integrity and fairness of the Department, to comply with both the letter and the spirit of the South Carolina Taxpayers' Bill of Rights, and to resolve disputes where possible without the expense of going to a formal hearing or court.

All time limits contained in this Revenue Procedure, except those mandated by statute or regulation, may be extended by mutual agreement of the person appealing and the appropriate Department employee.

To understand the appeals process, this Revenue Procedure must be read in conjunction with the South Carolina Revenue Procedures Act, Chapter 60 of Title 12 of the South Carolina Code, and the Rules of Procedure for the Administrative Law Judge Division. The Rules of Procedure are available from the Administrative Law Judge Division, Edgar A. Brown Building, Second Floor, 1205 Pendleton Street, Columbia, South Carolina 29201, (803) 734-0550.



II. Definitions

A. Appeals - The employees designated by Field Services Division, Office Services Division, Property Division, and Division of Motor Vehicles to carry out the responsibilities and duties assigned to Appeals in this Revenue Procedure.

B. Audit Supervisor - The employees designated by the Field Services Division, the Office Services Division, the Property Division, and the Division of Motor Vehicles to carry out the responsibilities and duties assigned to the Audit Supervisor in this Revenue Procedure.

C. Contested Case Hearing - A hearing defined in Section 1-23-310 of the S.C. Code, and conducted pursuant to Article 3, Chapter 23 of Title 1, the South Carolina Administrative Procedures Act. It includes hearings conducted by:

1. The Administrative Law Judge Division to review Department Determinations other than DMV Matters; and
2. The DMV Hearing Officers to review Department Determinations regarding DMV Matters.

D. Department - The Department of Revenue.

E. Department Determination - The final determination of an appeal by the Department made in accordance with this Revenue Procedure. This determination may be appealed to the Administrative Law Judge Division, or, for DMV Matters, to the Hearing Officers of the Department of Public Safety.

F. Department Representative - The person appointed by the Department's General Counsel to prepare the Department's determination and represent the Department at the Contested Case Hearing.

G. Director - The Director of the Department.

H. Division - The appropriate division or divisions of the Department. Divisions of the Department which are affected by this Revenue Procedure include the Field Services Division, the Office Services Division, the Property Division, the Division of Motor Vehicles, and the Office of the General Counsel.

I. DMV Hearing Officers - The Department of Public Safety's hearing officers.

J. DMV Matters - Matters related to driver licenses, motor vehicle registrations, and motor vehicle titles.

K. Final Assessment or Assessment - For the purposes of this Revenue Procedure:

1. Except for property taxes, an Assessment is the determination of any tax due.
2. For property tax purposes an Assessment is the determination of the value of the property multiplied by the assessment ratio. The property tax due is later determined by multiplying the Assessment by the millage levied by the taxing authority. An Assessment for property taxes of airlines and private car lines will include determination of the equalized assessment ratio, the millage and the tax due.

3. Assessments include the determination of any penalty or interest due and owing.

L. Proposed Assessment - The first written notice sent or given to a person stating that a Division within the Department has concluded that any tax is due. For property tax purposes, it includes the first notice stating the value and/or assessment ratio of certain property as determined by the Department. The term Proposed Assessment does not include the auditor's work papers or draft audit reports, or any document that specifically states it is not intended as a proposed assessment.

If a document is consistent with this definition, it will be deemed to be a Proposed Assessment for the purposes of this Revenue Procedure even if it is called something else; for example, even if it is called an assessment, notice of assessment, assessment notice, assessment notice and tax bill, notice of appraisal and assessment, proposed notice of assessment, notice of adjustment, or if it looks like an invoice.

M. Regulatory Violation - A Regulatory Violation is a violation of a statute or regulation which controls the conduct of alcoholic beverage licensees, bingo licensees, or coin operated device licensees, including a violation which may result in the suspension or revocation of a license. It does not include taxes or interest on taxes or monetary penalties in Chapter 54 of Title 12.

N. Tax or Taxes - Unless the context clearly requires otherwise, taxes include all taxes, licenses, permits, fees, or other amounts, including interest and penalties, imposed by Title 12 of the S.C. Code, or subject to assessment or collection by the Department.

O. Waiver of Restrictions on Assessments, Forms SC870 and SC870AD

1. Form SC870 C A taxpayer may sign this form if he wants to have the Department generate a Final Assessment showing the total tax, interest and penalty (if any) due so that the taxpayer can pay the Proposed Assessment and stop the accumulation of interest. This form does not prevent the Department from assessing additional taxes, or the taxpayer, where otherwise allowed, from filing a claim for refund.
2. Form SC870AD C A taxpayer may sign this form when he wants to resolve a dispute. It is not effective until it is accepted by a Division Assistant Administrator or his designee. If accepted by the Department, the taxpayer cannot file or prosecute a claim for refund or credit and the Department will not reopen the case except for fraud, malfeasance, concealment or misrepresentation of material fact, or an important mistake in mathematical calculation.

III. Assessments and Proposed Assessments

A. Taxes other than Property Taxes

1. If the taxpayer files a written protest with the Department within thirty (30) days of the date of the Proposed Assessment, the Department will not make any effort to collect the tax until the matter is resolved within the Department or a Contested Case Hearing decision is rendered. This suspension of collection

efforts does not apply to jeopardy or termination assessments or if paragraph B or C below is applicable.

2. If the taxpayer does not file a written protest with the Department within thirty (30) days of the date of the Proposed Assessment, the Department will issue a Final Assessment and begin collection activities if payment is not made.

3. The Taxpayers' Rights Advocate may suspend the Department's collection efforts pursuant to Section 12-54-730 of the S.C. Code if the Advocate determines that those efforts will cause the taxpayer to suffer an irreparable loss.

B. Property Taxes Assessed by the Department

1. If the taxpayer files a written protest with the Department within thirty (30) days of the date of the Proposed Assessment and the matter is unlikely to be resolved prior to December 31 of the same year, the taxpayer will receive a tax bill based upon 80% of the disputed assessed value, or a greater amount if the taxpayer agrees in writing. Additional taxes will be billed or a refund made after the matter is resolved.

2. If the taxpayer does not file a written protest with the Department within thirty (30) days of the date of the Proposed Assessment, then (except for airlines and private car lines) the Department will certify its Assessment to the appropriate county or counties and the county or counties will issue the tax bills.

For airlines and private car lines, if a protest is not filed within thirty (30) days of the date of the Proposed Assessment and payment is not made when due, the Department will begin collection activities.

3. If a protest of a Proposed Assessment is not made within thirty (30) days of the date of the Proposed Assessment, the tax must be paid.

C. All Taxes and Revocation of Licenses

If the taxpayer fails to make a timely response or fails to comply with the procedures outlined in this Revenue Procedure, the Department may decide the appeal against the taxpayer and immediately issue the Department Determination. If an appeal is filed with the Administrative Law Judge Division, the Department will likely argue that the taxpayer failed to exhaust his "pre-hearing remedies" as defined in Section 12-60-30(16) of the S.C. Code.

After payment, where otherwise allowed the taxpayer can file a claim for a refund.

IV. Procedure for Taxes, other than Property Taxes, where Dispute Arises from an Audit

A. Audit (other than Office Audits)

1. The auditor will discuss the draft audit report with the taxpayer, determine the facts and issues with which the taxpayer agrees and disagrees, and strive to resolve all issues. Resolutions made at the audit level must be consistent with Department policy and may not be based upon the hazards of litigation.

2. The taxpayer may request a Technical Advice Memorandum on the legal issues involved in the audit. See S.C. Revenue Procedure 94-1.
3. Each audit file must contain an audit report, the contents of which are set forth in Exhibit B.
4. The case file will be forwarded to the Audit Supervisor.

B. Audit Supervision

1. **Purpose.** The primary purpose of audit supervision is to facilitate administration of the State's tax laws by establishing and ensuring adherence to uniform auditing and enforcement standards.

2. **Organization.** The Field Services Division, Office Services Division, Property Division, and Division of Motor Vehicles will each designate one or more Audit Supervisors who will provide audit supervision.

3. **Procedures - Except for Proposed Assessments arising from office audits.** If the Audit Supervisor agrees with the position of the taxpayer on all issues, the file will be adjusted, the taxpayer notified, and the file closed. Resolutions made at this level must be consistent with Department policy and may not be based upon the hazards of litigation.

If the Audit Supervisor determines that additional tax is due, she will supervise the preparation of a Proposed Assessment and have it sent to the taxpayer. The Proposed Assessment will contain the following:

- (a) Instructions explaining how a taxpayer can file a written protest if he disagrees with the proposed assessment, and an explanation of the taxpayer's further appeal rights.
- (b) A standard form to be used at the taxpayer's option for filing a "written protest."

Upon receipt of a written protest from the taxpayer, if the Audit Supervisor agrees with the taxpayer, she will notify the taxpayer and close the file. If she does not agree with the taxpayer, she will forward the file to Appeals.

4. **Procedures C For Proposed Assessments arising from office audits (including office audits arising from Internal Revenue Service Agent's Reports).** The following procedures are to be followed by the audit sections and Audit Supervisor:

a) The Audit Supervisor of the appropriate section of the Office Services Division of the Department will prepare or have prepared a Proposed Assessment and forward it to the taxpayer. The Proposed Assessment will contain the following:

- (1) Instructions explaining how a taxpayer can file a written protest if he disagrees with the Proposed Assessment.

(2) A copy of the section's report supporting the Proposed Assessment. See Exhibit C for the contents of the audit section's report.

b) The Audit Supervisor of the section which sent the Proposed Assessment will receive the protest.

(1) If the Audit Supervisor agrees with the taxpayer on all issues, the taxpayer will be notified and the file closed.

(2) If the Audit Supervisor does not agree with the taxpayer, the Audit Supervisor or her designee will try to resolve the matter consistent with current Department policy. Resolutions made at this level may not be based upon the hazards of litigation.

(3) If the Audit Supervisor cannot resolve the matter within sixty (60) days of the original receipt of the protest, she will adjust the file for any issues with which she does agree and send the file to Appeals.

C. Appeals

1. Purpose, Organization and Procedures

a) **Purpose.** Appeals' purpose is to resolve controversies where possible without litigation on a basis which is fair and impartial to both the taxpayer and the State in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Department.

b) **Function.** Taxpayers may appeal any dispute to Appeals except for those such as denial of an installment payment agreement, revocation of licenses, and jeopardy and termination assessments, which have a different procedure set forth below.

c) After receipt of a protested file from the Audit Supervisor, Appeals will follow these procedures:

(1) If the file is incomplete, Appeals will return the file to the Audit Supervisor. If the protest is improper and cannot be corrected, Appeals will have the tax assessed and send the taxpayer a demand for payment, an explanation of why the protest was not acceptable, and an explanation of the refund procedure.

(2) If the file is complete and the protest is proper, Appeals will advise the taxpayer or the taxpayer's representative by letter that the file is in Appeals, and

¹If the Audit Supervisor needs more than sixty (60) days, she will give Appeals a summary of the issues and the date she estimates the file will be resolved or sent to Appeals.

- (a) Offer the taxpayer a conference with Appeals;
- (b) Explain the purpose and procedures involved in a conference with Appeals (see below), and the procedure if the conference with Appeals is refused; and
- (c) Provide a list of proposed facts and a statement of the issues in controversy.

(3) At any time, if the statute of limitations has not run, Appeals may amend the Proposed Assessment. If Appeals makes an amendment, it will send the amended Proposed Assessment to the taxpayer, and the taxpayer will be given thirty (30) days to amend his protest.

(4) If the protest raises new facts, or the taxpayer raises new facts with Appeals, Appeals will notify the Audit Supervisor or auditor if any help is needed in investigating the facts.

(5) If Appeals agrees with the taxpayer, it will notify the taxpayer and send a copy of its Resolution Report to the Audit Supervisor. See Exhibit F for the contents of the Resolution Report. This report will end the matter.

d) Conference with Appeals

(1) **Purpose.** The purpose of the conference with Appeals is to attempt to resolve any and all disputed matters prior to a Contested Case Hearing, to reconcile any differences concerning the facts or legal principles, and to provide an opportunity for the taxpayer to submit any new arguments and/or information, if any.

(2) **Procedures.**

- (a) The conference will be held in an informal manner.
- (b) The taxpayer is entitled to have his or her attorney, accountant and others present.
- (c) Appeals and the taxpayer will stipulate the facts upon which they agree.
- (d) The taxpayer and Appeals may raise any new issues, facts and arguments at this conference.
- (e) Appeals may discuss the appeal with the auditor, Audit Supervisor, or both, to the extent necessary to fully understand the legal and factual arguments in the appeal. Where practical the Audit Supervisor will be invited to the conference.

(f) The taxpayer and Appeals will attempt to settle the case. (See Sections C.2., "After the conference with Appeals," and C.3., "Settlements.")

(3) If the conference with Appeals is refused. If the taxpayer does not wish to take advantage of the conference with Appeals, Appeals will inform the taxpayer of the last date the taxpayer may submit new information for Appeals to consider. The taxpayer may send an amended protest or brief and respond to any assertions, arguments or conclusions made by Department employees.

2. After the conference with Appeals. The following procedures are to be followed upon completion of the conference with Appeals, or after the time for the taxpayer to submit additional information, if the conference is refused.

a) If Appeals Agrees with the Taxpayer or All Issues are Settled. If Appeals agrees with the taxpayer or all issues are settled at the conference, Appeals will prepare a Resolution Report. See Exhibit F for the contents of the Resolution Report.

If necessary, a Waiver of Restrictions on Assessments (Form SC870 or SC870AD) will be sent to the taxpayer for his signature.

b) If All Issues Are Not Settled At Informal Conference with Appeals. If all issues are not settled at, or soon after, the conference with Appeals, then Appeals will prepare Appeals' Report, and forward the file to the Department's General Counsel. See Exhibit D for the contents of Appeals' Report.

3. Settlements - Appeals will attempt to settle the case in a fair and impartial manner; i.e., one which reflects the probable result in the event of litigation.

a) Appeals has the authority to settle any case based upon its findings of the facts and its determination of the law. No settlement of a Division is binding until it is approved by the Assistant Administrator of the Division.

b) Subject to the following procedures and limitations, Appeals has the authority to settle cases based upon the hazards of litigation. Appeals may refuse to settle a case based upon the hazards of litigation if it believes that State tax policy would be better served with a judicial resolution. Such settlements should reflect, on an issue by issue basis, the probable result in the event of litigation, or mutual concessions for the purpose of settlement based on the relative strength of the opposing positions where there is a substantial uncertainty of the result in the event of litigation.

Appeals will consider:

- (1) The quality of the evidence likely to be presented,
- (2) The credibility of witnesses,
- (3) The availability of witnesses,

- (4) The ability of the taxpayer to carry his burden of going forward with the evidence,
- (5) The likelihood that the evidence the taxpayer can present will carry his burden of proof,
- (6) The doubt as to an issue of fact, and
- (7) The doubt as to a conclusion of law.

c) If the settlement is based on the hazards of litigation, it must be approved in the manner described below.

4. Hazards of Litigation. Because settlements based upon the hazards of litigation must be uniformly made, to settle a case based upon the hazards of litigation, Appeals must send its recommendation to the Department's General Counsel. The recommendation must be based upon the principles in this Revenue Procedure. The Department's General Counsel will discuss the recommendation with the Chief Counsel for Policy and the Chief Counsel for Revenue or Regulatory Litigation, as appropriate, and then either reject it or recommend it to the Director who may authorize the settlement. If the settlement is rejected, the Department's General Counsel may make suggestions for changes which would make it acceptable. If Appeals concurs with the changes, Appeals may resubmit the recommendation after the changes are made.

D. Department Representatives. If the case is not settled, Appeals will forward the file to the Department's General Counsel who will assign it to a Department Representative. The Department Representative will review the file and either:

1. Discuss the file with the Director, and then prepare the Department's Determination; or
2. Return the file to Appeals if the taxes, interest, penalties or other relief requested by Appeals is not adequately supported by the file or by the Proposed Assessment, or if directed to do so by the Director. After discussing the file with the Department Representative, Appeals may amend the file and return it to the Department Representative, or close the file.

The Department Representative will send the Department's Determination to the taxpayer or his representative with:

1. The choice to pay any tax, penalties and interest due, or to request a Contested Case Hearing; and
2. A statement explaining that a request for a Contested Case Hearing must be made to the Department Representative within 30 days of the date the Department Determination is sent to the taxpayer, and an explanation of how to request a hearing.

The Department Representative will prepare the transmittal to the Administrative Law Judge Division or the DMV Hearing Officers and represent the Department at the hearing. Administrative Law Judge Division hearings are conducted pursuant to the

Administrative Law Judge Division rules which are available from the Administrative Law Judge Division.

V. Procedure for Property Tax Appeals where the Department is the Assessor

A. Except to the extent different rules are provided, property tax procedures are the same as the procedures provided for other taxes. The Property Division will designate one of its employees to perform the functions of the Audit Supervisor. Although this person may have different titles depending upon the type of property tax, the type of taxpayer involved, or whether an exemption is at issue, for purposes of this Revenue Procedure, this person will be referred to as the "appropriate Property Division employee."

B. Property other than the Business Personal Property audited by the Field Services Division.

1. Appropriate Property Division employees will review the property tax returns and, when necessary, issue Proposed Assessments.

2. If the taxpayer files a protest, the appropriate Property Division employee will review the protest, and

a) If, based on the letter of protest and other information, the appropriate Property Division employee agrees with the taxpayer, he will notify the taxpayer and close the file.

b) If the appropriate Property Division employee does not agree with the taxpayer, he will meet with the taxpayer and strive to resolve all issues. If it is not possible to resolve all issues, the appropriate Property Division employee will, to the extent possible, determine the facts and issues with which the taxpayer agrees and disagrees. Resolutions must be consistent with Department policy. Settlements based upon the hazards of litigation may not be made at this level.

3. If the appropriate Property Division employee cannot resolve the matter within two months of receiving the protest, he will transfer the file to Appeals.

The Property Division will appoint one or more persons to act as Appeals. It may appoint different persons to perform the Appeals function depending upon the type or location of the property being taxed.

4. If Appeals cannot settle the matter within three months of the receipt of the protest and valuation of property is at issue, the appropriate Property Division employee will prepare a formal appraisal. This appraisal will be completed within four months of receiving the protest.

5. Appeals and its Report

a) If Appeals resolves the case, it will prepare a corrected Assessment and send it to the auditor of the county where the property is located.

b) If Appeals cannot resolve the case, it will prepare its report. Appeals' report, responsibilities and duties will be the same as Appeals' report,

responsibilities and duties for Proposed Assessments arising from an office audit, except the file which is forwarded will also contain the Division's appraisal if valuation is at issue, and any appraisals submitted by the taxpayer or others.

6. The remainder of the procedure will be the same as for non-property tax cases.

VI. Procedure for Appeal of Property Tax Exemptions

The appropriate section of the Property Division will review and make a determination on all claims for property tax exemptions. If the exemption is denied or a previously granted exemption is revoked, and a protest is received, the Property Division will treat the matter as a protest of a Proposed Assessment and follow the procedures outlined above.

VII. Procedure for Jeopardy Assessments

Jeopardy assessments will be handled in accordance with Sections 12-60-910 and 12-60-920 of the S.C. Code. Unless specifically directed otherwise, a taxpayer subject to a jeopardy assessment should deal directly with the Department's General Counsel.

VIII. Procedure for appeal of denial of installment agreement

Appeals of denials to pay a tax in installments will be made to the Assistant Administrator of the Office Services Division or such other person designated by the Director of the Department. The designated person will discuss the appeal with the Director. He will then prepare and issue the Department's Determination.

IX. Procedure for appeal of, revocation of, or the refusal to issue, licenses, and penalties for regulatory violations

A. Revocation of Retail Sales Licenses C If a person receives a notice from a Division stating that his retail sales license will be revoked, he has thirty (30) days from the date of the notice to protest the proposed revocation. Unless the Director directs otherwise, appeals of proposed revocations of retail sales licenses must be filed with the District Manager who signed the proposed revocation. If the District Manager cannot resolve the matter, he will forward the file to the Department's General Counsel.

B. Regulatory Violations and Licenses other than Revocation of Retail Sales Licenses C Except for the revocation of retail sales licenses (see paragraph A. above,) if a person receives a Proposed Assessment of penalties for Regulatory Violations, or a notice from a Division stating that his license will be revoked, or both, or a notice stating that his application for a license (including a retail sales license) has been denied, he has thirty (30) days from the date of the notice to protest the proposed assessment, revocation, or denial. The protest of any one or more of these items will be treated as a protest of a Proposed Assessment under Section IV B or C above and follow the procedures in the appropriate section (the denial of a license will be deemed to be from an office audit), except that Appeals will generally not contact the taxpayer. It will merely prepare its report from the file, including the protest. Appeals will only contact the taxpayer and

request a conference, if a review of the file indicates that a settlement is likely, or significant time could be saved by stipulating some of the facts at the Appeals level.

Provided, however, that if an application for an alcoholic beverage license would have been granted by the Department but for the objection of one or more members of the public, the denial shall allow the applicant to waive his right to further review within the Department and to consider the denial as the Department Determination. If he does so, he may request a Contested Case Hearing within thirty (30) days of the notice of denial.

C. All Licenses - Appeals of a Department Determination revoking or denying a license are appealable to the Administrative Law Judge Division, except for revocations or denials of drivers' licenses, or motor vehicle titles or registrations which are appealable to the DMV Hearing Officers.

It should be noted that this Revenue Procedure does not apply to any revocation or proposed revocation of a driver license by the Department of Public Safety.

X. Procedure for Claims for Refund

A. For tax matters other than property tax matters, the section of Office Services with the responsibility for claims for refund will consider the claim or, if appropriate, refer it to Field Services. If Office Services denies the refund and a protest is received, it will be treated as a protest of a Proposed Assessment sent to Office Services and the procedures outlined above will be followed. If Field Services denies the refund and a protest is received, it will be treated as a protest of a Proposed Assessment coming to Field Services and the procedures outlined above will be followed.

B. For property tax matters, the appropriate Property Division employee will review and strive to resolve the claim for refund. If the claim for refund is denied and a protest is received, the Property Division will treat the matter as a protest of a Proposed Assessment sent to the Property Division and follow the procedures outlined above.

C. For motor vehicle matters, the Division of Motor Vehicles will consider the claim. If the Division of Motor Vehicles denies the refund, a protest must be filed with the Assistant Administrator of the Division of Motor Vehicles. If the Assistant Administrator cannot resolve the matter, he will forward the file to the Department's General Counsel.

XI. Procedure for Release of Liens

If the Division denies a request for the release of a lien, the taxpayer will be given the opportunity to protest the denial. The taxpayer's protest will be treated as a protest of a Proposed Assessment and follow the procedures outlined above.

If the Division is preparing to sell the property, the taxpayer can request a stay from the Taxpayers' Rights Advocate.

XII. Procedure when a Case is Returned for Failure to Exhaust Administrative Remedies

If a case is returned by the Administrative Law Judge Division because a taxpayer failed to exhaust his "pre-hearing remedies" as defined in Section 12-60-30(16) of the S.C. Code, the case will be sent to the Audit Supervisor of the appropriate Division. The Audit

Supervisor will treat the matter in the same manner as a protest of a Proposed Assessment and the procedures outlined above will be followed.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank

Burnet R. Maybank, III, Director

Columbia, South Carolina

October 19, 1995

Exhibit A C Written Protest

A person who wishes to appeal must file a written protest that contains:

1. The person's name;
2. The appropriate taxpayer identification number or other appropriate numbers;
3. The period(s) involved; *e.g.* the period(s) for which the tax was proposed;
4. The matter in dispute; *e.g.* the nature and kind of tax in dispute; and
5. All of the reasons why the person disagrees with the Proposed Assessment or other Division determination.
6. Protests of property tax Proposed Assessments must also include the valuation and Assessment which the owner deems to be the fair market value and Assessment of the property. See S.C. Code Section 12-4-770 and Regulation 117-111.

Exhibit C - Audit Section's Report

The Audit Section's report will contain the following information:

1. The person's name, address, and appropriate identifying numbers (e.g., single identification number, social security number, FEI number, Department file number, retail license number, etc.);
2. The period(s) involved;
3. The matter in dispute; e.g., the nature and kind of tax in dispute;
4. The type and amount of the tax, interest and penalty (if any) determined to be due;
5. A description of the reasons for determining that the tax, interest and penalty (if any) are due; and
6. Any other information deemed important by the section.

Exhibit D C Appeals' Report

Appeals' Report will contain the following information:

1. The person's name, address, and appropriate identifying numbers (e.g. single identification number, social security number, FEI number, Department file number, retail license number, etc.);
2. The period(s) involved;
3. The matter in dispute; i.e., the nature and kind of tax in dispute;
4. Facts*
 - a) A numbered list of all facts Appeals determines are relevant to resolve the contested issues.
 - b) To the extent Appeals is aware that the person disagrees with any of these facts, a statement concerning the person's view and why Appeals did not adopt the person's view of the facts.
5. Discussion of legal issues*
 - a) A statement as to each legal issue which has been resolved.
 - b) A statement as to each legal issue Appeals determines to be relevant to resolve the contested issues and the reasons for Appeals' beliefs. Any issues not included will be deemed decided in the person who is appealing's favor.
 - c) To the extent Appeals is aware that the person disagrees with any of these issues, an argument supporting Appeals' view, a statement concerning the person's view, and why Appeals did not adopt the person's view of the issue.
 - d) This discussion of legal issues will apply relevant statutes, regulations, cases and rulings to the person's facts and explain why this law and these facts support Appeals' position.
6. Any other information deemed important by Appeals, including items the person considers relevant which Appeals considers irrelevant with an explanation of Appeals' determination that these facts or issues were irrelevant.

*Provided, that for regulatory violations, the "facts" and "discussion of legal issues" sections of Appeals report can be deleted if the report contains: (1) a copy of the written violation that contains enough information to determine the relevant facts, (2) a brief response to any issues raised in the protest, and (3) a list of possible witnesses with a brief summary of their expected testimony.

Exhibit E C Department's Determination

The Department's Determination will contain the following information:

1. The person's name, address, and appropriate identifying numbers (e.g. single identification number, social security number, FEI number, Department file number, retail license number, etc.);
2. The period(s) or date(s) involved;
3. The matter in dispute; e.g., the nature and kind of tax in dispute;
4. A numbered list of all facts the Department determines are relevant to resolve the contested issues; provided, that for a regulatory violation a copy of the written violation that contains enough information to determine the relevant facts is sufficient.
5. A statement as to each legal issue the Department determines is relevant to resolve the contested issues and the reasons for the Department's beliefs; provided, that for a regulatory violation a list of the sections the person is charged with violating, the proposed penalty, and a response to any issues raised in the protest is sufficient.
6. The Department may include any other information it determines should be included.

Exhibit F C Resolution Report

The Resolution Report will contain the following information:

1. The person's name, address, and appropriate identifying numbers (*e.g.* single identification number, social security number, FEI number, Department file number, retail license number, audit number etc.);
2. The period(s) involved;
3. The matter in dispute; *e.g.*, the nature and kind of tax in dispute;
4. The type and amount of the tax (or assessment for certain property tax purposes), interest and penalty (if any) the person agrees to pay; and
5. A brief statement of the issues and facts upon which the issues were resolved and the reasons for the resolution.

Exhibit G C Case File

The case file should contain a table of contents with the following items tabbed:

1. The Proposed Assessment
2. The taxpayer's protest and additional material submitted by the taxpayer after the protest
3. The audit report or audit section's report
4. Power(s) of Attorney
5. All waivers of Statute of Limitations
6. Copies of pertinent documents, such as contracts, lease agreements, appraisals, wills, etc. These documents will be indexed, numbered and tabbed.
7. Appeals' Report
8. The Department's Determination

**SOUTH CAROLINA DEPARTMENT OF REVENUE
REPORT OF FIELD AUDIT: INCOME TAX & LICENSE FEE**

FS-54

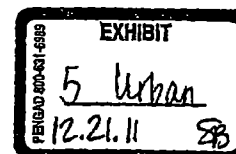
TAXPAYER: DUKE POWER COMPANY
ADDRESS: 422 S. CHURCH ST.
CHARLOTTE, NC 28242-001

FEI #: 56-0205520
FILE #: 20090024-9
PERIOD: 12/78-12/94
DATE: 8/8/02

INTEREST COMPUTED TO:

8/14/02

INCOME TAX:				
PERIOD ENDED:	INCOME TAX	INTEREST	PENALTY	TOTALS
12/78-94	(1,951,189)	(7,434,600)	0	(9,385,789)
LICENSE TAX:				
12/84-94	\$835,685	\$2,757,796		\$3,593,481
SUBTOTAL THRU 3/29/02	-\$1,115,504	-\$4,676,804	\$0	-\$5,792,308
UPDATE INTEREST: 3/29 TO 8/14		-\$132,889		-\$132,889
SUBTOTAL THRU 8/14/02	-\$1,115,504	-\$4,809,693	\$0	-\$5,925,197
SALES & USE TAX:				
TAX & INTEREST THRU 4/05/02	\$1,725,966	\$1,070,657		\$2,796,623
UPDATE INTEREST: 4/5-8/14		\$60,871		\$60,871
SUBTOTAL THRU 8/14/02	\$1,725,966	\$1,131,528		\$2,857,494
INCOME & LICENSE NETTED AGAINST SALES & USE TAX:				-\$3,067,703



SCDOR00021780

))
**NEXSEN PRUET
JACOBS POLLARD & ROBINSON, LLC**
ATTORNEYS AND COUNSELORS AT LAW

Bumel R. Maybank
MEMBER

DIRECT DIAL
(803) 253-8228
(843) 728-1768
BMaybank@NJP.com

March 20, 2002

Mr. John A. Swearingen
Audit Supervisor
Department of Revenue
301 Gervais Street
Columbia, SC 29201

Jan Steensen Crangle, CPA
Manager, Office of Appeals
South Carolina Department of Revenue
Post Office Box 125
Columbia, SC 29214

Re: Selected Duke State and Local Tax Issues.

Dear John and Jan:

The Duke crowd and I met in Charleston (natch) to discuss the settlement proposals contained in your fax of March 18. We have the following counter-proposal.

First, Duke naturally needs to check your figures. (They had not seen your fax prior to the meeting.) I know there have been issues in the past regarding the calculation of interest, but assuming Duke confirms your figures, we offer the following:

SALES TAX

Duke would like to settle the sales tax liability through 2001, using the methodology and quarterly tax liability contained in your fax. (This has the effect of reducing the amount of our refund.) Duke proposes to execute a SC870AD regarding the sales and use tax liability through 2001.

LICENSE TAXES

Subject to verifying the figures, as stated above, Duke proposes accepting the DOR's proposal and executing a SC870AD for license taxes for the years contained in your proposal. (December 1984 to December 1994.)

INCOME TAXES

Subject to verifying the figures, as stated above, Duke proposes accepting the DOR's proposal except that it would agree to execute a SC870, rather than a SC870AD. This would have the effect of keeping the years open for both the DOR and the State until the end of this year, unless the DOR and Duke jointly agree to execute another waiver.

NPCHAR1:-() -

1441 MAIN STREET, SUITE 1500, COLUMBIA, SC (29201) • POST OFFICE DRAWER 2426, COLUMBIA, SC (29202)
803-771-6800 • FAX 803-253-8277
www.NJP.com

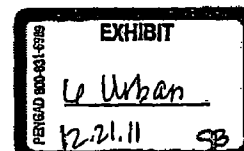
CHARLESTON, SC

CHARLOTTE, NC

OFFICES ALSO IN:
GREENVILLE, SC

HILTON HEAD, SC

MYRTLE BEACH, SC



SCDOR00021809

March 20, 2002
Page 2

Duke is examining the possibility of filing amended returns for the purposes of claiming tax incentives, as well as possibly other adjustments. In addition, the files are so stale and the number of years open are so large that Duke is reluctant to close out some 16 years without at least some due diligence, which they have not performed.

CONCLUSION

Duke is actively in the process of verifying the figures contained in your fax, which verification is expected to be completed in the next few days. Please let me know what you think about the other points.

Yours very truly,

Burnie

Burnet R. Maybank

BRM *nmw*

cc: Mr. Harley Priesmeyer/Duke Energy

NPCHAR1:181282.1-LT-(BRM) 011413-00041

SCDOR00021810

NEXSEN PRUET JACOBS & POLLARD, LLC
ATTORNEYS AND COUNSELORS AT LAW

BURNET R. MAYBANK III
LEADER

DIRECT DIAL
803-253-8228
BMaybank@NPJP.com

July 2, 2002

Mr. John A. Swearingen
Audit Supervisor
Department of Revenue
301 Cervaiss Street
Columbia, South Carolina 29201

Jan Steensen Crangle, CPA
Manager, Office of Appeals
South Carolina Department of Revenue
Post Office Box 125
Columbia, South Carolina 29214

Re: Proposed Duke Settlement

Dear John and Jan:

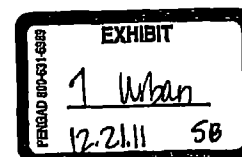
Duke offers the following settlement proposal:

SALES TAX

Duke would like to settle the sales tax liability through 2001, using the methodology and quarterly tax liability contained in your fax. (See attached Exhibit 1.) This includes accepting the DOR's interest rate calculation. Duke proposes to execute a SC870AD regarding the sales and use tax liability through 2001. We understand this equals approximately (\$2,796,623) with interest calculated through April 5, 2002.

INCOME AND LICENSE TAXES

Duke proposes accepting the DOR's proposal except that it would agree to execute a SC870, rather than a SC870AD. We understand this would have the effect of keeping the years open for both the DOR and the State until the end of the waiver period (12/31/2002), unless the DOR and Duke jointly agree to execute another waiver. As previously indicated, Duke is examining the possibility of filing amended returns.



SCDOR00021667

AXSEN PRUET JACOBS & POLLARD, I

John A. Swearingen
Jan Steensen Crangle, CPA
July 2, 2002
Page 2

We understand that this equals a refund of \$5,891,208 (with interest calculated through July 2, 2002.)

We would also like to accept your proposal that the DOR would issue a FAD (at our request) on the calculation of interest on the income and license taxes so that we could contest the interest rate calculations. (Duke may not contest the matter, but we would like to retain the option.)

CONCLUSION

We have pretty well agreed to all of the DOR proposals, so I trust you find this satisfactory. Duke would like to have the attached schedule (Exhibit 2) re-calculated with interest brought forward to no later than July 15th. Additionally, Duke would like for all these matters to be combined for settlement purposes and the DOR issue a refund in a timely manner for the net amount.

If the attached accurately reflects your understanding, please execute a copy of this letter and return it to us. We look forward to receiving the 870 and the 870AD which we will execute and return to you.

With kind regards, I am

Yours very truly,

Burnie
Burnet R. Maybank III

BRM/kc
cc: Mr. Harley Priesmeyer/Duke Energy

John Swearingen
John Swearingen
DOR

July 8, 2002

SCDOR00021668

From: JAN CRANGLE
To: Maybank, Burnet
Date: 3/28/02 9:44AM
Subject: Re: Duke Settlement Proposal

Burnie,

I have faxed the interest calculations for the 1978 tax year to your Columbia office. (In the cover memo I see I incorrectly referenced the due date of the return in 1979.) If you need additional info, or if you're in Charleston today and want me to fax it there, just let me know.

Also John Comer is working up the numbers to bring the matter through current years as you requested. I hope to have those figures shortly and will at that time send you the final report along with an 870AD for sales/use taxes and an 870 for the income/license matters.

Appreciate your keeping this one "on track" for us all.

Jan

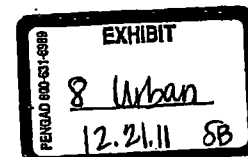
>>> "Burnet Maybank" <BMaybank@NPJP.com> 03/27/02 04:46PM >>>

With minor differences (which we are prepared to overlook) our figures jive with yours; we remain way apart, however, on the interest; we show the state owing almost \$2 million more in interest; I am sure we are making a fundamental calculating error - could you furnish us with your calculations/methodology? I suspect if you gave us just one year's worth we could figure what we are doing wrong

NEXSEN PRUET JACOBS & POLLARD, LLP
1441 Main Street, Suite 1500
Columbia, SC 29201
803-771-8900

www.NPJP.com

CC: ANDERSON, ROBERT; COMER, JOHN; SWEARINGEN, JOHN



SCDOR00022041

From: "Burnet Maybank" <BMaybank@NPJP.com>
To: <CRANGLJ@sctax.org>
Date: 6/20/02 4:47PM
Subject: Re: Waiver of Statute of Limitations

I just talked with Harley and he will be forwarding John a waiver; let me know if you need something else; we should also be forwarding a settlement counter proposal in the next few days

NEXSEN PRUET JACOBS & POLLARD, LLP
1441 Main Street, Suite 1500
Columbia, SC 29201
803-771-8900

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>>> <CRANGLJ@sctax.org> 06/19/02 10:02AM >>>

I talked to Harold Crawford and several members of the reprieve team prior to our last conversation on the topic, but haven't spoken with Bill Bray. I'll make it a point to get with him.

It's been several years since I ate at the Boathouse. With Atlanticville, Station 22, and Dunleavys all in walking distance, we usually don't venture far. Avoids designated driver issues :-)

>>> "Burnet Maybank" <BMaybank@NPJP.com> 06/19/02 09:43AM >>>

we discussed at length and have a counter-proposal coming to you; I also chatted with Bill Bray about the application of the reprieve program; has he had a chance to talk with you?

Sullivan's is! will be wonderful; the Boathouse restaurant is all the rage but very crowded

NEXSEN PRUET JACOBS & POLLARD, LLP
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Columbia, SC 29201
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>>> <CRANGLJ@sctax.org> 06/19/02 09:36AM >>>

Burnie,

In order to protect the statute, I have asked John Swearingen to issue the proposed assessment on the corporate income and license fee matter. This will give you an additional 90 day period under section 12-54-85(g)(2). John Comer advised me he is reviewing the sales tax calculations, but I wouldn't expect that we will have a lot of flexibility there.

I will be on vacation (Sullivan's Island) next week and John Comer will be following up with me the first week in July. Hopefully we will be able to move forward with either an agreement or by agreeing to disagree in early July.

SCDOR00022025

Thanks for your help.

Jan

>>> "Burnet Maybank" <BMaybank@NPJP.com> 06/10/02 03:46PM >>>
yes, we are talking by conf call tomorrow; Duke people were on vacation last week so I didn't get a chance
to talk with them; I will call or e-mail
you by Wed

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>>> <CRANGLJ@sctax.org> 06/10/02 03:46PM >>>
John has informed me the waiver on the corporate license fee issue expires June 30th. Can you get back
with us by the end of the week with the
taxpayer's decision on how to proceed? Thanks.

CC: <ANDERSR@sctax.org>, <BrayB@sctax.org>, <COMERJ@sctax.org>,
<SWEARIJ@sctax.org>

SCDOR00022026

From: JOHN SWEARINGEN
To: COMER, JOHN; CRANGLE, JAN
Date: 7/1/02 5:44PM
Subject: Re: Duke

I faxed Burnle the recomp info with interest to 3/29/02.

Net refund due: 3,588,544

Also an 870 & 870AD

>>> "Burnet Maybank" <BMaybank@NPJP.com> 07/01/02 04:38PM >>>

We are putting the final touches on our settlement proposal which I am confident you will find acceptable; (I almost sure we will accept your interest rate calcs; could you fax me a complete copy of a blank SC 870 and SC870AD; they are not in the package X or on the website and I'd like to see what we will be signing; I would like to get our letter to you tomorrow (Tues) so I would appreciate if you could fax the forms

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SCDOR00022024

From: JOHN SWEARINGEN
To: Maybank, Burnet
Date: 7/2/02 2:30PM
Subject: Re: Duke

Burnie,

I have not been able to get in touch with John Comer. Attached is spreadsheet with interest thru 7/10.

John

>>> "Burnet Maybank" <BMaybank@NPJP.com> 07/02/02 01:38PM >>>
why dont we say next Wed

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>>> <SWEARIJ@sctax.org> 07/02/02 01:37PM >>>
What is our target date for the settlement? I would like to run the interest thru a certain date.

>>> "Burnet Maybank" <BMaybank@NPJP.com> 07/02/02 01:20PM >>>
thanks!

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803-771-8900

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>>> <SWEARIJ@sctax.org> 07/02/02 01:19PM >>>
I do not have the sales #s thru 2001, will check with Jan & John

>>> "Burnet Maybank" <BMaybank@NPJP.com> 07/02/02 12:52PM >>>
I e-mailed your numbers to Duke and they replied with the following: "Burnie - John's numbers for the sales tax piece is off. We are now settling thru 2001. The number I have with interest thru 4/5/2002 is \$2,795,623."

Do you concur?

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SCDOR00022020

803-771-8900

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>>> <SWEARIJ@sctax.org> 07/01/02 05:27PM >>>

I have an interest calculation thru 3/29/2002 for the corp audit.

Tax: \$1,115,504 refund

Interest \$4,678,804 refund

Netted against sales tax and interest of \$2,223,664

Net refund \$3,568,644

>>> "Burnet Maybank" <BMaybank@NPJP.com> 07/01/02 05:10PM >>>

257-8228

also, we are going to be agreeing to your figures; could you refax those as well (my file is huge); we realize you will need to update the interest rate calcs; you dont need to worry about that

.....
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1441 Main Street, Suite 1500
Columbia, SC 29201
803-771-8900

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>>> <SWEARIJ@sctax.org> 07/01/02 04:51PM >>>

What is fax#?

>>> "Burnet Maybank" <BMaybank@NPJP.com> 07/01/02 04:38PM >>>

We are putting the final touches on our settlement proposal which I am confident you will find acceptable; (I almost sure we will accept your interest rate calcs; could you fax me a complete copy of a blank SC 870 and SC870AD; they are not in the package X or on the website and I'd like to see what we will be signing; I would like to get our letter to you tomorrow (Tues) so I would appreciate if you could fax the forms

.....
NEXSEN PRUET JACOBS & POLLARD, LLP
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Columbia, SC 29201
803-771-8900

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SCDOR00022021

From: JAN CRANGLE
To: COMER, JOHN
Date: 7/8/02 3:38PM
Subject: Duke

Just to keep everyone posted - I've faxed the 870s to Bumle and he is to sign and return to me. We are planning to order the refund on Wed after receiving the 870s. I'll return the S&U audit folder when we get everything signed and issued.

Thanks for all your help.

CC: ANDERSON, ROBERT; SWEARINGEN, JOHN

SCDOR000220191)

From: "Burnet Maybank" <BMaybank@NPJP.com>
To: <CRANGLJ@sctax.org>
Date: 7/9/02 11:50AM
Subject: faxed the 870s to Duke yesterday; should have signed copy for you today or tomorrow;
are the terms I

faxed the 870s to Duke yesterday; should have signed copy for you today or tomorrow; are the terms in
my letter satisfactory to you? If so, pls execute and return

onto Montana for me!

NEXSEN PRUET JACOBS & POLLARD, LLP
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Columbia, SC 29201
803-771-8900

www.NPJP.com

SCDOR00021665

----- Forwarded by Harley H Priesmeyer/Tax/PSC/PEC on 07/10/2002 11:02 AM

Harley H
Priesmeyer To: cranall@sctax.org
cc: bmaybank@npjp.com
07/09/2002 Subject: Form SC870
05:34 PM

Jan - my lawyers would feel much more comfortable if we can add the following to the instructions on the back of the SC870 form:
"Executing this document does not prevent you from seeking a refund of State taxes paid. The refund claim must be filed within three years from the date the return was filed, (strikethrough: or)two years from the date of payment of the tax or anytime before the expiration of the waiver (12/31/2002), whichever is later.

I think this was the intention of both parties, but I wanted to run this by you before we make this change. Other than this small change, we are prepared to sign the forms and send over to you, probably by tomorrow, if I can find an officer to sign them.

.....
Harley Priesmeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-601-0725
email: hhpriesmeyer@duke-energy.com

CC: bmaybank@NPJP.com; SWEARINGEN, JOHN

SCDOR00021662

From: "Harley H Priesmeyer" <hhpriesmeyer@duke-energy.com>
To: <cranglj@sclax.org>
Date: 7/10/02 4:16PM
Subject: Form SC870

Jan - alternatively, we could do without the SC870 for income/license fee
If you guys are agreeable to pay us the net amount of approximately \$3
million and we get a FAD for the interest calculation. If you are in
agreement with this arrangement, let me know and we'll revise the
settlement letter.

Harley Priesmeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhpriesmeyer@duke-energy.com

----- Forwarded by Harley H Priesmeyer/Tax/PSC/PEC on 07/10/2002 12:04 PM

Harley H
Priesmeyer To: cranglj@sclax.org
cc: bmaybank@nplp.com
07/10/2002 Subject: Form SC870
11:06 AM

Jan - I received your voice mail re why we needed to do a SC870 instead of
a SCAD870 form. There are two reasons for it. One, Duke wants to reserve
the right to contest the interest computation on the income/license fee and
secondly, Duke is planning on filing amended returns for some credits and
other deductions/adjustments that were previously not taken for these
years.

Hopefully, this will aid you re this matter. I remember seeing some
previous correspondence from Burney in which you were ok with Duke signing
an 870 form.

If you need anything else on this, please let me know.

Harley Priesmeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

SCDOR00021663

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhprismeyer@duke-energy.com

----- Forwarded by Harley H Prismeyer/Tax/PSC/PEC on 07/10/2002 11:02 AM

Harley H
Prismeyer To: cranglj@sctax.org
cc: bmaybank@npjp.com
07/09/2002 Subject: Form SC870
05:34 PM

Jan - my lawyers would feel much more comfortable if we can add the following to the instructions on the back of the SC870 form:
"Executing this document does not prevent you from seeking a refund of State taxes paid. The refund claim must be filed within three years from the date the return was filed, (strikethrough: or)two years from the date of payment of the tax or anytime before the expiration of the waiver (12/31/2002), whichever is later.

I think this was the intention of both parties, but I wanted to run this by you before we make this change. Other than this small change, we are prepared to sign the forms and send over to you, probably by tomorrow, if I can find an officer to sign them.

Harley Prismeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhprismeyer@duke-energy.com

CC: <bmaybank@npjp.com>

SCDOR00021664

From: JAN CRANGLE
To: Priesmeyer, Harley H
Date: 7/10/02 5:08PM
Subject: Re: Form SC870

Harley,

Generally we would use an SC870AD at this level and I'm receiving some serious questions about why we should make an exception and execute an SC870.

If I remember correctly, we discussed this back in March or thereabouts and you indicated that you needed additional time to review some of the later years computations. Generally we would be expected to have resolved these issues during the 3 months that have passed and the matter has been under review.

I don't have a problem with respect to adding language that will hold the periods open to address the interest computation question. It would however be unusual for us to hold all periods open for other credit or deduction adjustments.

I suggest that we arrange a conference call for Thursday morning. (John Swearingen will be leaving on vacation later on Thursday, so we need to resolve it in the morning if possible to avoid additional delay.) Would 10:30AM EDT work for you? If so, please call or e-mail me and I'll set it up at this end and see if we can get this closed.

Thanks.

Jan

7/11/2002 - Harley Priesmeyer, John Swearingen, John Crangle conference call. To want to hold all periods open for income & license. Indicated that our earlier understanding was they only needed to review later years. Advised me we agreed to 870 AD in sales & use however to in not prepared to cut a check for S+H. They want until 12/31/02 to complete review. Requested that they steady position & get back with us.

>>> "Harley H Priesmeyer" <hhpriesmeyer@duke-energy.com> 07/10/02 12:06PM >>>

Jan - I received your voice mail re why we needed to do a SC870 instead of a SCAD870 form. There are two reasons for it. One, Duke wants to reserve the right to contest the interest computation on the income/license fee and secondly, Duke is planning on filing amended returns for some credits and other deductions/adjustments that were previously not taken for these years.

Hopefully, this will aid you re this matter. I remember seeing some previous correspondence from Burney in which you were ok with Duke signing an 870 form.

If you need anything else on this, please let me know.

Harley Priesmeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhpriesmeyer@duke-energy.com

SCDOR00021661 |

From: JAN CRANGLE
To: URBAN, RON
Date: 7/11/02 11:34AM
Subject: Duke settlement proposal

Would you have some time to discuss this with John and I. The taxpayer is in full agreement with the sales and use tax audit with a balance due of \$2.7 million. They want to net this against the refund due on the income and license fee audit, however the tp disagrees with our interest calculations on the income and license audit. The question involves whether simple interest and tax are combined on 9/1/85 (when we adopted compounded interest) and the compounded interest computed on the total. We feel strongly that the DORs administrative practice of compounding only on the outstanding tax balance as of 9/1/85 is proper; however, the taxpayer would like to preserve their right to protest this issue.

The taxpayer also wants preserve their right to file a claim for refund for other deductions and credits. We wanted to close up these years and have them execute an SC870AD so we don't see them again. Since the periods involved date back to 1978 as the result of outstanding IRS RAR adjustments, and most of the early years involve refunds, I want to make sure we are in agreement on how the statute of limitations on refund claims will apply if they don't execute an 870AD.

Thanks.

CC: ANDERSON, ROBERT; COMER, JOHN; SWEARINGEN, JOHN

SCDOR00021660

11/16/92
From: JOHN COMER
To: CRANGLE, JAN
Subject: Duke

Good morning! Any word yet on the 870AD for the sales tax audit? Bill Perry and Carol Solomons are sort of dangling.

I'm also working with Duke on a Special 19 audit for a current construction project. Some of the positions they are suggesting would further widen the strike zone. That makes me a little nervous about the 91-98(01) audit. We really would like to get that one wrapped up. Thanks!

SCDOR00022016

From: JAN CRANGLE
To: URBAN, RON
Date: 7/11/02 11:34AM
Subject: Duke settlement proposal

Would you have some time to discuss this with John and I. The taxpayer is in full agreement with the sales and use tax audit with a balance due of \$2.7 million. They want to net this against the refund due on the income and license fee audit, however the tp disagrees with our interest calculations on the income and license audit. The question involves whether simple interest and tax are combined on 9/1/85 (when we adopted compounded interest) and the compounded interest computed on the total. We feel strongly that the DORs administrative practice of compounding only on the outstanding tax balance as of 9/1/85 is proper; however, the taxpayer would like to preserve their right to protest this issue.

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Thanks,

CC: ANDERSON, ROBERT; COMER, JOHN; SWEARINGEN, JOHN

SCDOR00032018

From: JAN CRANGLE
To: COMER, JOHN
Date: 7/12/02 7:40AM
Subject: Re: Duke settlement proposal

It's still in limbo. They are willing to sign the SC870AD on the sales tax, but they don't want to cut the check. I think we'd be OK just having the 870AD executed with the caveat that the payment would be made at the time the income tax matter is resolved. That way it's closed and we are just waiting for payment. What are your thoughts?

>>> JOHN COMER 07/11/02 01:34PM >>>

Jan: Did we get the 870AD signed on the sales tax audit yet, or is it still in limbo depending on the income tax situation?

CC: ANDERSON, ROBERT; SWEARINGEN, JOHN

SCDOR00022017

NEXSEN PRUET JACOBS & POLLARD, LLC
MEMORANDUM

TO: Jan Crangle
John Swearingen, DOR

FROM: Burnet R. Maybank III

DATE: July 25, 2002

RE: Duke Settlement

CLIENT-MATTER NO.: 11413-41

Although Duke is prepared to sign the 870 and 870AD which you have submitted. I didn't think it was a good idea to do so while we were in apparent disagreement over what the proposed settlement meant.

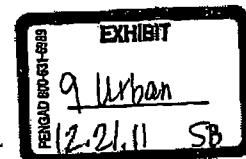
As I understand it, there is some concern over Duke's ability to file amended returns for pre-85 years. Duke's ability to file amended returns results not (exclusively) from the RARs, but rather from the Waivers which it has executed each year at the request of the DOR. Duke consequently has the right to file amended returns for pre-85 years regardless of the execution of the 870 and the 870AD. Stated another way, the execution of the 870s does not confer any new, or greater, right to file amended returns than Duke otherwise has. I also understand that it may possibly be the DOR's position that amended returns may relate only to RAR adjustments. Again, the execution of the 870s in no way impacts, or even, relates to the substance of the amended returns, or the DOR's position relative thereto.

Duke offered to settle the sales taxes as an accommodation to the DOR so that the amount of the refund check would be smaller. We did not intend to slow things down or complicate matters.

From Duke's perspective, they have been paying me for almost a year to recover license and income taxes from the State that the DOR seems to acknowledge is owed. Presumably a taxpayer does not have to beg or plead for money that it is concededly owed. I realize that there was a disagreement over how interest is calculated and the DOR very nicely agreed to issue a FAD on this issue in the event Duke decided to appeal. Consequently, this is no longer an issue.

In summary, we would like to re-reach a meeting of the minds over the settlement. I believe Duke would be willing to settle this matter with or without the sales tax component. Why don't we chat on Monday.

BRM/kc



NPCOL1:578804.1-MM-(BRM) 011413-00041

SCDOR00021807

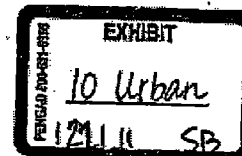
NEXSEN PRUET JACOBS & POLLARD, LLC
MEMORANDUM

TO: John Swearingen
Jan Crangle
FROM: Burnet R. Maybank III
DATE: August 12, 2002
RE: Duke Settlement

CLIENT-MATTER NO.: 11413-41

Attached is a fax executed copy of the SC 870AD (Sales and Use Taxes). I should have
the original to you shortly.

BRM/kc
Attachment



NPCOL1:582135.1-MM-(BRM) 011413-00041

SCDOR0002178

Jul-08-2002 01:28pm FAX
From-SC DEPT OF REVENUE

803848511

T-550 P.002/008 F-080

002/002



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
**OFFER OF WAIVER OF RESTRICTIONS ON
ASSESSMENT AND COLLECTION OF ADDITIONAL
TAX OR ACCEPTANCE OF OVERASSESSMENT**

SC870AD

(Rev. 7/97)
3310

Taxpayer Name(s) Duke Energy Corporation
(Please type or print)
Doing Business As _____
Street Address PO Box 1642
City Houston State Texas ZIP Code 77251-1642
Identification Number (SSN, FEI, etc.) 56-0705520

Increase (Decrease) in Tax, Interest and Penalties (Use separate section for each type of tax)	
Type of Tax	<u>Sales & Use</u>
Period Covered	<u>1/1/1991 through 12/31/2001</u>
Tax \$	<u>\$1,725,966.09</u>
Penalties \$	_____
Type of Tax	_____
Period Covered	_____
Tax \$	_____
Penalties \$	_____

Total due \$ 2,857,494 if paid by August 14, 2002 including interest.

This information was prepared by Jan Steensen Crangle, CPA Telephone Number 803.898.6616

**Consent To Assessment and Collection of Additional Tax
or Acceptance of Refund Determination**

The undersigned consents to the assessment and collection of any additional tax and penalties or accepts any decrease in tax and penalties shown above, plus any interest provided by law. This offer is subject to acceptance by the Department of Revenue. If this offer is accepted, no claim for refund can be filed or pursued and it will not be reopened in the absence of conditions stated in the general information and instructions.

Taxpayer's Signature _____ Date _____

Spouse's Signature _____ Date _____

Corporation Name (if applicable) Duke Energy Corporation

By [Signature] Title Sr. Vice President Date August 13, 2002
Signature

Commission Approval of Waiver by [Signature]

(See reverse side)

SCDOR00021800

SOUTH CAROLINA DEPARTMENT OF REVENUE
454 South Anderson Road, Suite 202
Post Office Box 12099
Rock Hill, South Carolina 29731

December 19, 2002

Duke Energy Corporation
Attn: Mr. Harley H. Priesmeyer
P. O. Box 1642
Houston, TX 77251-1642

Ref: Sales/Use Tax Audit # 06/21/1231
January 1, 1991 through December 31, 2001

Dear Mr. Priesmeyer:

In accordance with our agreement noted by form SC870AD, dated August 13, 2002, you may consider the above referenced audit as paid-in-full. As agreed, the amount due for the above periods was offset against corporate income tax refunds that were due to you on the date of the signing of the aforementioned form.

I would like to thank you for your efforts in helping to bring this audit up-to-date for the first time in many years. It has been a pleasure working with you and Greg Masters.

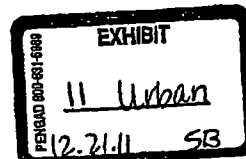
Please let us know if at any time we may be of assistance.

Sincerely,

John S. Comer III, Audit Manager
Phone (803)324-7641, fax (803)324-8289

*No DLN will come
back it is not on
accounting because
payment was taken
out of Refund.
Credit was given
in August 2002.*

Rm



SCDOR00021782

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Anonymous Taxpayer,

Petitioner,
vs.

South Carolina Department of Revenue,
Respondent.

CONSENT ORDER

DOCKET NO. 03-ALJ-17-0094-CC

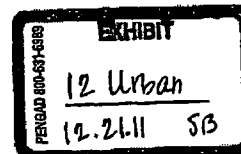
This matter came before the Court from an appeal by the Petitioner, Anonymous Taxpayer, of a final agency determination of the Respondent, the South Carolina Department of Revenue (the "Department") regarding the calculation of interest on an agreed refund of corporate income tax due to Petitioner for periods prior to September 1, 1985.

(1)
A hearing was initially scheduled in this matter for December 18, 2003. This hearing date and all discovery deadlines were postponed at the request of both parties upon their notification to the Court that settlement negotiations were underway. The parties have now reached an agreement resolving this matter on the following terms and conditions:

1. The Department agrees to allow tax credits against the South Carolina corporate income tax and license fees of Petitioner in the amount of \$554,244 for the tax year ending 2002, \$554,244 for the tax year ending 2003, and \$554,244 for the tax year ending 2004. In the event the tax credits are not fully utilized in any one year, they may be carried forward to future years until fully utilized.

2. The parties further acknowledge and agree that the Petitioner has certain refund claims pending before the Department which also relate to tax years prior to September 1, 1985. The settlement of this matter shall not constitute a resolution of the substantive issue of the

FILED



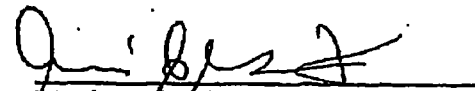
AUG 08 2005

DE00009356

calculation of interest for pre-September 1, 1985 tax periods and shall not be binding on either party with respect to Petitioner's pending claims.

Having reviewed this Agreement in Settlement and Compromise, I hereby order its adoption and dismiss the Petition in this matter with prejudice.

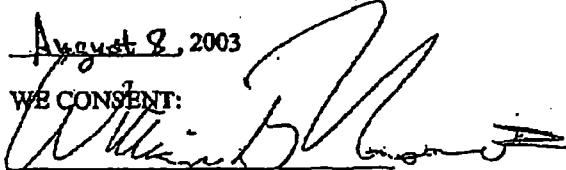
IT IS SO ORDERED.


Marvin F. Kittrell
Chief Administrative Law Judge

Columbia, South Carolina

August 8, 2003

WE CONSENT:


William G. Newsome III
Nexsen Pruet Jacobs & Pollard, LLC
1441 Main Street, Suite 1500
Columbia, SC 29201
(803) 771-8900

(2)

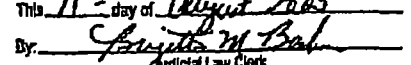
pr

Attorney for Petitioner


Leonard P. Odom
Counsel for Revenue Litigation
State of South Carolina
Department of Revenue
Law & Compliance Division
301 Gervais Street
Columbia, SC 29214

Attorney for Respondent

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 11th day of August 2003
By: 
Judicial Law Clerk

State of South Carolina
Department of Revenue
Office of General Counsel for Litigation
301 Gervais Street, P.O. Box 12265, Columbia, South Carolina 29211
Telephone (803) 898-5130 Telecopier (803) 898-5147

February 4, 2010

Burnet R. Maybank, III, Esquire
James F. Reanics, III, Esquire
Nexsen Pruet, LLC
PO Drawer 2426
Columbia, SC 29202

Re: Department Determination
Duke Energy Corporation

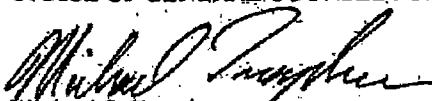
Dear Messrs. Maybank and Reanics:

Enclosed is the South Carolina Department of Revenue's Determination in the above-referenced matter. If you disagree with the Determination, you may request a contested case hearing before an Administrative Law Judge. If you choose to pursue such remedy, you must do so within 30 days of the date of this letter. If you fail to respond within this time limitation, you will lose your right to appeal the Department Determination and your protest will be ended. Should you desire a contested case hearing, you must complete the enclosed request form and mail it, along with a \$100 filing fee, to the Administrative Law Court at the address stated on the form's instruction sheet.

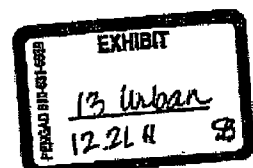
The Administrative Law Court rules require that you also send me a copy of your request. My address is as follows: PO Box 12265, Columbia, SC 29211.

Yours truly,

OFFICE OF GENERAL COUNSEL FOR LITIGATION


Michael S. Traynham
Counsel for Litigation

MST:lbc
Enclosures



DEPARTMENT DETERMINATION

Taxpayer:

Duke Energy Corporation
PO Box 1642
Houston, TX 77251-1642

Periods Involved:

Corporate Income Tax Years 1978 through 2001

Matters in Dispute:

1. Is the taxpayer entitled to utilize a single gross receipts factor apportionment formula in the calculation of its South Carolina corporate income tax?
2. Is the taxpayer entitled to include return of principal from the sale of short-term financial instruments in the denominator of its gross receipts factor?
3. Is the taxpayer's claim for refund timely?

Refund amount at issue:

Duke Income Tax:	\$125,142,447.
Crescent Income Tax:	<u>1,098,198.</u>
Total:	\$126,240,645.*

*Total is exclusive of interest. Any refund owed would be subject to a statutory interest rate pursuant to S.C. Code Ann. § 12-54-25 (Supp. 2008).

Determinations:

1. The taxpayer is not entitled to utilize a single-factor formula for apportioning its taxable income.
2. The taxpayer may not include its return of principal from the sale of short-term investments in calculating its gross receipts factor.
3. The taxpayer's claim for refund is untimely for some of the periods in question.

Relevant Facts:

1. Duke Energy Corporation (Duke or taxpayer), formerly known as Duke Power Company, is a multi-state power provider with operations in South Carolina.

2. In December 2002, Duke filed amended South Carolina corporate income tax returns for income tax years 1978 through 2001 requesting a substantial refund.
3. The taxpayer relied on waivers of the statutory time limit for filing amended returns (taxpayer's claim for refund). These waivers were provided by an employee of the Department of Revenue (Department) due to ongoing audit issues. The first of these waivers was issued on August 16, 1988.
4. The taxpayer raised three primary arguments in support of its claim for refund: (A) the taxpayer is not required to calculate its income tax on a three-factor formula pursuant to S.C. Code Ann. § 12-6-2250 (2008); (B) the taxpayer is entitled to include sales of short-term investments in the denominator of its gross receipts factor; and (C) the income and expense of Crescent Resource Corporation was not properly allocated in the original return.
5. The Department denied the requested refunds by letter dated February 12, 2003.
6. The taxpayer filed a timely protest of this denial by letter dated March 12, 2003.

Analysis:

I. The taxpayer is not entitled to use a single-factor gross receipts formula.

Pursuant to S.C. Code Ann. § 12-6-2290 (Supp. 2008), "[i]f the principal profits or income of a taxpayer are derived from sources other than those described in Section 12-6-2250 or Section 12-6-2310,"¹ the taxpayer must utilize a single factor apportionment ratio (gross receipts formula). The taxpayer argues it is entitled to utilize this formula because it is not a taxpayer described in either of the other code sections referenced by § 12-6-2290.

Section 12-6-2250(A) provides as follows:

A taxpayer whose principal business in this State is (i) manufacturing or a form of collecting, buying, assembling, or processing goods and materials within this State, or (ii) selling, distributing, or dealing in tangible personal property within this State, shall make returns and pay annually an income tax that includes its income apportioned to this State. Its income apportioned to this State is determined by multiplying the net income remaining after allocation pursuant to Sections 12-6-2220 and 12-6-2230 by a fraction, the numerator of which is the property ratio, plus the payroll ratio, plus twice the sales

¹S.C. Code Ann. § 12-6-2310 (2000) is not relevant to the facts of this case.

ratio, and the denominator of which is four. However, where the sales ratio does not exist, the denominator of the fraction is the number of existing ratios, and where the sales ratio exists but the payroll ratio or the property ratio does not exist, the denominator of the fraction is the number of existing ratios plus one. The property, payroll, and sales ratios must be determined in accordance with Sections 12-6-2260, 12-6-2270, and 12-6-2280, respectively.

(Emphasis added). The taxpayer's contention that it is not described by § 12-6-2250 is incorrect. The taxpayer is a manufacturer within the meaning of the statute, and must apportion its income according to the prescribed three-factor formula.² It has long been held in South Carolina that "a company engaged in the business of generating electricity is a 'manufacturer' within the meaning of a Statute imposing a tax upon a 'corporation engaged in the business of manufacturing.'" Duke Power Co. v. Bell, 156 S.C. 299, 152 S.E. 865, 868 (1930). South Carolina is hardly alone in this assessment. See, e.g., Hetherington v. Camp Bird Co., 202 P. 1087, 1088, (Colo. 1922); Curry v. Alabama Power Co., 8 So.2d 521 (Ala. 1942); Minn. Power & Light Co. v. Pers. Prop. Tax. Taxing Dist. City of Fraser, Sch. Dist. No. 695, 182 N.W.2d 685, 691 (Minn. 1970). The taxpayer's statements to the public are replete with references to its power generating assets, and its focus on generating power more efficiently. See, e.g., Duke Energy 2008 Summary Annual Report. Put plainly, South Carolina law has long recognized that electricity is something that must be "manufactured" within the meaning of our tax laws, and the generating entity – the taxpayer, in this instance – is the electricity manufacturer. The taxpayer's argument that it is entitled to use a single-factor formula must be rejected.

II. The taxpayer is not entitled to include gross receipts from the sale of short-term investments in calculating its gross receipts or sales factor.

If the Department is correct, and the taxpayer must use the three-factor formula provided by § 12-6-2250, there remains the issue of how it must then calculate its apportionment ratio. The taxpayer argues that it may include all proceeds from short-term investments, including the return of principal, in the denominator of its gross receipts ratio. This argument would apply to the sales factor of the three-factor formula as well. In calculating the sales factor, S.C. Code Ann. § 12-6-2280 (2000) provides that:

(A) The sales factor is a fraction in which the numerator is the total sales of the taxpayer in this State during the

²Moreover, the taxpayer's contention that it does not sell tangible personal property should also fail. "Tangible personal property" is specifically defined to include "services [such as] sales of electricity." S.C. Code Ann. § 12-36-60 (2000). Thus, while the taxpayer is correct that it provides a service, its service is statutorily defined as tangible personal property.

taxable year and the denominator is the total sales of the taxpayer everywhere during the taxable year.

(B) The term "sales in this State" includes sales of goods, merchandise, or property received by a purchaser in this State other than the United States Government. The place where goods are received by the purchaser after all transportation is completed is considered the place at which the goods are received by the purchaser. Direct delivery into this State by the taxpayer to a person designated by a purchaser constitutes delivery to the purchaser in this State.

(C) The word "sales" includes, but is not limited to:

(1) rentals from tangible personal property located in this State which are not separately allocated; and

(2) sales of intangible personal property and receipts from services if the entire income-producing activity is within this State. If the income-producing activity is performed partly within and partly without this State, sales are attributable to this State to the extent the income-producing activity is performed within this State.

Based on the calculation of the sales factor, the higher the denominator (total sales from everywhere) results in a lower sales factor which, in turn, results in less income tax owed the state.

The taxpayer has diluted its sales factor by including in its denominator (total sales from everywhere) the return of principal from its short-term investments. As part of its treasury and cash management program, the taxpayer invested in short-term investments for which it received a gain on the investments plus the return of principal. In so doing, taxpayer properly included the interest and gains related to the return from these investments in the denominator of the sales factor. However, by also including the return of principal in the denominator of its sales ratio, the ratio is diluted.

The following language was added to this section effective for tax years beginning after 2006:³

³Subsection (c) was also rewritten to discuss sales made to the United States Government.

(D) For purposes of this section, items included in sales are as provided in Section 12-6-2295. Section 12-6-2295 provides in part:

(B) The terms "sales" as used in Section 12-6-2280 and "gross receipts" as used in Section 12-6-2290 do not include:

(i) repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;

While the statute did not directly speak to the issue prior to 2006, the Department had implemented the long standing administrative practice to include only the net proceeds from investment activities. Income Tax Decision 1-D-309 (June 30, 1982) addressed the issue and concluded:

The commission has included royalties and sales of business connected tangible and intangible property in the sales factor. However, sales of tangible and intangible business connected property have been included only to the extent that the sale resulted in a gain. To include the gross sales price tends to distort the sales factor. Thus, through prudent administrative practice, this procedure has been developed.

All that is required of an apportionment formula is that it [sic] provide a reasonable approximation. Covington Fabrics v. South Carolina Tax Commission, 264 S.C. 59, 212 S.E.2d 574 (1975). The Income Tax Division's computation provides a reasonable basis for apportioning income and is thus valid . . .

Again in 1988 in Income Tax Decision 1-D-88-11, the practice was reaffirmed. The taxpayer in that matter sought to include the entire proceeds from the sale of foreign exchange contracts. The finding concluded:

The Division has included in the denominator of the sales factor gain resulting from the disposition of the exchange contracts. We find such to be proper. This position has been the practice of the Tax Commission since 1977 and is a longstanding administrative position. Such should not be overturned unless cogent reasons for doing so are found. Emerson Electric Co. v. Wasson, 287 S.C. 394, 339 S.E.2d 118 (1986). We find no cogent reasons to change the practice. It must be noted that the apportionment formula

need not be an exact measure of the taxpayer's business activity but rather must only provide a reasonable approximation. Covington Fabrics v. South Carolina Tax Commission, 264 S.C. 59, 212 S.E.2d 574 (1975). Here inclusion of the gain from the foreign exchange contracts provides a reasonable apportionment approach.

Perhaps the leading case addressing this issue is American Telephone and Telegraph Company v. Director, Division of Taxation, 476 A.2d 800 (1984), cert. denied, 97 NJ 627, 483 A.2d 157 (1984) (AT&T). In AT&T, the court was concerned with the proper treatment of revenues received by AT&T from "investments made with its idle cash" under the New Jersey receipts fraction for its apportionment formula.⁴ The New Jersey receipts fraction divides "New Jersey related receipts from sales, services, etc." by the "total receipts of taxpayer from sales, services, etc." AT&T argued that all revenues from its sale of short-term investments, including returns of principal, should be included in the sale of its short-term obligations, in the receipts fraction.⁵ The court concluded that the term "receipts" for apportionment purposes was limited to the net gain from the sale or redemption of investment paper stating:

We uphold as a general matter the exclusion of gross revenues received by plaintiff from the sale or maturity of investment paper. As Judge Crabtree observed, idle cash can be turned over repeatedly by investment in short term securities. It is no true reflection of the scope of AT&T's business done within and without New Jersey to allocate to the numerator or the denominator of the receipts fraction the full amount of money returned to AT&T upon the sale or redemption of investment paper. To include such receipts 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 AT&T from investment paper was simply its own money. Whatever other justification there is for excluding such revenues from the receipts fraction, it is sufficient to say that to do otherwise produces an absurd interpretation of § 6(B). "It is axiomatic that a statute will not be construed to lead to

⁴The court gave the following explanation of "idle cash": "AT&T maintained a pool of funds which it received primarily as dividends from its subsidiary corporations and from the sale of stock and debt obligations. Money not needed for immediate business use was placed in certificates of deposit or invested in short-term obligations of various types."

⁵The New Jersey Division of Taxation took the position that only interest owed on the investments should be included in the receipts fraction.

absurd results. All rules of construction are subordinate to that obvious proposition. [Even the rule of strict construction] does not mean that a ridiculous result shall be reached because some ingenious path may be found to that end." State v. Provenzano, 34 N.J. 318, 322, 169 A.2d 135 (1961).

Of particular significance is the AT&T court's observation that including the full amount of money returned on the sale of short-term investments without the exclusion of principal would be comparable to "measuring business activity by the amount of money that a taxpayer repeatedly deposited and withdrew from its own bank account." Given that a return of principal on an investment is simply a return of the taxpayer's own money, to allow a taxpayer to recognize the return of principal in the gross receipts factor creates the anomaly that the taxpayer is being allowed to reduce its state taxable income not because of a decrease in business activity in the state but because of the amount of its own money the taxpayer has turned over during the tax period. See also, Sherwin-Williams Company v. Indiana Department of State Revenue, 673 N.E.2d 849 (1996) ("[T]his Court holds that 'gross receipts' for the purposes of the sales factor includes only interest income, and not the rolled over capital or return of principal, realized for the sale of investment securities.").

In Walgreen Arizona Drug Company v. Arizona Department of Revenue, 97 P.3d 896 (2004), the Arizona Court of Appeals cited with favor the opinion of an Arizona Tax Court, which had ruled that the return of principal on short-term investments did not qualify as gross receipts for the state's sales factor:

[D]aily revenue from Walgreen's sales would be considered gross receipts when received. Any excess revenue after payment of debt or other disbursements remains a part of those gross receipts and should be counted as such. However, once that excess revenue is invested in securities or other interest bearing mediums, it loses its characterization as gross receipts and may not be counted a second time as gross receipts simply because the money was withdrawn from an investment in a marketable security or interest bearing account. This is akin to someone taking the \$100 left from their [sic] weekly paycheck[,] which is considered income when it was received, depositing it into an interest bearing account[,] then withdrawing the \$100 one month later and claiming it as income a second time. That \$100 is not income.

In affirming the ruling of the tax court, the Walgreen court, quoting extensively from the N.J. AT&T case, held that "the return of principal from the type of short-term

investments at issue here is not includable in the sales factor denominator calculated pursuant to A.R.S. Section 43-1145." Walgreen, 97 P.3d at 902.⁶

The taxpayer has argued that the term "sales" includes "sales of intangible personal property . . ." and, thus, would include the proceeds from the sale of short-term investments. However, when the effect of including the return on principal in the gross receipts factor is considered, there is room to go beyond the language. In Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994), the Supreme Court commented thusly on the strict construction of statutes:

However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Based upon the reasoning employed by the New Jersey AT&T and Walgreen courts and the Department's longstanding administrative practice, a taxpayer's return of principal should not be included in the sales factor. Inasmuch as the principal "sales" at issue here are nothing more than an exchange of the taxpayer's own money, they have no substance other than to artificially inflate the denominator of the gross receipts formula, which in turn serves to decrease South Carolina income tax owed. To allow the return on principal to be included in the sales factor, when to do so lessens the South Carolina income subject to tax, and as a consequence unreasonably represents the amount of business done in South Carolina, is plainly absurd as contemplated by the Kiriakides court.⁷ Thus, the return of principal is not properly includable in calculating the taxpayer's South Carolina sales factor.⁸

⁶The Walgreen court also cited a regulation promulgated by the Multi-State Tax Commission (MTC), which defines "gross receipts" to exclude the return of principal on short-term investments. Walgreen, 97 P.3 at 901. See MTC Reg. IV.2(a)(5).

⁷Even in those several cases wherein the deciding court has found that the return of principal is included in "sales" or "gross receipts", those courts have determined that the use of an alternative apportionment formula is appropriate in order to fairly represent the extent of the taxpayer's business within that state. Thus, the return on principal was ultimately excluded from the sales or gross receipts under an alternative apportionment methodology.

⁸In the alternative, the Department could argue that the return of principal should be excluded from the sales factor based on an alternative apportionment formula found in § 12-21-2320(A) as this would more fairly represent the taxpayer's business in South

III. Timeliness of the taxpayer's claim for refund.

A. The waivers provided to the taxpayer are not intended to extend the time for filing a claim for refund.

The taxpayer's refund claim extends over a period of more than 20 years, from 1978 to 2001. In support of his claim, the taxpayer provided numerous copies of waivers provided by a Department employee periodically during that period. These waivers are titled "Consent to Extend the Time to Assess Tax." The language of the waivers state that the agreement "extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of [the South Carolina Code]." The waivers cite different code provisions depending on when they were issued, but all cited code provisions refer to the Department authority, with a taxpayer's consent, to extend the time for assessing a tax. See S.C. Code Ann. § 12-54-85(C)(4) (Supp. 2008). The waivers are not intended to extend the time in which a taxpayer can file a claim for refund. If the Department's examination of a taxpayer reveals that a refund is due, it will be paid, but nothing in the waiver itself grants the taxpayer an extension of time to file a refund claim. Thus, the taxpayer is still constrained by the time limitations for filing a refund contained in § 12-54-85(F), discussed more fully below. Thus, the only years for which the taxpayer's refund claim is timely are 2001, 2000, and 1999.

B. The Department had no authority to extend the time for filing a refund claim before the passage of the Revenue Procedures Act in 1995.

South Carolina law prescribes strict time limitations on the filing of a claim for refund. "Except [in cases involving Internal Revenue Service adjustments,] claims for credit or refund must be filed within three years from the time the return was filed, or two years from the date the tax was paid, whichever is later." Section 12-54-85(F)(1). The General Assembly granted the Department the authority to "extend time limitations provided by [Title 12]" with the passage of the Revenue Procedures Act (RPA) in 1995. S.C. Code Ann. § 12-60-40 (Supp. 2008). Prior to the passage of the RPA, the Department had no statutory authority to extend the time for a taxpayer to claim a refund - only the authority to extend the time for assessing a tax. See, e.g., S.C. Code Ann. § 12-54-80 (Supp. 1988).

Since the Department had no authority to extend the period for filing a refund until 1995, those periods which expired prior to that time could not have been extended by the Department even if the waivers operate as the taxpayer claims. Thus, regardless of what was intended by the Department's waivers, the taxpayer's refund claims for years prior to 1992 cannot be considered timely by the Department.

Carolina: This is the approach that some state courts have taken upon declining to rule that gross receipts do not include the return on short-term investments.

C. The Department cannot extend a filing period which has already expired.

Even if the waivers operate as the taxpayer believes, and the Department's authority to extend the time to assess tax permits it to also extend the time for the filing of a claim for refund by a taxpayer, the Department cannot extend a time period which has already expired. Extensions may only occur, with the taxpayer's consent, only within the period the Department is statutorily authorized to assess tax. See § 12-54-85(C)(4); see also § 12-54-80. The earliest waiver produced by the taxpayer was issued in August of 1988. That waiver could only extend the period for assessing taxes for any period still open under the three-year statute of limitations.⁹ Thus, the Department could not extend the time for assessing tax years 1978 through 1983. As a result, the claim for refund as to these years is not timely.

D. The taxpayer's 1998 claim for refund for Crescent Resources is not timely.

The taxpayer filed a claim for refund on behalf of Crescent Resources Corporation for tax years 1998 and 1999. Crescent was a separate entity at this time and apparently received no waivers to extend its time to file refunds, thus a claim for refund for Crescent is subject to the standard statute of limitations, Section 12-54-85(F). Based on the three year statutory look back period, the claim for 1998 is not timely, and cannot be granted by the Department.

February 4, 2010

⁹Moreover, the 1988 waiver only purported to extend the periods for tax years ending December 31, 1983 and later. The prior years were not referenced in a Department waiver until the mid 1990s.

0001

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DUKE ENERGY CORPORATION,
Petitioner(s),
vs. Case No: 10-ALJ-17-0270-CC
SOUTH CAROLINA DEPARTMENT OF REVENUE,
Respondent(s).

D E P O S I T I O N

WITNESS: GLENN J. ROBINSON, M.S., P.E.
DATE: Wednesday, January 4, 2012
TIME: 10:31 a.m.
LOCATION: Willoughby & Hoefer, P.A.
930 Richland Street
Columbia, South Carolina
TAKEN BY: Attorneys for the Petitioner
REPORTED BY: SHERI L. BYERS
Registered Professional Reporter

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0002

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ALSO PRESENT:
T. COOPER MONROE, III, MANAGING DIRECTOR
IOANNIS (JOHN) PAPAPOLYMEROU

Robinson Glenn J - Vol I
(INDEX AT REAR OF TRANSCRIPT)

21
22
23
24
25
0003

1
2 STIPULATION: It is stipulated among counsel
3 that this deposition is being taken in accordance with
4 the Rules of the Administrative Law Court, and that the
5 deponent reserves the right to read and sign the
6 deposition transcript.
7

8
9 GLENN J. ROBINSON, M.S., P.E., being
first duly affirmed, testified as follows:

10

EXAMINATION

11

BY MR. TRESH:

12

Q. Good morning, Mr. Robinson.

13

A. Good morning.

14

Q. For the record, my name is Eric Tresh, and
15 I'm an attorney with Sutherland Asbill & Brennan. I'm
16 counsel to Duke Energy.

17

Mr. Robinson, can you please state your full
18 name for the record.

19

A. I'm Glenn Robinson.

20

Q. Okay. I wanted to get some ground rules set
21 up and go through these with you before we formally get
22 started.

23

First, if at any time you don't understand my
24 questions, please let me know or ask me to rephrase the
25 question. Otherwise, I'm going to assume that you

0004

1 understand my question and your responses to the
2 question that I've asked you.

3

Do you understand?

4

A. Yes.

5

Q. Second, because this deposition is being
6 transcribed by the court reporter, it's important that
7 you allow me to finish my question before you begin
8 your answer. I will extend you the same courtesy.

9

Do you understand?

10

A. Yes.

11

Q. Third, again, because this deposition is
12 being transcribed, it is important that you give a
13 verbal response to each question. Shrugs and nods
14 cannot be reflected on the transcript.

15

Can you understand?

16

A. Yes.

17

Q. Fourth, you must answer each question posed
18 to you unless your attorney directs you not to answer
19 on the grounds of privilege. Your attorney may object,
20 but those objections are for the record. You still
21 have to answer the question unless directed otherwise.

22

Do you understand?

23

A. I understand.

24

Q. Finally, if you need to take a break at any
25 time during the deposition, please let me know. I will

0005

1 only ask that if there is a question pending, you
2 answer the question before we break.

3

Do you understand?

4

A. Yes.

5

Q. Do you have any questions before we get

6 started?
7 A. No.
8 Q. Is there any reason that you are unable to
9 respond completely and truthfully to the questions I
10 ask you today?
11 A. No.
12 Q. What is your understanding of what you are
13 here to testify about?
14 A. My understanding is that the matter under
15 dispute is the method of taxation of Duke Energy. I
16 have been asked by the Department of Revenue to provide
17 some opinions regarding the nature of electricity,
18 electrical generation, electricity and commerce. And I
19 have done some work along those lines for them.
20 Q. Okay. In the deposition notice that you
21 received, it indicates that you are going to testify to
22 the principles of manufacturing of electricity; is that
23 correct?
24 A. Yes, that's correct.
25 Q. And that you're going to testify as to its
0006 electricity scientific and technical intricacies?
1 A. I would not use that language, but, yes, that
2 is correct.
3 Q. Okay. And electrical industry standards,
4 you're going to testify to those as well?
5 A. If you ask me about them, I will do my best.
6 Q. Okay. Are you an expert in electrical
7 industry standards?
8 A. That's such a broad statement that no one can
9 possibly be an expert in all aspects of electricity and
10 the electrical industry. I can testify with regard to
11 my understanding of the nature of electrical
12 generation, transmission and distribution, fundamental
13 physics of electricity and electrical energy.
14 Q. Are you an expert in any electrical industry
15 standards?
16 A. I come close to being an expert in the
17 National Electric Code, which is not, I don't think, a
18 matter under dispute here. If you could name me a
19 standard, I could tell you whether I'm an expert in
20 that or not.
21 MR. TRESH: Okay.
22 (PETITIONER'S EXH. 1, Curriculum Vitae, was
23 marked for identification.)
24 BY MR. TRESH:
0007
1 Q. Let's go through your background a little
2 bit.
3 A. Certainly.
4 Q. I passed out a copy of a document which I
5 believe is your CV. Is that correct?
6 A. That's correct.
7 Q. Starting with your professional experience,
8 most recently it indicates that from August of 1999 to
9 the present you're employed as a consulting electrical
10 engineer with Engineering Design & Testing Corporation;
11 is that correct?
12 A. That is correct.
13 Q. And what is Engineering Design & Testing
14 Corporation?
15 A. Primarily a forensic outfit. We investigate
16 damage for insurance companies. It would be usually

17 physical damage, some personal injury. Some economic
18 issues.

19 Q. Okay. And what does it mean to be a
20 consulting electrical engineer?

21 A. It means that each task is likely to be with
22 a different client, and so I am tasked with consulting
23 with that client. I don't consult with the Engineering
24 Design & Testing but rather with the client in each
25 individual matter. And I provide them information

0008

1 coming from my training and background. I usually do a
2 onsite investigation to determine the physical facts in
3 the matter. And then if asked, I will write a report
4 that states my opinions in regard to the particular
5 incident. Usually it's a matter of the location and
6 cause of a specific malfunction.

7 Q. And in this case, did you do any sort of
8 onsite investigation in this case?

9 A. No.

10 Q. And you said you usually do an onsite
11 investigation; is that correct?

12 A. In the normal course of my assignments, yes.
13 This assignment is a little out of the ordinary.

14 Q. Okay. And you said that you usually then
15 issue a report after your onsite investigation; is that
16 correct?

17 A. If asked. In a minority of cases, the client
18 for one reason or another does not request a report.

19 Q. Did you issue a report in this case?

20 A. No.

21 Q. Were you asked to issue a report?

22 A. No.

23 Q. Do you know why the client would not have
24 asked you to issue a report in this case?

25 MR. GREEN: Objection as to form.

0009

1 THE WITNESS: The answer is no, I do not know
2 why the client would not have asked me to write a
3 report in this case.

4 BY MR. TRESH:

5 Q. Okay. In your CV it says that one of your
6 job descriptions is to deal with attorneys.

7 Can you explain what that means?

8 A. Can you point out the line where it says
9 "deal with attorneys"?

10 Q. "Responsible for consultation with," and then
11 after a few different commas, it says, "and attorneys."

12 A. Oh, I consult with attorneys, yes.

13 Q. It's part of your job descriptions?

14 A. Yes.

15 Q. And in what matter? Why would you consult
16 with attorneys?

17 MR. GREEN: Objection as to form.

18 THE WITNESS: In general, the attorneys
19 become involved as a result of litigation springing
20 from a damage instance with an insurance company. That
21 is not always the case. But if an attorney needs
22 information regarding science or engineering and in
23 particular regarding electrical engineering, then I am
24 free to discuss that with him and offer my insight.

25 BY MR. TRESH:

0010

1 Q. Okay. Do you hold yourself out as someone who

2 gets paid to testify in court cases?
3 A. No. I get paid for my time, and I will offer
4 my opinion. But my opinion is not for sale.
5 Q. Do you or your company hold yourself out as
6 someone that will get paid to testify? Not your
7 opinion.
8 A. That's not my primary activity. My primary
9 activity is to determine the facts of the matter. The
10 reporting and testifying spring from that.
11 Q. Determine the facts of the matter for what
12 purpose?
13 A. For the purpose that my client has in mind.
14 I don't go out and seek work regarding any specific
15 matter. The clients come to me, and they have their
16 questions. And I attempt to answer them, provide
17 service.
18 Q. What types of matters do you most frequently
19 work on?
20 A. Normally instances of damage.
21 Q. In lawsuits? Damage where one party is suing
22 another?
23 A. No.. No. No, I'm sorry. Physical damage.
24 Q. Physical damage.
25 A. For example, equipment malfunction, a fire,
0011 machine breakdown, electrocution.
2 Q. And why would a client seek out your opinion
3 typically?
4 A. The bulk of the clients are insurance
5 adjusters, and their first question is always, "Is this
6 a covered loss?" And they need factual information to
7 determine that.
8 After that question, there's often questions
9 about the scope of damage, scope of repair. And I can
10 assist with those questions.
11 Q. Okay.
12 A. And then finally, if the insurance company
13 has a liability and pays the bill, they may seek to get
14 part of that money back from a third party. And in
15 that case, I can work with them and their attorneys on
16 that.
17 Q. Okay. Since 1999 in your capacity as being
18 employed by Engineering Design & Testing Corp, have you
19 done any actual engineering work?
20 A. Only incidental to investigations. I do
21 calculations. Sometimes prepare sketches and drawings.
22 Q. Do you do any electrical engineering work in
23 your capacity as an employee of Engineering Design &
24 Testing work -- Testing Corp, excuse me?
25 A. I believe all of my work for them is
0012 engineering work.
2 Q. Okay. You mentioned a moment ago that one of
3 the things you do in your capacity is testifying in
4 court, for example, or testifying in depositions. Is
5 that engineering work?
6 A. It falls under the rubric of engineering
7 work, yes.
8 Q. Are you familiar with electric power points?
9 A. To a degree. I have investigated damage at
10 several. I've also been responsible in the past for
11 small electrical cogeneration.
12 Q. Since in the past 13, 14 years, have you done

13 any work with -- have you been responsible for any
14 cogeneration plants?

15 A. No. All that was at Fibermark beginning in
16 1999 and extending through 19--- excuse me, beginning
17 in 1995 and extending through 1999.

18 Q. What was Fibermark, Inc.?

19 A. They're a small paper manufacturer in
20 New Jersey.

21 Q. Small paper manufacturer. And you were
22 employed there from 1995 to 1999?

23 A. Correct.

24 Q. And so your experience with electrical
25 cogeneration systems was while you were employed

0013
1 working for a small paper manufacturer?

2 A. That's correct.

3 Q. Okay. You said a moment ago that you were
4 responsible -- or investigated accidents at power
5 plants. Did you ever investigate any accident at a
6 Duke Power plant?

7 A. I believe that there was a transformer claim,
8 and I cannot remember the name of the town, but it's on
9 the lake northwest of Charlotte. I believe that was a
10 Duke facility. And the matter at hand was a -- I'm
11 guessing transformer that ultimately they bought a
12 replacement and the -- I don't even remember the
13 outcome of that matter. But I did work with one of the
14 Duke engineers.

15 Q. So in that case were you representing an
16 insurance company?

17 A. Yes.

18 Q. And that insurance company was relative to a
19 claim against Duke Energy or a claim by Duke Energy?

20 A. A claim by Duke Energy against the insurance
21 company for the value of the replacement transformer.

22 Q. So at that time you were adverse to Duke
23 Energy?

24 A. Yes, I was.

25 Q. Okay.

0014
1 A. Could I expand that statement?

2 Q. Please.

3 A. I don't really consider myself adverse to any
4 participating entity. My goal is to get to the root of
5 the engineering aspects and physical aspects of an
6 incident, and the chips fall where they may. I'm
7 neither for nor against any party in a matter like
8 that.

9 In fact, the insurance adjustors have a
10 motto, "It is what it is." Meaning if the physical
11 results support a claim, then it's their duty to pay
12 it. If the physical results do not support a claim,
13 then it is their duty to deny it.

14 Q. So your testimony would be that speaking on
15 behalf of insurance adjustors, when claimants make a
16 claim, that's not an adverse proceeding, the insurance
17 adjustors view that as a simple exercise in finding
18 facts?

19 A. I would say for the most part that's true.

20 Q. Okay.

21 A. I'm sure there are adjustors who have a
22 adversarial mentality, but the ones that I have dealt
23 with pretty much are looking for the truth of the

24 matter so that they can make a determination based on
25 policy language.

0015

1 Q. Okay. And do you view this proceeding as an
2 adversarial matter?

3 A. This one here is apparently adversarial in
4 the sense that Duke has brought an action against the
5 state, but I don't have a dog in this fight. My role
6 here is to provide information to the best of my
7 ability.

8 Q. Are you being paid by the state of
9 South Carolina in this case?

10 A. Yes, I am.

11 Q. Okay. I understand that you haven't been
12 asked to prepare any report for this matter.

13 A. That's correct.

14 Q. Do you intend to prepare any written report
15 in this case?

16 A. I don't anticipate that. If asked, I will.

17 Q. Okay. Have you been asked to testify at
18 trial in this case?

19 A. No.

20 Q. Have you brought any documents to the
21 deposition with you today?

22 A. I have brought the contents of my file, which
23 is in front of me.

24 Q. Okay. Can you identify what the contents of
25 those files are?

0016

1 A. I believe all of this has been provided to
2 you ahead of time. I have a legal-size manila folder
3 with a typed label on it, which is standard for our
4 file system. And then within that I have subfiles. I
5 have one purple-colored file, which is primarily
6 documents that I have received in connection with the
7 case. And some of my notes in regard to those
8 documents.

9 And then I have another file, which is
10 labeled "correspondence," which is client
11 communications and a couple of invoices. And that also
12 contains my client opening form, which defines who the
13 client is and things like billing address, telephone
14 numbers.

15 Q. Okay.

16 A. And then finally I have a notebook in which I
17 have put placed all of the -- what I consider to be
18 original work and technical material.

19 Q. It's your understanding all that information
20 has been provided to us in advance; is that correct?

21 A. Yes, that's correct. And in particular, I've
22 been careful not to modify the file ever since I was --
23 ever since the Department of Revenue handed me over to
24 this law firm. You'll have to pardon me, the name
25 temporarily escapes my mind.

0017

1 Q. It's not a problem.

2 Okay. A couple of questions, have you ever
3 been deposed in a lawsuit before?

4 A. Yes. About 13 times.

5 Q. Okay. Have you ever testified in court
6 before?

7 A. Once.

8 Q. Have you ever testified on behalf of the
Page 7

State of South Carolina before?

A. No.

Q. Have you ever testified on behalf of any other state or local government?

A. I have no recollection of having done so. It is possible that -- well, I have not testified. I know I've done work -- for example, the Horry County judicial system had a claim regarding a new court building.

Q. The court building. Okay.

A. And I was on site to work with their electricians and the contractor to try to determine the cause of the malfunction. There may have been other courts -- excuse me, not courts, but municipalities involved in one way or another with other matters, but I have no recollection of that.

Q. Okay. You mentioned earlier you are being

paid for your testimony. What is your -- do you have an hourly rate? Are you being paid by the hour?

A. I am being paid by the hour.

Q. What is that rate?

A. In this matter, it is \$200 an hour. That was my rate last year when I signed the agreement.

Q. And does your compensation in any way depend on the outcome of this case?

A. No.

Q. And how much have you been paid thus far?

A. I can't easily answer that question. I can -- I see in front of me an invoice for \$2,493. That's probably close to the amount I've been paid so far. Here's another invoice for -- no, that's merely a correction to the original invoice. So 2,493, give or take a little bit.

Q. Okay. Are you currently consulting with the Department of Revenue and the State of South Carolina in any other cases?

A. No.

Q. Okay. Who is Tim Jur?

A. He's my boss. He's the founder of our firm. Works across the street from me. He has done some work in the past for the Department of Revenue. I think it was primarily definitional issues. I don't believe it

was in regard to a specific legal proceeding.

Q. So the firm you're employed by has testified on behalf of the -- or has worked for the South Carolina Department of Revenue in the past?

A. That's correct. That's how I was placed on this assignment.

Q. Has Tim Jur been retained to work on this case?

A. No.

Q. Have you discussed this case with Tim Jur?

A. Not in substance. There may have been a remark in passing, but -- especially early on when he accompanied me on my first visit to the Department of Revenue. But after that, he had no further involvement. And he's not billed any time to the file.

Q. Before that visit to the Department of Revenue, did you and Tim discuss the case?

A. No.

Q. So you went to the Department of Revenue

20 meeting without having any understanding whatsoever
21 about what this case is about?

22 A. That's correct.

23 Q. Okay. Did you do anything to prepare for
24 your deposition today?

25 A. I met several times with my clients,

0020

1 principally Mr. Green. But other than that, I've done
2 no engineering work.

3 Q. Did you meet with anybody other than
4 Mr. Green?

5 A. There's another young attorney at the end of
6 the table here. He has been present in several of the
7 meetings.

8 Q. Okay. Any nonattorneys?

9 A. I'm sorry?

10 Q. Did you meet in preparation or before this
11 deposition with any nonattorneys?

12 A. Not to my recollection.

13 Q. Okay. Did you review any documents in
14 preparation for this deposition?

15 A. No. All of my document review was done
16 before I was -- let me stop there. That's not correct.
17 With the exception of the report by Professor --

18 Q. You call him Dr. Papa, I believe.

19 A. Dr. Papa, yes.

20 Q. Papapolymerou.

21 A. I have reviewed his report sometime in the
22 last month, but other than that I've not done any
23 document review since I was transferred from the
24 Department of Revenue to this law firm.

25 MR. TRESH: Okay.

0021

1 (PETITIONER'S EXH. 2, File Materials, was
2 marked for identification.)

3 BY MR. TRESH:

4 Q. I've handed you a rather large stack of
5 documents --

6 A. Yes.

7 Q. -- that we understand the Department of
8 Revenue provided to you in advance of this deposition.
9 If you want to take a moment and maybe flip through
10 them.

11 Do these documents look familiar?

12 A. Well, the top page does.

13 Q. Okay.

14 A. This appears to be materials from my file.

15 Q. Okay. I'd like to direct your attention to
16 Bates number 16971. I'm going to pass you out several
17 of them.

18 (PETITIONER'S EXH. 3, 14782 Draft - Tangible
19 Personal Property, SCDOR00016971, 17083, 17084, 17101
20 through 17104, was marked for identification.)

21 THE WITNESS: That appears to be the same as
22 the top page of here.

23 MR. TRESH: It is.

24 MS. TODOROVA: It's easier to refer to that.

25 THE WITNESS: All right.

0022

1 BY MR. TRESH:

2 Q. As I stated previously, your attorneys have
3 tendered you as an expert witness to render an opinion
4 regarding the principles of manufacturing of

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5 electricity; is that correct?

6 A. Close enough, yes.

7 Q. Okay. What are the principles of
8 manufacturing electricity?

9 A. Okay. To start with, electricity in this
10 matter is electricity in commerce; that is, electrical
11 energy. Okay. We're not talking about stroking a cat
12 or lightning, other natural phenomenon. But my
13 approach to this has been strictly to consider
14 electricity as a commercial quantity. My understanding
15 that the manufacturer of electricity is Duke's
16 principal business, manufacturer and sale.

17 The principles of manufacture of electricity
18 were nicely laid out in Professor Papa's report, and I
19 do not disagree with his description. What it involves
20 are two fundamental physical laws, Ampere's law and the
21 name of the other one escapes me.

22 But the fact is that moving a conductor that
23 is a piece of metal in a magnetic field results in a
24 voltage difference across the two ends of the conductor
25 that are perpendicular to the direction of the motion.

0023

1 That is the principle behind all electrical generators.

2 Q. Okay.

3 A. In practice, commercial electrical generators
4 are rotary machines. One has to turn the shaft which
5 drives the conductors that are rotating in a magnetic
6 field, and the electrical energy is drawn from the
7 terminals of the stationary windings of the generator.
8 So it is fundamentally an operation of turning a shaft,
9 providing energy -- that mechanical energy to the
10 generator and drawing the electrical energy from the
11 connection terminals of the generator.

12 Q. Okay. What makes you an expert on the
13 principles of electricity?

14 A. Training. It is taught in high school and
15 college physics classes. There is additional practical
16 experience relative to observation and operation and
17 maintenance of generators.

18 Q. So what makes you an expert in principles of
19 electricity is the high school and college classes you
20 took and the experience you had when you worked for the
21 paper company in New Jersey; is that correct?

22 A. That's pretty close, yes.

23 Q. You've also been tendered to testify as to
24 the industry standards related to the manufacturing of
25 electricity; is that your understanding?

0024

1 A. I will have to take your word for that
2 because that's not something I was aware of. If you
3 can name the standard, I can address it.

4 Q. Do you believe you're an expert in the
5 industry standards of manufacturing electricity?

6 A. Tell me what you mean by the term.

7 Q. Well, I was going to ask you since your
8 attorney has offered you as an expert in this subject.

9 A. There is a set of standards applicable to the
10 transmission industry, transmission part of the
11 electrical industry. The National Electrical Safety
12 Code, I am somewhat familiar with that.

13 Q. Somewhat familiar. Okay.

14 A. Relative to the operation of generating
15 plants, there are a million codes having to do with

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16 such things as air emissions, air quality. Water
 17 pollution, I'm not familiar -- I'm not sufficiently
 18 familiar with those to be any kind of an expert.
 19 I do know the general principles, the
 20 principle transmission voltages, the principles of
 21 circuit protection that are involved in operating a
 22 generating plant and sending the energy through the
 23 distribution grid.
 24 Q. Okay.
 25 A. That's about --

0025

1 Q. General principles, is that what you just
 2 said?
 3 A. Yes.
 4 Q. Okay. You've also been proffered as an
 5 expert on the scientific and technical intricacies of
 6 electricity. Are you an expert in those subjects?
 7 A. To a nonengineer, I suppose it is intricate,
 8 but our training is such that we can address questions
 9 regarding different aspects of electrical equipment and
 10 electrical generation. So to the extent that that
 11 appears intricate to a nonexpert, I guess I am an
 12 expert.
 13 Q. Let me rephrase my question.
 14 A. All right.
 15 Q. It's not whether you would be an expert to a
 16 nonexpert. My question would be, are you an expert on
 17 the scientific and technical intricacies of
 18 electricity?
 19 A. I would use the word principles, not
 20 intricacies.
 21 Q. Okay.
 22 A. Given that substitution, yes.
 23 Q. Okay. The document in front of you is Bates
 24 marked on the right-hand corner SCDOR00016971.
 25 A. Yes.

0026

1 Q. Did you prepare this document?
 2 A. Yes, I did.
 3 Q. And the rest of the documents attached to
 4 that 17083, et cetera, are the rest of the documents
 5 your notes and e-mails? 17803, 17804, 17103, and
 6 17104.
 7 A. Yes. These are documents that I have
 8 prepared.
 9 Q. Okay. In forming your opinion regarding the
 10 issues in the case, you've testified you're an expert
 11 in these subjects. Did you rely on Internet sites such
 12 as Wikipedia?
 13 A. Among others, yes.
 14 Q. Did you rely on Wiktionary?
 15 A. I don't recall whether I used that one or
 16 not. I'm for sure I used other dictionary resources.
 17 Q. Okay. If I could turn your attention to
 18 17103, which I believe is the second-to-last document
 19 in this stack. And I believe about a third of the way
 20 down the page it says "Wiktionary verb produce."
 21 A. Yes.
 22 Q. Is that something that you put together or
 23 reviewed?
 24 A. This one was done by copy and paste, so these
 25 are not all from one source. But, yes, Wiktionary is

0027

1 in there.
2 Q. So would you have consulted Wiktionary in
3 forming your expert opinion?
4 A. Yes.
5 Q. And do you believe Wikipedia and Wiktionary
6 are authoritative sources regarding electricity?
7 A. No. They're authoritative sources regarding
8 the language.
9 Q. You believe Wiktionary is an -- Wikipedia and
10 Wiktionary are authoritative sources?
11 A. Yes.
12 MR. GREEN: Objection to form.
13 BY MR. TRESH:
14 Q. Can they be changed?
15 A. I'm sorry?
16 Q. Can anyone go in and change a definition on
17 Wikipedia? Could I go in today and change that
18 definition?
19 MR. GREEN: Objection as to form.
20 THE WITNESS: To answer that question, yes,
21 you could; however, the Wikipedia organization has
22 built-in safeguards against malicious or unhelpful
23 changes.
24 BY MR. TRESH:
25 Q. Okay. And how long does it take for those
0028
1 safeguards to spring into place if I were to change a
2 definition today?
3 A. Well, first of all, you can't change a
4 definition today. You can propose a change, and then
5 it's rereviewed by their editors. And I honestly do
6 not know how long it takes for that process to come
7 into play. My impression is that it's perhaps a few
8 weeks.
9 Q. Okay.
10 A. And I understand, by the way, that in the
11 early days of Wikipedia there were problems where
12 people were addressing political agendas by changing
13 the site. And those problems were addressed by the
14 Wikipedia organization to prevent that from happening
15 without adequate review.
16 Q. But today you think -- it would be your
17 testimony that relying on Wikipedia for purposes of
18 producing expert testimony in a court case is
19 appropriate?
20 A. Certainly.
21 Q. Okay. What's your understanding of Duke
22 Energy's business?
23 A. Duke Energy manufactures and sells
24 electrical energy, principally. They have a minor
25 business -- service-oriented business related to their
0029
1 data communication capabilities. They will also do
2 things like substation design on a contract basis. But
3 far and away, the bulk of their revenue comes from the
4 sale of energy.
5 Q. How do you know that?
6 A. I reviewed one of the Duke binders which was
7 submitted to the Regulatory Commission.
8 Q. What type of binder was that?
9 A. About four inches thick, and I returned it to
10 Harry Hancock at the Department of Revenue. I believe
11 it was a submission by Duke to the Regulatory

12 Commission in 1991.

13 Q. Okay. And so you have no firsthand knowledge
14 of Duke Energy's business, do you?

15 A. Well, what do you mean?

16 Q. You've never worked with Duke Energy; is that
17 correct?

18 A. I never worked with them. I have worked -- I
19 have never worked for them. I have worked with one of
20 their engineers at their generating plant in the
21 Charlotte area.

22 Q. And that and working with that engineer, just
23 to clarify, was when you -- when Duke Energy had
24 submitted a claim to an insurance company that you were
25 being paid by; is that correct?

0030

1 A. That's correct.

2 Q. Okay.

3 A. But in general, Duke Energy's business is
4 revealed by its name. It is an energy provider. It
5 sells energy in commerce.

6 Q. Okay. Can you describe for me what
7 electricity is?

8 A. In this context?

9 Q. Just in any context.

10 A. Well, in this context, electricity is
11 electrical energy.

12 Q. Okay. And does an electric service provider
13 like Duke generate the actual electrons or the
14 electrically-charged particles that are used in
15 electricity?

16 A. Of course not.

17 Q. Does Duke generate electricity?

18 A. It generates electrical energy, which in this
19 context is electricity.

20 Q. Okay. Can you describe the process of
21 generating electricity.

22 A. I believe I did earlier. If you move a
23 conductor in a magnetic field, a potential difference
24 is developed across the ends of the conductor. That
25 potential difference can be connected to external means

0031

1 to deliver an electrical current. The practical
2 aspects is that the generating equipment is rotary
3 machines, and so you cause this motion by turning the
4 shaft on the generator and you take the electrical
5 energy out of the electrical connection terminals on
6 the stationary part of the machine.

7 Q. When I receive electric service at my house,
8 do I receive any electrons or particles? Do I take
9 possession of any particles?

10 A. No. You take possession of the energy, which
11 is the motion of the charged particles in the electric
12 conductors in the service connections and in your
13 residence.

14 Q. I take possession of the energy?

15 A. That's correct.

16 Q. Okay. How do I possess the energy?

17 A. Well, you may, in fact, experience an
18 electrical shock. But that's not intentional. You --

19 Q. Is that possessing energy, if I were to be
20 shocked by it?

21 MR. GREEN: Objection as to form.

22 THE WITNESS: I would say so, yes.

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23 BY MR. TRESH:

24 Q. Okay.

25 A. You also apply the electrical energy for your

0032

1 own purposes, such as operating a television set or
2 heating water. So you have received a benefit from
3 Duke Power, so you have possessed the benefit of
4 electrical energy.

5 Q. Possessed the benefit of electric energy;
6 that's your testimony?

7 A. That's correct.

8 Q. Are there any other ways to produce electric
9 energy other than the way you just described?

10 A. Yes. You can have a photoelectric cell,
11 which operates on a different principle.

12 Q. But it would still produce electric energy;
13 is that correct?

14 A. That's correct.

15 Q. Any other ways you can think of?

16 A. Yes. There are thermoelectric generators not
17 used in commerce.

18 Q. Okay.

19 A. They are used as sensors. They can also be
20 run in reverse to make small portable refrigerators.

21 Q. And if they were used to create small
22 portable refrigerators, they wouldn't be used in
23 commerce, in your view?

24 A. I'm sorry. Thermoelectric generation is not,
25 to my knowledge, used to produce electricity for sale.

0033

1 Q. Would solar energy be used to produce
2 electricity for sale?

3 A. To a small degree, yes.

4 Q. Small degree? What do you mean by a small
5 degree?

6 A. There's much less solar-generated electricity
7 sold than there is generated by thermal sources or
8 hydroelectric.

9 Q. So perhaps to a smaller degree, maybe not a
10 small degree?

11 A. Smaller degree. It's still pretty small.
12 There's a lot of photoelectric electricity for sale in
13 Spain but not a lot in this country.

14 Q. Okay. Any other ways of producing
15 electricity that you're aware of? Such a thing as wind
16 generation? Can wind produce electricity?

17 A. Certainly.

18 Q. I'm sorry?

19 A. Certainly, but it is very similar to a
20 thermal plant. The thing is you have to turn a shaft
21 on a generator, and once you've done that, then you can
22 draw electricity off the generator terminals.

23 Q. Do cell phones produce electricity?

24 A. No.

25 Q. A cellular signal between two towers and a

0034

1 cellular signal when you make a phone call, that
2 doesn't produce any electricity?

3 A. No. All of the electrical energy involved in
4 the cell system is waste energy. The quantity in
5 commerce is the communication, not the electrical
6 energy.

7 Q. That wasn't the question I asked.

8 A. Let's try again.
9 Q. So the question I asked was, is there any
10 electrical energy or electricity produced by a cellular
11 call? Not whether it's used in commerce and not
12 whether it's waste energy.
13 A. You changed your question slightly.
14 Q. Okay.
15 A. Okay. A cell phone receives all of its
16 energy -- I'm talking about the piece you hold in your
17 hand.
18 Q. Yes.
19 A. Okay. -- receives all of its energy from an
20 enclosed battery, a chemical battery. It does not
21 produce electricity in the sense that we are discussing
22 today. It generates, on the transmitting end, an
23 electromagnetic wave, which carries the intelligence of
24 the conversation, which is the desired quantity. All
25 of the energy taken from the battery, with exception of
0035
1 the minute amount involved in the electromagnetic wave,
2 is dissipated as heat in the device.
3 Q. So you've got this electromagnetic wave
4 that's being produced. You said "in electricity as
5 we're discussing today." What type of -- why do you
6 put that qualifier on it? Are we not talking about --
7 are you not being proffered as an expert in the
8 manufacturing of electricity? Is there any limiter on
9 that in terms of your expertise?
10 A. No. Let me ask a return question to
11 illustrate my difficulty.
12 Does Duke sell radiant energy?
13 Q. The subject of today's deposition is you've
14 been proffered as an expert in electricity, among other
15 things.
16 A. Okay.
17 Q. And my questions are being asked to determine
18 how electricity ought to be defined. What is
19 electricity? You're the expert and not me.
20 A. So we wanted to speak more generally.
21 Q. Well, I'm talking about electricity, and I
22 asked the question.
23 A. Very general question.
24 Q. Right.
25 A. Okay.
0036
1 Q. Does a cellular telephone -- when I make a
2 cellular call, is there any electrical energy that's
3 produced?
4 A. There is electrical energy produced in the
5 battery of a cellular telephone handset, which is used
6 to power the electronics in the cellular telephone.
7 The electronics receives electromagnetic waves, and it
8 generates electromagnetic waves.
9 Q. And what is an electromagnetic wave?
10 A. In common parlance, radio and television
11 communicate across distances with no electrical
12 connection between them, between the two locations.
13 And the electromagnetic wave is the carrier of energy
14 and communication intelligence between the two
15 locations. It is a disturbance in the fundamental
16 properties of space similar -- I would not say similar
17 to gravity but analogous to gravity; that is, one does
18 not need to be in contact with the earth to experience

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19 gravity. One does not need be in physical contact with
20 a radio transmitter to receive energy from it.

21 Q. Does Duke use electromagnetic waves to
22 transmit its energy?

23 A. Not that I am aware of.

24 Q. Okay.

25 A. One can -- one can analyze the transmission

0037

1 lines from the standpoint of fields and waves, but
2 normally this is not done.

3 Q. And in our cellular telephone example, that
4 signal between the tower, let's say, and the handheld
5 device --

6 A. Yes.

7 Q. -- is energy transmitted as part of that
8 transmission?

9 A. Yes, indeed.

10 Q. Yes. okay.

11 And Duke transmits energy, too?

12 A. Yes, but it is conducted by a different
13 means.

14 Q. So they both transmit energy. The cellular
15 telephone call and Duke transmitting electricity, but
16 it's done just through different means; is that
17 correct?

18 A. That's correct.

19 Q. Does electricity have any sort of objective
20 material existence?

21 A. Yes.

22 Q. Can you explain that?

23 MR. GREEN: Objection as to form.

24 THE WITNESS: You can taste it weakly. You
25 can feel the electrical current in your body. You can

0038

1 certainly detect the passage of electrical current with
2 instruments.

3 BY MR. TRESH:

4 Q. Can you feel sunlight on your body?

5 A. Absolutely.

6 Q. Would you say sunlight has any physical form
7 or body?

8 A. Absolutely, yes.

9 Q. Okay. Can you feel wind?

10 A. Absolutely.

11 Q. Would you say that wind has physical form or
12 body?

13 A. Wind is defined as the motion of air
14 particles, and so, yes, you can certainly feel wind.
15 In the absence of motion, you are generally not aware
16 of the air particles.

17 Q. So electricity, sunlight and wind all have a
18 physical form or body; is that your testimony?

19 A. Yes.

20 Q. Can electricity be seen?

21 A. Yes. In the instance of an arc light.

22 Q. Could sunlight be seen?

23 A. Yes.

24 Q. Okay. Can electricity be touched?

25 A. Yes.

0039

1 Q. Do you touch it or do you feel it? In other
2 words, do you feel the effects of electricity, or were
3 you actually touching the electricity itself?

Page 16

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4 A. One can experience the touch, if you will, of
5 electricity in the very same manner that one can
6 experience the touch of a tabletop; that is, supposing
7 you are in the path of an electron beam, the impact of
8 the particles on your skin is sensible. Similarly, if
9 I put my finger on the tabletop, the pressure of the
10 table on my skin is sensible.

11 Q. Would that be the same for feeling the
12 sunlight on your skin? The beams?

13 A. Very similar.

14 Q. Very similar?

15 A. The difference being the carrier particle in
16 sunlight is not an electron, it's a photon.

17 Q. And feeling the wind blow on your back, for
18 example, that would be similar as well?

19 A. Yes, because what you are feeling is two
20 things really. But for this answer, you're feeling the
21 minute variations in pressure on your skin caused by
22 the motion of the air particles.

23 Q. So electricity can be touched, if you will.

24 I think those were the words that you said.

25 Electricity can be touched, if you will, in the same

0040
1 way that wind and sunlight can be touched?

2 A. Yes.

3 Q. And electricity can be seen in the same way
4 of the arc -- or in a similar way in the same way that
5 sunlight and wind can be seen; is that correct?

6 A. Well, you have a hard time seeing wind, but
7 you can see sunlight and you can see electric arcs.

8 Q. Okay. And can you measure wind?

9 A. Can I measure wind?

10 Q. Yes.

11 A. Absolutely.

12 Q. Can you measure sunlight?

13 A. Yes.

14 Q. You can measure electricity?

15 A. Yes.

16 Q. All of these things can be measured; is that
17 correct?

18 A. That's correct.

19 Q. Okay. Can you buy electricity?

20 A. You can buy electrical energy, which for the
21 purposes of this discussion is electricity.

22 Q. And that electrical energy could be produced
23 by a number of different means including --

24 A. That's correct. Duke possesses hydro
25 stations, nuclear stations, oil-fired stations.

0041
1 Q. Solar energy stations?

2 A. I'm not aware of it, could well be.

3 Q. Okay. And so the electricity that you can
4 buy could be produced by any number of means; is that
5 correct?

6 A. That's correct. Principally by rotating a
7 shaft, but also to the degree that Duke sells
8 electricity generated by photoelectric means, then
9 that's a different principle. Yes.

10 Q. Okay. Does electricity have any length to
11 it?

12 A. Length? No. Electromagnetic waves have
13 length, but electricity in commerce has no length.

14 Q. You keep using the term "in commerce," what's

15 the significance of that?
16 A. Because I think that's the matter in dispute
17 is commerce.
18 Q. Why do you think that?
19 A. Well, I suppose because on my initial visit
20 with the client, it was told to me that Duke had
21 proposed being taxed under a different part of the
22 South Carolina revenue laws --
23 Q. Okay.
24 A. -- than it was presently being taxed. And so
25 I believe that is why we are here today.
0042
1 Q. Why do you use the qualifier when you say
2 "electricity in commerce"? In other words, Duke is --
3 are you okay?
4 A. Yes.
5 Q. Okay. Duke and the South Carolina Department
6 of Revenue have a disagreement over the application of
7 the tax code.
8 A. Okay.
9 Q. Why do you qualify your remarks about
10 electricity in commerce? In other words, why is it
11 relevant whether the electricity is in commerce or not?
12 A. Because there's a lot of noncommercial
13 electricity. Static electricity, for example, when you
14 walk across a carpet and touch a doorknob, there's
15 lightning, there's stroking a cat. There's electricity
16 generated by a variety of means for instrumentation
17 purposes. But these are not sold as electricity. And
18 that's the distinction I intend to make. I'm not -- I
19 don't want to talk about stroking cats. I can't -- if
20 you ask me to, I will.
21 Q. So based upon what the folks at the
22 South Carolina Department of Revenue told you, you
23 believe that it's relevant that electricity -- to the
24 definition of electricity whether it's sold or not?
25 A. The definition of electrical energy does not
0043
1 depend on whether it is sold.
2 Q. And does the definition of electricity depend
3 upon whether or not it's sold?
4 A. No, it does not.
5 Q. Okay. And so then why would you believe that
6 that distinction matters in this case?
7 A. I suppose it's a -- it comes from my training
8 as an engineer. Engineers attempt to simplify and
9 idealize so that a matter can be analyzed and
10 discussed. The more one broadens the topic area, the
11 less one can say about it.
12 Q. But you've been proffered as an expert to
13 help us, potentially help the court, determine what is
14 electricity for purposes of applying the tax law. And
15 so it's your testimony that electricity, whether it's
16 sold or not sold, the definition of electricity or
17 electrical energy would still be the same?
18 A. That is correct. In fact, you could -- Duke
19 could give away electricity. That's their choice.
20 Q. Okay. Still applying the tax law, whether
21 the electricity is sold in commerce or not, that
22 doesn't really matter, does it?
23 A. Well, now, I am not an expert in tax law.
24 Q. Okay.
25 A. I presume it has to do with legal entities

0044

1 and commerce.
2 Q. Okay. What has to do with legal entities and
3 commerce?
4 A. The tax law.
5 Q. Okay. Can you use solar energy to power a
6 house?
7 A. In principle, yes.
8 Q. So I could go and contract with someone to
9 install a couple of solar panels on my roof and use
10 that to power some or all of my home?
11 A. Some of your home, yes. If you're in favor
12 of hot showers, I would not recommend it.
13 Q. Okay. And that solar energy that's being
14 produced --
15 A. That's correct.
16 Q. -- that's electricity?
17 A. After it exits the solar panel, yes.
18 Q. Okay. And so at that point would I be
19 manufacturing electricity, in your view?
20 A. Yes.
21 Q. As a homeowner?
22 A. Yes.
23 Q. Okay. And --
24 A. You could -- for example, you could have a
25 pond in the back and run a rotary generator on

0045

1 hydropower on a small scale. People do that. And
2 whether you sell it or not, depends on the local laws
3 and tariffs.
4 Q. Okay. And you testified earlier that the
5 cell phone signal --
6 A. Yes.
7 Q. -- that that produces electrical energy,
8 right, electricity?
9 A. It emits electromagnetic energy.
10 Q. How does it emit it? Does it produce it?
11 A. There's a circuit in there that gets
12 connected to the antenna. The current in that circuit
13 couples into the radiation impedance of free space, if
14 you want to get technical. And that allows the
15 electromagnetic wave to propagate. And if there is a
16 suitable receiver in some location, it can detect that
17 disturbance.
18 Q. Do you take issue with my term "produce"? Is
19 it not being produced?
20 A. It is too broad. If the electrical energy in
21 a cell phone all comes from the battery, the chemical
22 energy in a battery. Now, that energy is used
23 principally wasted as heat in the cell phone. A small
24 amount is transmitted as electromagnetic waves in free
25 space.

0046

1 Q. Why do you say produce -- why do you say my
2 use of the term "produce" is too broad? I understand
3 how it happens. I understand it comes from a battery.
4 A. Okay.
5 Q. Why would you take issue with the term that
6 it's produced, or do you take issue with that term?
7 A. Actually, I guess I don't. I don't take
8 issue with the statement that the cell phone produces
9 electromagnetic energy.
10 Q. Telecommunication service providers like

11 Verizon, for example, AT&T, they produce electricity.
12 A. No.
13 Q. They don't?
14 A. They produce electromagnetic energy which is
15 conveyed by a different means than electricity which is
16 conveyed by physical conduction.
17 Q. I didn't ask how it's conveyed, so let's go
18 back.
19 Is there any electricity produced when you
20 make a cell phone call?
21 A. Electricity is produced by the cell phone
22 battery, and you use that electrical energy in the cell
23 phone to make your cell phone call. Electricity is not
24 transmitted from the cell phone to the tower or vice
25 versa. Electromagnetic waves and electromagnetic
0047 energy is transmitted, which is a little different than
2 sending electrical energy or electricity.
3 Q. But during the cell phone call, electricity
4 is produced; you said that, correct?
5 A. By the battery, correct.
6 Q. Okay. And electrical energy is sent over
7 through the air, correct?
8 A. No.
9 Q. No. Okay. I'm sorry.
10 A. Electromagnetic energy.
11 Q. Electromagnetic energy is sent through the
12 air?
13 A. That's correct.
14 Q. And so telecommunications companies like
15 Verizon and AT&T produce electricity through the
16 battery --
17 A. Yes.
18 Q. -- and send electromagnetic energy; is that
19 correct?
20 A. That's correct.
21 Q. Okay. Would you say they manufacture -- cell
22 phone companies, would you say they manufacture
23 electricity?
24 A. No, I wouldn't say that.
25 Q. What's the difference between produce and
0048 manufacture?
1 A. It's not their principal business.
2 Q. I understand. I apologize. I didn't ask
3 what their principal business was.
4 A. All right.
5 Q. You testified a moment ago that they produce
6 electricity.
7 A. I testified regarding a cell phone handset.
8 The thing in your hand. Okay.
9 Now, do you want to talk about cell stations?
10 Q. No. I just asked whether they manufacture
11 electricity.
12 A. Okay. I would say no.
13 Q. Okay. What's the difference between produce
14 and manufacture?
15 A. It's not -- that's not the distinction.
16 Q. Go ahead. I'm sorry.
17 A. The cell phone battery produces electricity.
18 That's not the property of the cell phone company.
19 That's my property.
20 Q. Okay.
21

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22 A. Now, the cell phone company uses electricity,
23 but it purchases the electricity from Duke Power.
24 Okay. For its own purposes. But it does not produce
25 electricity.

0049

1 Q. So when it sends -- so when the signal goes
2 from my cell phone to a cell tower, that
3 electromagnetic energy is being purchased from Duke?

4 A. No. No. No.

5 Q. I'm sorry.

6 A. The other way. From the cell tower to your
7 cell phone.

8 Q. Well --

9 A. The energy is purchased from Duke or
10 equivalent manufacturers.

11 Q. When I make a cell phone call, the signal
12 that goes from my handset to the cell tower?

13 A. Is produced from the battery in the handset.

14 Q. Okay.

15 A. My property.

16 Q. Okay. Does Duke -- is there electromagnetic
17 energy produced and transmitted by Duke Energy?

18 A. Undoubtedly, they have radio communication to
19 help them conduct their business.

20 Q. So when they transmit electricity, they're
21 not transmitting any electromagnetic energy?

22 A. The propagation of electricity in the
23 transmission lines can be analyzed in terms of the
24 propagation of electromagnetic waves. But these are
25 guided waves dependent on the physical installation of

0050

1 the conductors in the transmission line. They're not
2 radiated into free space. And that's the primary
3 distinction I make when I make a distinction between
4 electricity or electrical energy and electromagnetic
5 energy.

6 Q. And electricity and electromagnetic energy,
7 these distinctions are -- would you say there's a
8 difference between the properties of electromagnetic
9 energy and electricity? In other words, I can feel
10 both, touch both? We testified to that earlier, right?

11 A. Certainly.

12 Q. So were there any real differences in the
13 properties between these things?

14 A. It depends on how you want to get the energy
15 from one place to another.

16 Q. Okay. I'm sorry. Go ahead.

17 A. Okay. In the case of electricity, also known
18 as electrical energy, it is guided from the source to
19 the destination by the conductors in your transmission
20 network. In electromagnetic energy, it is launched
21 into free space by an antenna. It may bounce back in
22 the case of radar or may be intercepted by a receiving
23 antenna.

24 Q. Isn't electromagnetic energy electricity?

25 A. For all practical purposes, no.

0051

1 Q. Electromagnetic energy is not electricity?

2 A. That's correct.

3 Q. Okay. Do these two share similar form?

4 A. No.

5 Q. But they can both be touched?

6 A. They can both be sensed, yes.

Page 21

7 Q. Okay. So I want to direct you back to SCDOR
8 16971, which you have in front of you.
9 A. Yes.
10 Q. And up at the top left-hand corner it's
11 marked "14782 draft --"
12 A. That's correct.
13 Q. "-- tangible personal property."
14 A. That's correct.
15 Q. This appears to be a draft of something that
16 you've written; is that correct?
17 A. Yes.
18 Q. Is this the most current draft?
19 A. It appears to be.
20 MR. TRESH: Okay.
21 (PETITIONER'S EXH. 4, 14782 Draft - Tangible
22 Personal Property, SCDOR00016971 through 16977, was
23 marked for identification.)
24 MR. TRESH: DOR 16971.
25 THE WITNESS: Same thing?

0052

1 BY MR. TRESH:
2 Q. The first page is. If you look behind it, I
3 think they look a little bit different.
4 These appear to be all documents that you
5 prepared; is that correct?
6 A. I'm sorry. Restate the question, please.
7 Q. Are these drafts -- are these documents that
8 you prepared?
9 A. Yes, they are.
10 Q. Okay. If I can have you turn to page and go
11 to 16972.
12 A. Yes.
13 Q. Okay. In the first paragraph, it says, "It
14 is understood that electricity is included by statute
15 as tangible personal property."
16 What statute are you referring to?
17 A. Actually, my understanding is that is part of
18 the sales tax law in South Carolina.
19 Q. That electricity is included by statute for
20 purposes of the sales tax law; is that correct?
21 A. That's correct.
22 Q. And are you aware that for purposes of
23 South Carolina's license tax electricity is defined as
24 a service?
25 A. No, I'm not aware of that.

0053

1 Q. And you were shown the sales tax statute but
2 not the license tax statute; is that correct?
3 A. I may have seen the license tax statute. Is
4 it the one that is quoted in Professor Papa's paper?
5 Q. I'm not quite sure. I'm asking you whether
6 you were familiar with that.
7 A. Okay. We'll leave it at that. I may have
8 seen it.
9 Q. Okay. So you claim that you saw an actual
10 statute that defines electricity as tangible personal
11 property?
12 A. An excerpt.
13 Q. An excerpt from the statute?
14 A. Yes.
15 Q. Okay. So looking at 16972, you state that,
16 "Electric current can be sensed by an individual weakly
17 by taste and several different ways by touch." And

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18 then you talk about being zapped by a static charge,
19 burning sensation in the skin and by muscle response.

20 A. Yes.

21 Q. Heating effects of electrical current can
22 also be felt and can result in burn injuries, correct?

23 A. Yes.

24 Q. Okay. When you talk about these things, are
25 you talking about the effects of electricity? Correct?

0054

1 A. Yes. That's how we experience the world.

2 Q. Okay. So we experience the world in terms of
3 tangible property, real property, intangible property,
4 we would experience the effects of all these things; is
5 that correct?

6 A. That's correct.

7 Q. Okay. And so in this regard you really
8 wouldn't make any difference in terms of feeling the
9 effects between tangible, intangible, and real
10 property, correct?

11 A. This paper is written coming from a physical
12 point of view. One has to maintain for the purposes of
13 law and commerce, the distinction between intangible
14 and tangible personal property. Correct?

15 Q. You're the expert on the subject, not me.

16 A. No. I'm not an expert in law, by the way.

17 Q. Okay. Okay.

18 A. My understanding is that intangible personal
19 property is essentially a right, and that right is
20 evidenced by usually a certificate or document. But it
21 could be an implied right.

22 So I would certainly not call electricity an
23 intangible personal property.

24 Q. How would you define sunlight? Is that
25 tangible, intangible, or real property?

0055

1 A. Now we've got the term "real" combined
2 with --

3 Q. There are three types of property named in
4 this.

5 A. I'm sorry, there we go.

6 Well, my understanding of real property is
7 that it is the land and improvements owned by an
8 individual or corporation or an entity. Okay. So
9 electricity is not land or improvements.

10 Q. Okay.

11 A. Okay. It is not intangible personal
12 property, therefore, unless I'm missing a category, it
13 has to be tangible personal property.

14 Q. So you've written on page 16972 that
15 "tangible" personal property refers to any type of
16 property that can be generally moved, touched, or
17 felt?

18 A. Correct.

19 Q. And you said earlier that sunlight has -- can
20 be both felt and has -- you know, that it can be felt.
21 So would you say that sunlight is tangible personal
22 property?

23 A. It could be. If someone could arrange to
24 control the transfer.

25 Q. Why is it important for this definition that

0056

1 the transfer is controlled?

2 A. Because all of these forms of property

Page 23

3 address the issue of ownership.

4 Q. Okay.

5 A. For example, real property means that I can
6 exclude you from my real property. Okay. Tangible
7 personal property means that I can exclude you from
8 voting my share in a corporate election because I
9 happen to own the stock certificate. Okay.

10 A tangible personal property refers to any
11 other kind of property, that is, where I have an
12 ownership interest. That's what property means. And
13 normally applies to, as I said, things that can be
14 moved, touched, or felt.

15 Okay. Now, supposing that I put up a big
16 umbrella over you, and I said, "I've got a legal right
17 to do that, by the way. There's a Supreme Court
18 decision that says I have a right to put up that
19 umbrella. And if you want sunlight on your skin, you
20 have to pay me a nickel."

21 Okay. Then in that scenario, sunlight could
22 be a tangible personal property because I exercise
23 control. I have excluded you from possession of it,
24 and I'm willing to --

25 Q. Would I be selling you tangible personal
0057 property at that point?

1 A. If you remove the umbrella and --

2 Q. Yes.

3 A. -- and I received the nickel?

4 Q. Yes.

5 A. Yes.

6 Q. Okay. That's good. Okay.

7 And that's all based on these Wikipedia
8 definitions, correct?

9 A. It's based on my understanding of the three
10 categories which, yes, I did use Wikipedia as a
11 resource, but I am not aware of any substantial
12 disagreement with these definitions.

13 Q. Okay.

14 A. By the way, I need to make one more comment.

15 Q. Sure.

16 A. 16972 appears to be an expansion of 16971;
17 ergo, 16971 was not the latest draft.

18 Q. Okay. Thank you.

19 Let's go to document 17101. It's towards the
20 back. Second to last sentence in the last paragraph.
21 You state, "I would conclude that if a product (other
22 than hours of service) can be metered, it is a result
23 of manufacturing, not service." Is that correct?

24 A. Yes.

0058

1 Q. You testified earlier that sunlight could be
2 measured, correct?

3 A. Yes.

4 Q. And that wind could be measured, correct?

5 A. Yes.

6 Q. Is measured synonymous with metered?

7 A. Close enough, yes.

8 Q. And so in your example earlier with the
9 umbrella --

10 A. Yes.

11 Q. -- which you said you were selling me
12 tangible personal property, if I could measure the
13 amount of sunlight, which you also testified to, when I

14 remove the umbrella, I would be manufacturing
15 electricity -- I would be manufacturing sunlight or
16 manufacturing something? Tangible personal property, I
17 guess?

18 MR. GREEN: Objection as to form.

19 THE WITNESS: You would be conveying tangible
20 personal property.

21 BY MR. TRESH:

22 Q. Let me rephrase the question. So you've
23 testified --

24 A. Would you be manufacturing it? No, because
25 it's manufactured elsewhere. You are in that case a

0059

1 broker.

2 Q. Where is it manufactured?

3 A. In the sun.

4 Q. And so if I had a solar panel --

5 A. Yes.

6 Q. -- and that solar panel used the sunlight --

7 A. Yes.

8 Q. -- to create electricity, that sunlight being
9 used through the solar panel, that would be
10 manufacturing in your view?

11 A. The sunlight is manufactured in the sun,
12 correct.

13 Q. Okay. And so really anything that can be
14 metered is a result of manufacturing; is that correct?

15 A. Pretty close, yes.

16 Q. Okay.

17 A. I did have one exception, for hours of
18 service.

19 Q. Okay. Last two sentences of the -- the last
20 sentence of the report, "Taken to its logical
21 conclusion," you state --

22 A. Excuse me. This is not a report, this is an
23 essay.

24 Q. It's an essay?

25 A. Harry asked me several questions, and I

0060

1 produced these essays to answer his questions.

2 Q. Okay. So if we go to the second page of

3 17102 --

4 A. Yes.

5 Q. -- you state that, "This is consistent with
6 existing cases where geothermal energy is piped and
7 metered and cases where natural gas is sold in terms of
8 heat value, not mass."

9 A. That's correct.

10 Q. "The transfer of electricity is no more
11 ethereal than the transfer of heat."

12 A. Yes.

13 Q. Can you explain what you mean by that?

14 A. Some people have trouble with electricity as
15 being tangible. They prefer to think about it as magic
16 or as somehow not real. And I provided a couple of
17 examples here where other commodities are transferred
18 in commerce and where they are sold on bases other than
19 mass.

20 Q. Okay.

21 A. Okay. And I conclude that these are -- the
22 electricity is no more ethereal than the transfer of
23 heat.

24 Q. Turn back to the first page now.

25 A. Yes.

0061

1 Q. 17101. You say that manufacture -- I'm on
2 the top paragraph again. It's about the third
3 sentence. It says, "Manufacture now implies
4 mechanically-powered technology and division of labor."
5 Is that correct?

6 A. Yes.

7 Q. Are you an expert on manufacturing?

8 A. I've been employed in manufacturing for a
9 number of years.

10 Q. In addition to being employed as an
11 electrical engineer?

12 A. Well, my degree in electrical engineering was
13 the reason why I was employed in manufacturing
14 companies both as project engineer and as electrical
15 and power superintendent.

16 Q. Okay.

17 A. So the electrical engineering discipline was
18 part of the job.

19 Q. Okay. Would you agree that computers are
20 mechanically powered?

21 A. Not directly.

22 Q. How are they powered?

23 A. By electricity.

24 Q. And when you say "not directly mechanically
25 powered," what do you mean by that?

0062

1 A. They don't have a shaft. In normal
2 operation, you don't turn the pedals to make the
3 computer run.

4 The first computer by Babbage, back in the
5 1800s, yes, it was mechanically driven. It was a
6 mechanical computer. But in today's parlance, no,
7 computers are not mechanically driven. They're not
8 mechanical devices.

9 Q. Because they don't have shafts?

10 A. Because they don't accept mechanical energy
11 as a principal input.

12 Q. What is mechanical energy?

13 A. The exertion of force on an object and moving
14 that object through a distance. Force times distance
15 is work, which is the same as energy.

16 Q. Okay.

17 A. So a computer, wonderful or evil as it may
18 be, is not really a mechanical device. It contains --
19 most of them contain disk drives which have a rotating
20 comp on it, and, yes, that's a mechanical device. But
21 that's a subpart of the computer.

22 Q. So even though it contains a small mechanical
23 device, it's not a mechanical device because it doesn't
24 contain a bigger mechanical device?

25 A. No. It's a mechanical device because its

0063

1 principal input is not mechanical and its principal
2 output is not mechanical. It's a strictly information
3 processing device. Similar to a cell phone, by the
4 way.

5 Q. And when you type into a computer, is the
6 keyboard a mechanical device you're typing on to the
7 computer?

8 A. It certainly is.

9 Q. So the keyboard is a mechanical device.

10 Okay.

11 A. These days it has evolved into more what's
12 commonly called an electromechanical device. It has
13 mechanical input and electrical or electronic output.

14 Q. When you say "mechanically powered
15 technology," in your report, so manufacture now implies
16 mechanically powered technology. Would you say a
17 keyboard is mechanically powered technology?

18 A. It could fit under that definition.

19 Q. Okay. And you say the other aspect of
20 manufacture is division of labor. And would you agree
21 that most businesses, whether they're in the business
22 of making things or selling services, employ division
23 of labor?

24 A. Yes. The principal distinction there is
25 between what we consider to be manufacturing as opposed

0064
1 to craft industry.

2 Q. But when we talk about division of labor, you
3 said we've got two components for manufacture. One is
4 we've got mechanically powered technology, right?

5 A. Yes.

6 Q. And you say "and division of labor"?

7 A. Yes.

8 Q. And division of labor, you would agree that
9 most businesses use division of labor -- whether
10 they're a service provider or a manufacturer, they
11 divide up their labor in order to be more efficient,
12 correct?

13 A. Yes. Internally they employ different people
14 for different purposes. That's division of labor.

15 Q. So in the example of an accounting firm, for
16 example.

17 A. Yes.

18 Q. They file sales tax returns, some of them do
19 anyway. And so if you had a person that sat and
20 entered all the information into a keyboard and
21 composed the tax return, then I had a couple of other
22 folks that went ahead and took the tax returns and put
23 them in envelopes and yet other folks that went to the
24 big stamp machine and time stamped them, that would
25 fall within this definition of manufacture; correct?

0065
1 A. If you stretch it a whole lot, yes, it could.

2 Q. Why is it a stretch? We have mechanically
3 powered technology as a division of labor, why is that
4 a stretch?

5 A. What's your principal product?

6 Q. The tax return.

7 A. So I agree, you're manufacturing a tax
8 return.

9 Q. Okay.

10 A. The state could tax it any number of ways or
11 not.

12 Q. So you would agree -- so it would be your
13 view that the state would tax the accounting firm as a
14 manufacturer? They're in the business of creating
15 these tax returns.

16 A. It could. The state could choose to tax them
17 as a manufacturer.

18 Q. Okay.

19 A. However, as an engineer, I would laugh at
20 that.

Robinson Glenn J - Vol I

21 Q. Why?
22 A. Because the principal product is essentially
23 an intangible, that is, a certificate of some sort. A
24 paper tax form.
25 Q. So the paper tax form is intangible, and you
0066 believe that the --
1 A. The information on the form is the key
2 quantity, not the form itself.
3 Q. And in the example of electricity, it's
4 electric service sold by Duke, is the customer after
5 the electricity or are they after the energy produced
6 by the electricity to turn on their lightbulb?
7 A. The customer is after the energy produced by
8 Duke.
9 Q. So no different. The customer really doesn't
10 care about the electrons, right?
11 A. That's correct.
12 Q. No more than my accounting client cares about
13 the form that the taxpayers -- I'm sorry, do you need
14 to take a break?
15 A. No. I have sinus problems and occasionally I
16 need to pull back.
17 Q. I just want to make sure you're okay.
18 A. Uh-huh.
19 Q. Okay. In the second paragraph of the 17101,
20 you talk about commercial economic characterization.
21 So I think you say, "The commercial economic
22 characterization of products --" "-- of a product is
23 goods or services. Does not correlate with the legal
24 formula."
25
0067 1 What is the commercial economic
2 characterization of a product?
3 A. All I'm referring to is two formulas. In one
4 place, I read goods and services. In another place, I
5 read goods and materials.
6 Q. And this energy that you just testified that
7 the customer is after, Duke's customer, the energy is a
8 good or material; is that your testimony?
9 A. Yes.
10 Q. Energy is a material?
11 A. Yes.
12 Q. In the same way sunlight is a material?
13 A. In the same way that sunlight is a material,
14 in the same way that energy and mass can be transformed
15 in nuclear processes. So from 1906 onward, to be
16 logically consistent, you'd have to treat energy and
17 mass as the same.
18 Q. And cable broadcast signal, for example, that
19 would be in a similar way a material, a transmission of
20 that signal?
21 A. The transmission --
22 Q. Or the signal itself?
23 A. -- employs energy.
24 Q. Okay.
25 A. But the value is in the intelligence, not in
0068 1 the energy. I don't want to heat my TV screen, I want
2 to see a cartoon.
3 Q. So the energy that Duke sells is a material,
4 the cartoon on your television is not?
5 A. Yes. The configuration of the information on

6 the screen is -- I would not characterize as a
7 material.
8 Q. But energy you would?
9 A. Absolutely.
10 Q. Okay. Second paragraph you say, "Goods --"
11 "In the former, goods are physical material and
12 services are immaterial."
13 So goods have to be physical material,
14 correct?
15 A. In that formula, where you're talking about a
16 topic of goods and services and everything has to fit
17 into one or the other, then in that case the goods are
18 physical material and the services are immaterial and
19 that means only incidentally involve physical transfer
20 of material.
21 Q. Okay. Is it immaterial that electricity is
22 transferred from a Duke plant to a customer's home?
23 A. No.
24 Q. Is there any material service involved in the
25 transmission of energy from Duke's plant to a
0069 customer's home?
1 A. Yes. The transmission of electrical energy
2 falls under my -- falls into the same category as
3 materials, in my estimation.
4 Q. So the transmission of the energy falls
5 into -- is also a material?
6 A. That's correct.
7 Q. And do you believe that Duke is -- do you
8 believe there's any service involved in moving energy
9 from Duke's facility to a customer's home?
10 A. The initial hookup to the service.
11 Q. Uh-huh.
12 A. Other than that, as far as I'm concerned,
13 it's a transfer of energy, which amounts to a material.
14 Q. Why would you say that the transmission of
15 energy from -- can you explain to me why you believe
16 the transfer of the energy from Duke's facility to
17 someone's home is a material rather than a service?
18 A. Yes. First of all, because you meter it and
19 each unit is substantially the same as every other unit
20 that you transfer. It's a commodity. Okay. A
21 kilowatt hour is a kilowatt hour is a kilowatt hour.
22 It doesn't matter what time of day as far as the
23 customer is concerned. So it is a commoditized
24 product. You charge for each one. If the customer
0070 uses more, you charge more. If it uses less, you
1 charge less. It's just like if I sell you two pigs, I
2 charge you twice what I charge for selling you one pig.
3 Q. In the same way if I sold you two tax
4 returns, I charge you double what I charge for one tax
5 return, correct?
6 A. Do they contain the same information?
7 Q. The sales tax return, likely so.
8 A. Then you've only sold me one tax return.
9 It's the information that counts, not the paper.
10 Q. Because the -- so if I had two pigs of
11 different weight, does that matter?
12 A. If you sell by weight, it does. If you sell
13 them by unit, it doesn't.
14 Q. Okay. And if I sell tax returns by unit,
15 I'll charge you \$10 per return. Why is there a
16

17 meaningful difference there?
18 A. Are they identical returns?
19 Q. Are the pigs identical?
20 MR. GREEN: Objection as to form.
21 THE WITNESS: I'll say it one more time. The
22 important thing about a tax return is not the paper.
23 And, in fact, nowadays, they may not be on paper. The
24 important thing is the information. That's what the
25 state wants. That's what the taxpayer provides.

0071

1 BY MR. TRESH:
2 Q. You mentioned a moment ago the fact that you
3 could meter -- we were talking about the idea that the
4 service of transmitting from Duke's facility to the
5 customer's home, the important thing, while you believe
6 that's a material, is that it can be metered, right?
7 You testified to that?
8 A. Yes.
9 Q. Can you meter cell phone minutes?
10 A. Absolutely. You can meter attorney hours.
11 You can meter engineering hours.
12 Q. Does that make any of these things material?
13 A. No, it does not. That is an exception based
14 on the idea that if I charge my client for doing the
15 same work twice, I am cheating my client. It's not
16 commoditized.
17 Q. In the cell phone example, which we said can
18 be metered --
19 A. Yes.
20 Q. -- the cell phone call would then be a
21 material in your definition; is that correct?
22 A. No. A cell phone call is not a material in
23 my definition. It's a time-based service.
24 Q. Hang on. I believe you testified a moment
25 ago that cell phone calls can be metered; is that

0072

1 correct?
2 A. Yes.
3 Q. Okay. So they can be metered. And you also
4 testified that if something can be metered, it's a
5 material?
6 A. No.
7 Q. That's not true?
8 A. Because right in front of you, I would
9 conclude that a product, other than hours of service,
10 can be metered, it is the result of manufacturing, not
11 service. So if you want to go into hours of service,
12 then, no, it's not manufactured. But if you're paying
13 by quantity of goods transferred, then it is
14 manufactured.
15 Q. So if I could buy cell phone service in some
16 other way than hours of service, which I can.
17 A. Yes. You can do a flat rate.
18 Q. Right.
19 A. So could Duke. Duke could charge me \$30 a
20 month, and I could use as little or as much as I want.
21 That would be a service. That would be definitely a
22 service.
23 Q. Okay. So in your view, electricity -- the
24 electricity that Duke sells, the electric energy that
25 Duke sells, it would change from a material to a

0073

1 service if Duke went ahead and sold it on a single

2 charge, you know, \$40 per month for all the
3 electricity?
4 A. All you can eat.
5 Q. That's a service?
6 A. All you can eat. For example, a good example
7 at a restaurant because I brought it up.
8 Q. Yeah.
9 A. Okay. Normally, you would think that's a
10 material transfer. But if it's just a matter of you
11 sit there and eat all you want and I'll charge you 10
12 bucks, that's transformed into a service.
13 Q. The manner in which you bill for something
14 changes its --
15 A. Sure.
16 Q. -- characteristic?
17 A. For example, my garbage pickup. I pay them
18 once a month. They take as little or as much as I
19 produce. That's a service. No question.
20 Q. Okay.
21 A. And by the way, a lot of garbage companies
22 will charge their commercial clients on a ton basis.
23 Tons transfer. Okay. Well, that's different. Then it
24 is a transfer of a commoditized product.
25 MR. TRESH: Can we take like a five-minute

0074

1 break.
2 (A recess transpired.)
3 MR. TRESH: For the record, we've reconvened.
4 That will conclude our deposition of Mr. Robinson,
5 unless Mr. Green has any further questions.
6 MR. GREEN: I have none.
7 (The deposition concluded at 12:28 p.m.)
8
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0075

SIGNATURE OF DEPONENT

1
2
3 I, the undersigned, GLENN J. ROBINSON, M.S.,
4 P.E., do hereby certify that I have read the foregoing
5 deposition and find it to be a true and accurate
6 transcription of my testimony, with the following
7 corrections, if any:
8 PAGE LINE CHANGE REASON
9
10
11
12

GLENN J. ROBINSON, M.S., P.E. DATE

CERTIFICATE OF REPORTER

I, Sheri L. Byers, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate and complete record of the testimony of the deponent and of all objections made at the time of the examination to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 6th day of January, 2012, at Columbia, Richland County, South Carolina.

Sheri L. Byers,
Registered Professional Reporter,
Notary Public
State of South Carolina at Large
My Commission expires:
January 5, 2014

I N D E X

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EXHIBITS

Petitioner's		
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ENGINEER: ELECTRICAL

GLENN J. ROBINSON, M.S., P.E.
Engineering Design & Testing Corp.
Post Office Box 8027
Columbia, South Carolina 29202

EDUCATION:

1963 B.S. Electrical Engineering - University of Washington
1968 M.S. Electrical Engineering - University of Washington

PROFESSIONAL EXPERIENCE:

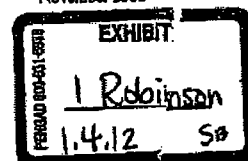
August, 1999 to present **Engineering Design & Testing Corp. - Columbia, South Carolina**
Consulting Electrical Engineer responsible for consultation with insurance companies, manufacturing industries, government and attorneys. Specific areas of expertise include: Evaluation of distribution and plant-wide electrical systems; review and evaluation of instrumentation and process control systems; troubleshooting and failure analysis of electric and control networks; evaluate cause of damage, scope of damage and cost of repair of electrical systems and equipment.

1995 to 1999 **Fibermark, Inc. - Warren & Hughesville Mills, New Jersey**
Electrical Superintendent responsible for electrical and instrument (E&I) engineering and boiler/generator administration. Implement modern controls for secondary fiber system and stock refiner. Major rebuild and startup of Hughesville dry end including complete rewiring and drive modifications in conjunction with equipment upgrade.

1992 to 1995 **Getchell Gold, Inc., Getchell Mine - Golconda, Nevada**
Project Engineer responsible for capital projects tracking and budgeting, project and E&I engineering, piping, E&I and facility design and major overhaul of demineralizer, boiler and deaerator piping and controls. Add 15 MVA electrical substation and 13KV mine feeder line (specification, procurement, design, installation and startup). Commission and start up underground mine distribution substation.

1991 to 1992 **Pitt County Memorial Hospital - Greenville, North Carolina**
Electrical Engineer responsible for project and electrical engineering. Specific projects included LAN repeater room and network extension installation, CT room layout (foundation, structure and electrical design) and miscellaneous electrical and lighting changes.

November 2006



- 1986 to 1991 **Weyerhaeuser Company, Lumber Facility - Ayden, North Carolina**
Engineering Manager responsible for scope, design, permitting and procurement of \$60 million green-field sawmill. Responsible for plant, processing and system engineering during and after construction, electric, water and sewer utility coordination and participation in process and process control startup. Leadership and hands-on participation in numerous process improvement projects. Develop production planning software and validated and improved log sorting control software.
- 1979 to 1985 **Weyerhaeuser Company Wood Products R&E - Tacoma, Washington**
Project Manager responsible for a manufacturing control system development program, related projects and transverse bucking system from concept through start-up and acceptance (first of several implementations). Stem scanner development and field test, benefit tests, system requirements, cost estimate, capital approval, team building, cost control, key software validation, startup tuning and acceptance.
- 1974 to 1978 **The Oregon Graduate Institute - Beaverton, Oregon**
Staff Engineer responsible for instrument development, implementation and technical supervision. Instrumentation developed included lighting strike monitor for Bonneville Power HV transmission lines, a non-contacting lumber thickness gauge, a control product introduction for an electronics distributor and numerous monitor and data systems for researchers. Managed instrument maintenance and computer center.
- 1965 to 1974 **The University of Washington - Seattle, Washington**
Staff Engineer responsible for instrument development, implementation and technical supervision.
- 1963 to 1965 **The Boeing Company - Seattle, Washington**
Staff Engineer responsible for parts of missile and radar system proposals.

REGISTRATIONS:

Registered Professional Engineer in South Carolina (#20297)
Registered Professional Engineer in North Carolina (#017548)
Registered Professional Engineer in Washington (#11097)
Registered Professional Engineer in Georgia (#028024)
Registered Professional Engineer in Ohio (#72945)
Registered Professional Engineer in Indiana (# 10809491)
National Council for Engineering and Surveying (#22912)

November 2006

14782 draft – Tangible Personal Property

It is understood that electricity is included by statute as Tangible Personal Property. We were asked to address this as a scientific/technical matter. This is not entirely a matter for science, since the terms are defined in law.

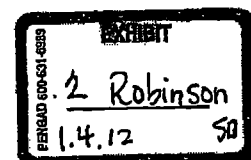
Definitions:

Real property and personal property are the two main subunits of property in English Common Law (Wikipedia). "Real property" is also called immovable property and applies to land and improvements. All other types property can be conveyed and are called personal property.

Tangible personal property refers to any type of property that can generally be moved, touched or felt.

Electrical current can be sensed by an individual weakly by taste and in several different ways by touch. Examples of the latter include being zapped by static charge, by a burning sensation in the skin, and by muscle response. The heating effects of electrical current can also be felt, and can result in burn injuries. Thus, electricity is personally tangible by itself and through its effects on an individual.

The conveyable personal property aspect is relevant to electricity in commerce. Electrical energy is used to do useful work. The sale and receipt of a specific quantity of electrical energy amounts to the sale and receipt of a specific quantity of the power to do useful work. In all commercial transactions, the parties are considered to be persons. Hence the concept of transfer of tangible personal property as a commercial good is applicable to the sale and purchase of electrical energy.



SCDOR00016971

14782 draft – Tangible Personal Property

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Tangible personal property refers to any type of property that can generally be moved, touched or felt.

Property is any physical or intangible entity that is owned by a person or jointly by a group of people. Depending on the nature of the property, an owner of property has the right to consume, sell, rent, mortgage, transfer, exchange or destroy their property, and/or to exclude others from doing these things. Important widely recognized types of property include real property (land), personal property (physical possessions belonging to a person), private property (property owned by legal persons or business entities), public property (state owned or publicly owned and available possessions) and intellectual property (exclusive rights over artistic creations, inventions, etc.), although the latter is not always as widely recognized or enforced. A title, or a right of ownership, establishes the relation between the property and other persons, assuring the owner the right to dispose of the property as they see fit.

Electricity as property

Electrical current can be sensed by an individual weakly by taste and in several different ways by touch. Examples of the latter include being zapped by static charge, by a burning sensation in the skin, and by muscle response. The heating effects of electrical

current can also be felt, and can result in burn injuries. Thus, electricity is personally tangible by itself and through its effects on an individual.

The conveyable personal property aspect is relevant to electricity in commerce. In all commercial transactions, the participating parties are considered to be persons. Electrical energy is used to do useful work. The sale and receipt of a specific quantity of electrical energy amounts to the sale and receipt of a specific quantity of the power (and the right) to do useful work. Importantly, the owner of property can elect not to transfer possession of the property. This is clearly the case with electric power, where control of the transfer rests with the provider, even while the amount transferred may be at the discretion of the receiver.

Hence the sale and purchase of electrical energy is consistent with the concept of transfer of tangible personal property as a commercial good.

14782 DRAFT reply

Questions: What is required to make electricity? How does this relate to Duke operations in South Carolina?

Electricity is the manifestation of energy in electrical form. Electricity can be personally sensed by touch and taste, and it can be measured with appropriate instruments. In commerce, the good transferred is electrical energy, so the question is better stated "What is required to produce commercial electrical energy". Electrical energy that is not at present commercially common in the eastern United States is not addressed here.

To produce commercial electrical energy requires an original energy source, a means of converting the original energy into electrical form (generation), and a means of delivery of the resulting electrical energy. This is most economically described by working backwards.

The means of delivery of the resulting electrical energy in the United States is typically an alternating current (AC) transmission and distribution (T&D) network. In most places this consists of aluminum electrical conductors suspended from towers or poles. For reasons of economy, this network includes substations where the energy is transformed from one standardized voltage to another. It also requires metering devices and means of accounting and billing.

Electrical energy is provided to the T&D network by generating stations. The final element in these stations is a rotating electrical generator. The rotary motion is provided by equipment appropriate to the original energy source. In the case of hydro power, the gravitational potential energy of a raised body of water is used to spin a water turbine that is connected to a generator. In other cases, a two-step process is employed. A "Combustion Turbine" is driven directly by the gases heated by burning fuel oil or, preferably, natural gas. A Steam Turbine is driven by steam derived from water boiled by heat of nuclear decay or from burning coal. Other cases exist as well, but these cover our subject.

As a commercial producer of electrical energy in South Carolina, Duke maintains a T&D network and "fleets" of generating stations, grouped by type. The Duke fleets consist of three nuclear stations, thirty hydro stations, eight coal-fired stations and four gas-fired stations.

To make all this work requires much supporting and logistical infrastructure. The Duke infrastructure has been re-organized (as "Duke Energy") to allow it to sell services as well as electrical energy. However, generation and sales of electrical energy remains Duke's dominant source of revenues.

All this discussion rests on fundamental physical principles. Electrical power (watts, kilowatts, megawatts) is the rate of transmission of electrical energy. Any physical

SCDOR00016974

mechanical
system must generate less energy (and power) than it consumes. The remainder is waste heat. Any form of power can be employed to do work, and the reverse is true also. Work must be done, by applying power, to convert the stationary electrical charges in a metallic solid to the energetic charges that result in electrical current. Passing an electrical current through an energy-consuming device, such as a light bulb, results requires a substantial force on a hand-cranked generator, compared to the force required when the bulb is switched off. The more light, the harder the push.

A rotary electrical generator is based on the principle that moving a conductor in a magnetic field will generate a voltage between the ends of the conductor. A comparatively small amount of power is required to produce the magnetic field.

Summary in outline form
Making electricity requires

- an original energy source, such as
 - nuclear fuel or coal
 - fuel oil or natural gas
 - potential energy of a raised body of water (Hydro Power)
- a means of converting the original energy into electrical form (generation)
 - Except hydropower, generation requires the fuel energy to be first converted to an intermediate form, such as heat energy in a liquid or gas, and then converted into electrical energy in a rotating machine (generator).
 - An electromagnetic generator is a rotating machine that converts mechanical energy into electrical energy in a saleable form (medium voltage AC).
 - The rotary motion is provided by a turbine.
 - Examples of these combinations include
 - nuclear fuel or coal burner, boiler and Steam Turbine
 - fuel oil or natural gas burner and Combustion Turbine
 - energy of falling water and Water Turbine
- A means of delivering and receiving payment for the product.

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All this discussion rests on fundamental physical principles. Electrical power (watts, kilowatts, megawatts) is the rate of transmission of electrical energy. Any physical

SCDOR00016976

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 - fuel oil or natural gas burner and Combustion Turbine
 - energy of falling water and Water Turbine
- A means of delivering and receiving payment for the product.

Duke Power Company
Legal Department
122 South Church Street
Charlotte, NC 28242-0001



DUKE POWER

704/382-8127

October 25, 1991

Mr. Charles W. Ballentine
Executive Director
The Public Service Commission
of South Carolina
P. O. Drawer 11649
Columbia, South Carolina 29211

Re: SCPSC Docket No. 91-216-E

Dear Mr. Ballentine:

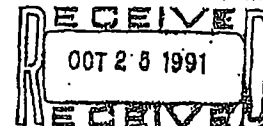
Please find enclosed for filing in the above-captioned matter the original and 10 copies of the Proposed Order of Duke Power Company. Attached is a Certificate of Service for the parties of record.

Sincerely yours,

Ellen T. Ruff
Ellen T. Ruff
Deputy General Counsel

ETR/sch
Enclosures
cc: Parties of Record
Mr. William F. Austin

S. C. PUBLIC SERVICE COMMISSION



(704) 382-8137 Fax

STEVE C. GRIFFITH, JR.
LEWIS F. CAMP, JR.
RAYMOND A. JOLLY, JR.
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WILLIAM LARRY PORTER
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ALBERT V. CARR, JR.
WILLIAM J. BOWMAN, JR.
ROBERT M. BISCHAK
RODARD M. MARSH, JR.
RONALD V. SHEARIN
W. WALLACE GREGORY, JR.
JEFFERSON D. GRIFFITH, III
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GARRY S. RICE
LISA A. FINGER
KAROL P. HACK
CHRISTIN J. BRANLETT
OP COURSEL
WILLIAM J. WARD, JR.
GEORGE W. FERGUSON, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of the Proposed Order of Duke Power Company (SCPSC Docket No. 91-216-E) to the following:

Ms. Marsha A. Ward, General Counsel
The Public Service Commission
of South Carolina
P. O. Drawer 11649
Columbia, South Carolina 29211

Mr. Steven W. Hamm, Consumer Advocate
Ms. Nancy J. Vaughn, Staff Attorney
Department of Consumer Affairs
P. O. Box 5757
Columbia, South Carolina 29250-5757

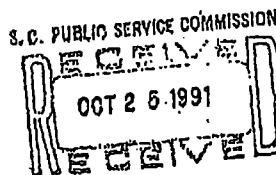
Mr. Arthur G. Fusco
Sherrill and Rogers, PC
P. O. Box 100200
Columbia, South Carolina 29202-3200

Mr. William E. Booth, III
Mays, Foster, Booth & Gunter
2512 Devine Street
Columbia, South Carolina 29205

Mr. Jasper P. Rogers
Route 1, Box 346
Ridgeway, South Carolina 29130

This the 25th day of October, 1991.

ELU. P. O.



SCDOR00016-79

BEFORE THE
PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
DOCKET NO. 91-216-E

RECEIVED
OCT 25 1991

In the Matter of
Application by Duke Power Company
for Authority to Adjust and Increase
Its Electric Rates and Charges

PROPOSED ORDER
OF
DUKE POWER COMPANY

Steve C. Griffith, Jr.
Executive Vice President and General Counsel

Ellen T. Ruff
Deputy General Counsel

Karol P. Mack,
Senior Attorney

Duke Power Company
422 South Church Street
Charlotte, North Carolina 28242-0001

William F. Austin

The Austin Firm
1022 Calhoun Street, Suite 301
Post Office Box 12396
Columbia, South Carolina 29211

Attorneys for Duke Power Company

October 25, 1991

S.C. PUBLIC SERVICE COMMISSION
OCT 25 1991
UTILITIES DIVISION

S.C. PUBLIC SERVICE COMMISSION
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On May 17, 1991, Duke Power Company (Duke or the Company) filed an Application with the Public Service Commission of South Carolina (the Commission) to adjust and increase its retail electric rates and charges, effective for service in accordance with the terms and conditions of §58-27-870, Code of Laws of South Carolina (1976), as amended.^{1/} The rates proposed by the Company in its Application were designed to increase annual gross revenues from South Carolina retail operations by \$72,542,000 or 7.29% based on the test year, i.e., the twelve (12) months ended December 31, 1990.

The proposed revenue increase is distributed among classes of customers by increasing residential revenues by 9.08%, general service revenues by 7.96%, industrial revenues by 5.96%, and outdoor lighting revenues by 6.18%. Different percentage increases for customer classes are proposed because of the existing disparity in rates of return between customer classes.

The principal reason for the requested increase set forth in the Application is the commercial operation of the Bad Creek Hydroelectric Station, a 1,065 MW facility located in the mountains of western South Carolina. Units 1 and 2 began commercial operation on May 15, 1991. Units 3 and 4 began commercial operation on September 3 and September 13, 1991, respectively.

Petitions to intervene were received from the Consumer Advocate, South Carolina Department of Consumer Affairs, the South Carolina Energy Users Committee (SCEUC), the Clifton Power Corporation, and Jasper P. Rogers. These petitions to intervene were allowed by the Commission.

By letter of May 30, 1991, the Executive Director of the Commission required the Company to file with the Commission on or before June 24, 1991, and serve on all parties of record, the testimony and exhibits of the witnesses which the Company intended to offer at the hearing in this matter.

^{1/} Pursuant to the provisions of that section, the Company gave the Commission the statutory 30-day notice of its intention to file an increase in its rates.

By letter of June 11, 1991, the Executive Director of the Commission scheduled a public hearing on September 23, 1991, and required the Company to provide notice of the public hearing by newspaper notices and bill inserts. The Company furnished proof of publication of the required notice on July 19, 1991.

On June 24, 1991, the Company filed with the Commission its prepared direct testimony and exhibits for the following witnesses: William S. Lee, Chairman of the Board and President, Duke Power Company; Roger G. Ibbotson, President of Ibbotson Associates, Inc.; Richard J. Osborne, Vice President, Finance, Duke Power Company; Donald H. Danton, Jr., Senior Vice President, Planning and Operating, Duke Power Company; W. R. Stimart, Vice President, Rates and Regulatory Affairs, Duke Power Company; Ronald E. White, Senior Vice President, Foster Associates, Inc.; and Thomas S. LaGuardia, President, TLG Engineering, Inc. On September 3, 1991, Duke filed Supplemental Testimony and Supplemental Exhibit 1 of W. R. Stimart. Duke filed Supplemental Exhibit 2 on September 20, 1991. During the hearing, Duke filed Supplemental Exhibit 3.

By letter of August 8, 1991, the Executive Director of the Commission required the Commission Staff and all other parties of record to file their testimony on or before September 9, 1991. The following testimony was filed: for the Consumer Advocate: Paul Chernick, Resource Insight, Inc.; Peter J. Lanzaletta, Whitfield Russell Associates; Phillip E. Miller, Riverbend Consulting, Inc.; John B. Legler, Professor of Banking and Finance in the College of Business Administration, University of Georgia; for the Commission Staff: I. Curtis Price, III, A. R. Watts, and James E. Spearman; for the South Carolina Energy Users Committee: Nicholas Phillips, Jr.^{2/} The Commission also

^{2/} Pursuant to their respective requests, the Consumer Advocate and SCEUC were granted an extension of time to September 13 to file their testimony.

received a written statement from Jasper P. Rogers on or about September 21, 1991.

On September 16, 1991, Duke filed updated and revised testimony of Roger G. Ibbotson, and the Consumer Advocate filed a revised exhibit of Peter J. Lanzalotta.

On September 11, 1991, in Order No. 91-775, the Commission scheduled a prehearing conference for September 18, 1991, at 10:00 a.m. The prehearing conference was held as scheduled.

The public hearing before the Commission commenced as scheduled on September 23, 1991. William F. Austin, Esquire, Steve C. Griffith, Jr., Esquire, Ellen T. Ruff, Esquire, and Karol P. Mack, Esquire, represented the Company; Marsha A. Ward, Esquire, represented the Commission Staff; Steven W. Hamm, Esquire, Raymon E. Lark, Jr., Esquire, Nancy J. Vaughn, Esquire, and Richard Elam, Esquire, represented the Consumer Advocate; Arthur G. Fusco, Esquire, represented SCEUC; William E. Booth, III, Esquire, represented Clifton Power Corporation; and Jasper P. Rogers appeared on his own behalf. The public hearing was completed on September 26, 1991.

On September 25, 1991, the Company filed the rebuttal testimony of Donald H. Danton, Jr. and William F. Reinke. Subsequent to the hearing, the Consumer Advocate filed the surrebuttal testimony of Philip E. Miller and Paul Chernick on October 2, 1991.

A night hearing was held in Greenville, South Carolina on October 7, 1991. The Commission heard testimony from the following witnesses: Tom Blank, Jim Schumer, Earl Mills, Joe Jelks, Jim McKittrick, Ron Vankirk, John E. Newman, Robert Keenan, and Kris Risley.

Clifton Power Corporation was granted an extension of time to September 17 to file its testimony, but did not file any testimony.

Based upon the verified Application, the testimony, and exhibits received into evidence at the hearing and the entire record of these proceedings, the Commission now makes the following findings of fact:

FINDINGS OF FACT

General Procedural Issues

1. Duke is engaged in the generation, transmission, distribution, and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both states known as the Piedmont Carolinas.

2. Duke is an electric utility operating in the State of South Carolina where it is engaged in the generation, transmission, distribution, and sale of electricity to the public for compensation. The Company's retail operations in South Carolina are subject to the jurisdiction of this Commission pursuant to S.C. Code Ann. §§58-27-10 et seq. (1976), as amended. The Company's wholesale operations in South Carolina are subject to the jurisdiction of the Federal Energy Regulatory Commission (hereinafter "FERC").

Test Period

3. The test period for purposes of this proceeding is the 12-month period ended December 31, 1990, adjusted for certain known and measurable changes.

Requested Increase

4. Duke, by its Application, sought an increase in its basic rates and charges to its South Carolina retail customers of \$72,542,000. Subsequent to the filing of the Application, the Company lowered its request to \$68,384,000.

Cost Allocation

5. The summer coincident peak (summer CP) demand allocation methodology is the most appropriate method for making jurisdictional allocation of production costs and for making fully distributed cost allocations among customer classes in this proceeding. Consequently, each Finding of Fact

appearing in this Order which deals with the overall level of rate base, revenues, and expenses for South Carolina retail service has been determined based upon the summer CP allocation method.

Test Period Revenue

6. The appropriate operating revenues for Duke for the test year under present rates and after accounting and pro forma adjustments are \$994,450,000 for service to the South Carolina retail jurisdiction.

Bad Creek Hydroelectric Station

7. The Commission finds that the costs of the Bad Creek Hydroelectric Station were prudently incurred. In so doing, the Commission specifically finds that all four units were in commercial operation prior to the commencement of the hearing; that the station was completed under Duke's budget; that considering Duke Power's system generation needs, the choice of pumped storage was prudent compared to other types of generation such as combustion turbines; that Bad Creek is needed to enable Duke to meet the load on its system and to maintain a minimum level of reserve requirements; and that the Bad Creek Station is used and useful. The costs of the Bad Creek Station should be included in Duke's rate base.

Carolina Power & Light Co. Contract (Schedule J)

8. No adjustment to the test period for billings to Carolina Power & Light Company under Schedule J is appropriate.

Test Year and Post-Test Year Cost Increases

9. It is appropriate to increase operation and maintenance expenses by \$4,832,000 to reflect increases in wage rates and related fringe benefit costs that occurred during the test year. This adjustment also results in a corresponding increase in payroll taxes of \$419,000.

10. It is appropriate to increase operation and maintenance expenses by \$4,287,000 to reflect increases in wage rates and related fringe benefits and payroll taxes which occurred after the end of the test year.

Implementation of SFAS 106

11. It is appropriate to increase operation and maintenance expenses by \$3,830,000 to reflect the implementation of accrual accounting for other post-retirement benefits expense in accordance with Statement of Financial Accounting Standards No. 106.

Demand-Side Management Programs

12. The Commission Staff, the Consumer Advocate, and the Company entered a Stipulation relating to Demand-Side Management (DSM) cost deferral. The Stipulation is reasonable and is approved by the Commission.

13. It is appropriate to increase operation and maintenance expenses by \$3,911,000 to reflect known increases in costs associated with the Company's load control and interruptible service demand-side management programs.

Depreciation and Decommissioning Expenses

14. The appropriate depreciation rates for purposes of setting depreciation expense are as follows:

<u>Function</u>	<u>Rate</u>
Production	
Steam	2.57%
Nuclear	
Decommissioning	1.61%
Investment	3.09%
Total Nuclear	4.70%
Hydraulic	1.98%
Other	0.74%
Transmission	2.57%
Distribution	3.59%
General (Summary Only)	3.59%

15. In determining decommissioning expense to be included in cost of service, it is appropriate to assume zero real return for qualified nuclear decommissioning trust investments and 1% for nonqualified investments.

16. The appropriate components of decommissioning expense to be included in cost of service are as follows:

<u>(Dollars in Thousands)</u>		<u>Annual Cost</u>	
<u>Unit</u>	<u>Total Cost</u>	<u>System</u>	<u>S. C. Retail</u>
Oconee 1	\$164,792	\$10,491	\$ 2,722
Oconee 2	158,311	10,101	2,621
Oconee 3	202,855	12,218	3,171
Oconee ISFSI	21,750	1,325	344
McGuire 1	171,246	8,950	2,323
McGuire 2	186,265	9,294	2,412
Catawba 1	23,476	1,199	311
Catawba 2	26,163	1,271	330
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TOTAL	\$954,858	\$54,849	\$14,234
	=====	=====	=====

Other Operating Expenses

17. The reasonable level of test year operating revenue deductions for the Company after pro forma adjustments is \$837,757,000.

Capital Structure and Rate of Return

18. The appropriate capital structure for the Company for use in this proceeding is as follows:

<u>Item</u>	<u>Percent</u>
Long-Term Debt	40.50%
Preferred Stock	9.68%
Common Equity	49.82%

Total	100.00%
	=====

19. The proper embedded cost rates for long-term debt and preferred stock are 8.78% and 7.74%, respectively.

20. The reasonable rate of return on common equity that Duke should be allowed an opportunity to earn is 13.17%, which the Commission adopts for this proceeding. Combined with the debt and preferred cost rates and the capital

structure set forth in the table below, which the Commission finds reasonable, the overall rate of return is 10.87%.

<u>Item</u>	<u>Percent</u>	<u>Cost</u>	<u>Weighted Rate</u>
Long-Term Debt	40.50%	8.78%	3.56%
Preferred Stock	9.68%	7.74%	.75%
Common Equity	49.82%	13.17%	6.56%
	-----		-----
TOTAL	100.00%		10.87%

Material and Supplies

21. The reasonable allowance for materials and supplies investment is \$73,668,000.

Plant Held for Future Use

22. The reasonable allowance for plant held for future use is \$4,402,000.

Working Capital

23. The reasonable allowance for working capital is \$57,832,000.

Rate Base

24. Duke's reasonable original cost rate base used and useful in providing service to the public within the State of South Carolina is \$1,834,972,000, consisting of electric plant in service of \$2,868,210,000; net nuclear fuel of \$88,747,000; plant held for future use of \$4,402,000; materials and supplies of \$73,668,000; and allowance for working capital of \$57,832,000, reduced by accumulated depreciation and amortization of \$924,185,000, accumulated deferred income taxes of \$315,569,000, operating reserves of \$14,180,000, and customer deposits of \$3,953,000.

Revenue Requirement

25. Based upon the foregoing, Duke should increase its annual level of gross revenues under present rates by \$68,384,000. The annual revenue requirement approved herein is \$1,062,834,000 which will allow Duke a reasonable

opportunity to earn the rate of return on its rate base which the Commission has found just and reasonable.

Rate Design

26. The rate designs, rate schedules, miscellaneous charges; and terms and conditions proposed by the Company are appropriate and should be adopted, except as specifically modified herein.

27. The rate of return for the Industrial class is outside of the "band of reasonableness", a band or range of plus or minus 10% of the average retail rate of return. Consequently, the revenue increase approved herein should be distributed in order to move the Industrial class rate of return to the band of reasonableness.

28. The modifications to the penalty provisions of Interruptible Rider IS proposed by the Company should be adopted. The credit should not be increased in view of the substantial participation by customers at the current level of credit.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1 AND 2

The evidence supporting these findings concerning the Company's business and legal status is contained in the Company's verified Application and in prior Commission Orders in this Docket of which the Commission takes notice. These Findings of Fact are essentially informational, procedural, and jurisdictional in nature; and the matters which they involve are essentially uncontested.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 3 AND 4

The evidence for these findings concerning the test period and the amount of the revenue increase requested by the Company is contained in the verified Application of the Company and the testimony and exhibits of Duke witnesses Lee and Stimart.

On May 17, 1991, the Company filed an Application requesting approval of rate schedules designed to produce an increase in gross revenues of \$72,542,000.

Subsequent to the filing of the Application, the Company decreased its request to \$68,384,000. The Company's filing was based on a test period consisting of the 12 months ending December 30, 1990. The Commission finds that this test period is appropriate and should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

The evidence for this finding concerning the proper production allocation method consists primarily of the testimony and exhibits of Company witness Denton, Commission Staff witness Watts, and SCEUC witness Phillips.

Duke provides retail service in two states as well as wholesale service to certain municipalities and electric membership cooperatives; therefore, it is necessary to allocate the cost of service among jurisdictions and among customer classes within each jurisdiction. The Company based its Application on the use of the summer coincident peak allocation methodology (summer CP), which was found appropriate by the Commission in its order in the Company's last rate case, Oocket No. 86-188-E. As Company witness Denton testified, Duke has utilized and the Commission has approved the summer CP method in its cost studies since 1970. Denton also testified that by all forecasts, Duke will continue to be a summer peaking company. (Tr. Vol. 2, p. 91)

Commission Staff witness Watts and SCEUC witness Phillips supported the continued use of the summer CP method. SCEUC witness Phillips presented testimony and exhibits demonstrating the dominance of the summer peak demand on the Duke system. Phillips further testified that other methods of cost allocation would not adequately account for the dominant summer coincident peak and would therefore fail to reflect the actual load characteristics of the Duke system. (Tr. Vol. 4, p. 112) No witness challenged the appropriateness of the summer CP allocation methodology for Duke.

The Commission finds, based on the evidence submitted by the Company, Staff, and SCEUC, that the summer coincident peak allocation methodology utilized by

Duke is most appropriate for Duke and therefore adopts the summer CP for cost allocation in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

The evidence for this finding concerning the adjusted level of operating revenues is found in the testimony and exhibits of Company witness Stimart, Commission witnesses Watts and Price, and Consumer Advocate witness Miller.

Company witness Stimart's exhibits reflected adjusted operating revenues under current rates of \$994,450,000 for South Carolina retail operations. (Hearing Exhibit 4, Stimart Exhibit 1, page 1, Stimart Supplemental Exhibit 3, page 1) Commission Staff witness Watts agreed with the Company's (\$1,004,000) adjustment to annualize revenues to the level of rates reflected in the currently approved South Carolina Retail tariffs. Watts also recommended that the Company's adjustment be modified by \$110,510 to reflect the additional revenue associated with the requested increase in the Company's Reconnect Fee from \$5.00 to \$15.00. (Tr. Vol. 5, p. 229) The Commission finds that it is inappropriate to adjust test year revenues to reflect the proposed increased reconnect fee. The additional revenues to be derived from this proposal are part of the Company's requested increase of \$68,384,000 and should be reflected as such.

Company witness Stimart adjusted test year revenue by \$6,517,000 to reflect the expected annual level of KWh sales resulting from growth in the number of customers during the test period. (Hearing Exhibit 4, Stimart Exhibit 1, page 3) Mr. Stimart further testified that the end of period level of residential and general service customers was compared to the average number of customers during the test period. The increases in number of customers were then multiplied by the applicable average KWh consumption per customer to derive the annualized change in KWh consumption based on the number of customers at the end of the test period. (Tr. Vol: 2, pp. 145-146)

Commission Staff witness Price suggested that the standard Commission method of accounting for customer growth be utilized. (Tr. Vol. 5, p. 79) Consumer Advocate witness Miller also recommended using the procedure employed by the Commission in the Company's past cases. (Tr. Vol. 5, pp. 33-34)

The Commission notes that although the Staff and Consumer Advocate contend that they are using the standard approach to customer growth, they determined growth of .87% and .6927% respectively. (Hearing Exhibit 37, Accounting Exhibit A-2 and Hearing Exhibit 36, Schedule PEM5)

The Commission concludes that the Company's adjustment which is based on growth in specific customer classes and which utilizes average consumption by class is a more precise calculation than that proposed by either the Staff or the Consumer Advocate and is therefore appropriate for use in this proceeding.

The Commission finds that the Company's adjustment to annualize revenues to reflect the currently approved South Carolina retail tariffs is appropriate and should be adopted. The Commission also finds that Duke's recommendation for the customer growth adjustment should be adopted.

Based on the above findings, the appropriate level of operating revenues for the Company under present rates after accounting and pro forma adjustments is \$994,450,000.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

The evidence for this Finding of Fact is contained in the testimony of Company witnesses Lee, Stimart and Reinke, and Consumer Advocate witness Lanzaletta. Mr. Lee testified that the Bad Creek Hydroelectric Station, a four-unit, 1,065 MW facility, was completed ahead of schedule and under budget. In his prefiled testimony, Mr. Lee testified that Bad Creek would be completed under budget at an approximate cost of \$1.1 billion. (Tr. Vol. 1, p. 59) Mr. Lee testified that pumped storage offers special dynamic advantages to the Duke system that no other type of capacity can offer. Without Bad Creek, the

projected reserve margin in 1991 would have been well below the minimum reserve margin of 20%. (Tr. Vol. 1, p. 60)

In his summary and update of his testimony given on the stand, Mr. Lee stated that Bad Creek Units 1 and 2 went into commercial operation on May 15, 1991 and were in operation at the time of the record summer peak. If these two units had not been on-line, Duke's summer reserve margin would only have been 15%. Unit 3 began commercial operation on September 3, 1991 and Unit 4 on September 13, 1991. Mr. Lee testified that Bad Creek had been completed ahead of schedule and over \$100 million under budget. He stated that the completed cost of Bad Creek compares favorably to other projects completed in the same timeframe. In addition, he testified that the capacity from Bad Creek is necessary to meet the growing demand for reliable electricity in the Duke service area and to maintain adequate reserve margins (Tr. Vol. 1, pp. 66-67)

Mr. Stimart, in the summary of his direct testimony, testified that the final plant cost of Bad Creek was approximately \$1,008,000,000. (Tr. Vol. 2, p. 165)

Company witness Reinke also testified that Bad Creek Units 1 and 2 were needed to meet the summer 1991 peak and Units 3 and 4 are needed to keep reserves at the minimum levels in 1992. Duke's reserves are projected to be 20.7% in 1992 and 18.3% in 1993. (Tr. Vol. 6, p. 94)

Planning for Bad Creek began in the late 1960's when the Company foresaw the need for pumped-storage capacity to complement the nuclear and base load plants that were being planned and built by the Company. Mr. Reinke testified that pumped-storage projects such as Bad Creek offer benefits over and above the value of the capacity alone. Pumped storage is a benefit to the Duke system because its load shape can accommodate the technology and there is sufficient nuclear and fossil generation to provide low-cost pumping energy for Bad Creek. (Tr. Vol. 6, pp. 90-91) With the addition of Bad Creek, the Duke system will

be able to operate more reliably and economically because of the complimentary fit of the pumped-storage generation with the rest of Duke's generation. At a final cost of \$1,008,000,000, Bad Creek compares favorably with other units of its type completed in the same timeframe. Exhibit (WFR-1), Hearing Exhibit 44, to Mr. Reinke's testimony, which assumes commercial operation in 1992, reflects this favorable comparison which is further enhanced by the fact that all four Bad Creek units were brought into operation ahead of schedule.

Consumer Advocate witness Lanzalotta was the only witness who raised any issues concerning the prudence of Bad Creek. Mr. Lanzalotta testified that there are indications that Duke has adequate pumped storage without the addition of Bad Creek. He testified further that his belief was based on his Exhibit (PJL-5), Hearing Exhibit 38, which showed that the generation from Duke's other pumped-storage generating unit, Jocassee, dropped by about 50% in 1992 and 1993, the first years of Bad Creek's operation. (Tr. Vol. 5, p. 119)

Company Witness Reinke testified in response to this point and stated that the projected reduced output from Jocassee in 1992 and 1993 is the result of two of the Jocassee units being scheduled to be out of service for approximately six months in each year for major maintenance work. Mr. Reinke testified further that the addition of Bad Creek would enhance the opportunity to conduct the maintenance at Jocassee in the most economical way. (Tr. Vol. 6, pp. 92-93)

Witness Reinke testified that both the Jocassee and Bad Creek units operated above their projected levels of output in 1991. In addition he testified that the pumped-storage generation for the first 19 days of September, 1991, exceeded the total generation for Jocassee in September, 1990. (Tr. Vol. 6, p. 93) The Commission finds the evidence presented on this point by the Company to be convincing and rejects the position advanced by witness Lanzalotta.

Consumer Advocate witness Lanzalotta also testified that Units 3 and 4 of Bad Creek are not needed to maintain reliable reserves over the three-year

period during which Duke expects the rates from this proceeding to be in effect. Mr. Lanzalotta testified that with the addition of Bad Creek Units 3 and 4, Duke's reserves would range from 27.9% to 23.3% during 1991-1993. (Tr. Vol. 5, p. 125) This testimony was addressed by Company witness Reinke who showed that Mr. Lanzalotta had erred in the method he used to calculate Duke's reserves. The apparent discrepancy is in how demand-side programming should be treated in calculating reserve margins. Mr. Reinke testified that the proper method to calculate reserves is to determine the combustion turbine equivalent of demand-side management programs rather than as load, which is how Mr. Lanzalotta made his calculation. Mr. Reinke's testimony sets forth in some detail that where generating capacity is to be deferred or replaced by demand-side programs, it is appropriate to use a generation equivalent model to calculate reserves. Mr. Reinke testified that using this method, Duke's reserves would be 20.7% in 1992 and 18.3% in 1993 after the addition of Units 3 and 4 of Bad Creek. (Tr. Vol. 6, pp. 94-96)

The Commission is convinced by Duke's evidence and finds that Bad Creek Units 3 and 4 are required to maintain reliable reserves. In addition, the Commission specifically finds that Duke's methodology for calculating reserves as presented in its testimony is the proper method to use.

Company witness Reinke discussed the proper Minimum Planning Reserve margin in response to Mr. Lanzalotta's testimony concerning reserve margins. Mr. Reinke testified that the consideration of new demand-side programs and the long lead times required to construct major generating projects have made the matching of growth and the need for generating capacity even more imprecise. Because of these factors, it may well be prudent to increase the minimum planning reserve margin above 20%. (Tr. Vol. 6, pp. 96-97)

The Commission believes this approach has merit and finds that the Company will need to give special consideration to the impact of demand-side programs

in establishing its minimum reserve in accordance with its testimony in this case.

Consumer Advocate witness Lanzalotta offered testimony to show that 1,237 MW of combustion turbines would cost less in 1992 than Bad Creek. Mr. Lanzalotta used a bus bar analysis to show that 1,237 MW of CTs would be able to supply the same amount of capacity and energy expected from Bad Creek in 1992 at a total annual cost which is about \$43,000,000 less than Bad Creek is expected to cost. Mr. Lanzalotta's analysis used a 5.8% capacity factor. (Tr. Vol. 5, p. 128)

Company witness Reinke testified in rebuttal to this point. Mr. Reinke testified that a bus bar analysis, which is simply the annual costs, including capital costs, of the plant divided by its annual output, is inappropriate as a means of comparing generating options with different characteristics. Such an analysis does not take into account the system benefits associated with pumped-storage such as the reduction in spinning reserve requirement and its load following capability. Mr. Reinke testified further that pumped storage is beneficial to the Duke system because its load shape is such that the pumped-storage generation can be utilized during the day to meet system load, and there are sufficient resources in the form of nuclear and efficient fossil generation to provide low-cost pumping at night and on the weekends. (Tr. Vol. 6, pp. 97-98)

Mr. Reinke testified further that Mr. Lanzalotta's use of a 5.8% capacity factor, which does not reflect the impact of the other system benefits of pumped storage in his bus bar analysis, was incorrect. In fact, Bad Creek has operated as high as 33.3% in 1991, and had numerous weeks when the capacity factor has been greater than 15%. Jocassee, Duke's other pumped storage hydroelectric generating station, has operated well in excess of 15% during 1991. A bus bar analysis using a 15% capacity factor rather than a 5.8% capacity factor, would

cost \$10 million less annually than combustion turbines. (Tr. Vol. 6, p. 98) Similarly, a 27% capacity factor for Bad Creek produces a \$79 million benefit annually over combustion turbines.

The Commission finds that, based on the evidence presented by the Company, Bad Creek provides greater savings to the consumer than an equivalent amount of combustion turbines.

Consumer Advocate witness Lanzaletta testified that the cost of Bad Creek was higher than the rates paid to co-generators. (Tr. Vol. 5, p. 127) Company witness Reinke testified in response to this point. Mr. Reinke stated that Mr. Lanzaletta's comparison was incorrect because it attempted to compare resources which have different operating characteristics. Mr. Reinke testified that co-generators and other QF's typically operate around the clock and fluctuate to meet the owner's requirements rather than Duke's system requirements. (Tr. Vol. 6, pp. 98-99) Mr. Lanzaletta acknowledged on cross-examination that one of the advantages of Bad Creek is that it will operate when the Company needs it. (Tr. Vol. 5, p. 171) The Commission finds that based on the evidence, a cost comparison of Bad Creek with co-generation is inappropriate.

After carefully reviewing all of the evidence presented by the parties, the Commission finds that the construction of Bad Creek was prudent and that it is needed to meet the demand in Duke's service area. The Commission finds further that the costs of constructing the station were prudently incurred and that the selection of hydroelectric pumped-storage generation is prudent compared to other generating alternatives. In addition, the Commission finds that Duke's reserve margins with the Bad Creek units in service will be at levels that are reasonable and necessary for reliable service.

The Consumer Advocate has criticized certain other aspects of Bad Creek. The Commission has reviewed this testimony and exhibits carefully. The

remaining criticisms, while not specifically addressed, must be rejected by the Commission as not being supported by the facts in evidence.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

In Mr. Stimart's supplemental testimony, he recommended an adjustment to test period revenues to reflect the anticipated billings to be received under FERC Rate Schedule J between Duke Power Company and Carolina Power & Light Company. (Tr. Vol. 2, pp. 159-160) This adjustment would have decreased test period costs by \$11,487,906. (Hearing Exhibit 4, Stimart Supplemental Exhibit I, page 2) Mr. Lee testified on the stand, however, that Duke had received notice from Carolina Power & Light Company that it did not intend to comply with the provisions of Schedule J. He also testified that litigation could well result. (Tr. Vol. 1, p. 73) Based upon these events, Mr. Lee and Mr. Stimart recommended that no adjustment be made to the test period as a result of Schedule J due to the uncertainties involved in that contract. (Tr. Vol. 1, p. 74) (Tr. Vol. 2, p. 160) Mr. Stimart proposed that any collections received pursuant to Schedule J be placed in a deferred account and that when the uncertainty surrounding the contract is resolved, the Company submit a proposal to adjust rates to reflect the collections in the deferred account and to reflect future collections under Schedule J in rates. (Tr. Vol. 2, p. 160)

The Commission concludes that it would be inappropriate to include any amounts from Schedule J in rates adopted in this proceeding. The Commission orders the Company to place any collections received pursuant to Schedule J in a deferred account.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

The Company and Consumer Advocate differed on the Company's adjustment to annualize the increases in wage rates and related fringe benefit costs during the test period. The Company proposed an adjustment of \$4,832,000. Witness Price agreed with this adjustment. While witness Miller agreed with the

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"concept of recognizing wage increases which have occurred during the test year", he opposed the Company's adjustment because of Duke Power's plans to reduce its workforce by three percent through attrition by the end of 1991. (Tr. Vol. 5, pp. 26-28)

Mr. Lee testified the three percent workforce reduction is the Company's expectation in an effort to identify all potential cost savings. He also testified that these efforts will not serve to reduce our cost of service but will serve to lower the level of increases. (Tr. Vol. 1, p. 53)

The Commission finds that witness Miller's proposed adjustment is inappropriate and inconsistent with the principles applied by this Commission. The effect of Duke Power's workforce plan on year-end wage expense and other expense levels is neither known nor measurable. The amount of wage increases granted during the test year is known and measurable and should be included in cost of service.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

The Company also made provision for the impact of cost increases on the Company's expenses occurring after December 31, 1990, which would be known and measurable at the time of the hearings in this proceeding.

At the hearing, Mr. Stimart identified actual wage increases of \$4,287,000 and an actual increase in NRC fees of \$1,048,000 that the Company had experienced since the end of the test year, December 31, 1990. Mr. Stimart testified that these cost increases are now known and measurable and should be considered by this Commission in determining the cost of service. (Tr. Vol. 2, pp. 166-167)

Staff witness Price recommended in his Supplemental Testimony the inclusion in cost of service of the additional NRC fees. Staff based its recommendation on its examination of the actual bills from the NRC which were furnished to the Staff and Consumer Advocate by the Company. (Tr. Vol. 4, p. 71) (Tr. Vol. 5,

p. 88) Consumer Advocate witness Miller did not address the additional NRC fees. Witness Miller did not take exception to the Company's adjustment to NRC fees as originally filed. In his direct testimony addressing attrition, witness Miller states that the Commission's current ratemaking philosophies mitigate against attrition by permitting "the annualization of various expenses to reflect changes which have occurred beyond the end of the test year, as long as the costs being used are known and measurable and reflective of normal, ongoing operations." (Tr. Vol. 5, p. 24). The Commission concludes that the additional NRC fees of \$1,048,000 are an appropriate component of cost of service which has been audited by the Commission Staff and are a known and measurable ongoing expense.

In his Supplemental Testimony, Staff witness Price did not recommend the inclusion in cost of service of \$4,287,000 for increased wages resulting from actual wage rate increases granted to employees during the period December 31 to July 31, 1991, because he did not have the opportunity to audit those wage increases. Witness Stimart explained on cross-examination that the workpapers were supplied to the Commission Staff and that the wage increase was calculated in the same manner as the adjustment for wage increases occurring within the test year which the Commission Staff accepted. (Tr. Vol. 4, pp. 71-72) The Consumer Advocate did not address this update in wage increases occurring after the test year.

The Commission concludes that the wage increases granted by the Company through July 31, 1991, meet the Commission's test of known and measurable. The Commission is mindful of the continuing effects of inflation on the Company's costs. Wage increases will continue to be granted in the months subsequent to July, 1991, and during the time the rates set in this proceeding are in effect. By including these known wage increases through July, 1991, in cost of service, the Commission is following its policies as outlined earlier by Consumer

Advocate witness Miller in order to give the Company a reasonable opportunity to earn the return this Commission allows.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

Consumer Advocate witness Miller recommended that Duke defer the costs associated with Statement of Financial Accounting Standards No. 106 (SFAS 106) because its effective date is not until 1993. (Tr. Vol. 5, p. 48) Company witness Stimart explained that SFAS 106 requires the Company to accrue, during the years that employees render the necessary service, the expected cost of providing those benefits to employees unlike the pay-as-you-go treatment afforded these benefits in the past. Witness Stimart testified that this Statement was effective in 1990⁴ giving Companies some time to obtain the necessary records to adopt this statement as early as possible before the mandatory 1993 date. (Tr. Vol. 4, p. 62) The amount of the Company's adjustment is based on the cost determinations reflected in the Company's recently completed actuarial study undertaken to establish compliance with current accounting requirements. Commission Staff witness Price agreed with the Company's recommendation to recognize SFAS 106 costs in this proceeding particularly in light of the Company's recent major changes in retirement benefits. Price noted that the Company and Commission Staff have known for years that this expense was coming. (Tr. Vol. 5, pp. 92-94) This Commission approved the adoption of SFAS 106 in the GTE South Telephone case in Docket No. 90-698-C. (Tr. Vol. 5, p. 93)

The Commission finds that the Company's adjustment to reflect the implementation of SFAS 106 meets the known and measurable standard and is appropriately included in operating expense.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 12 AND 13

The evidence relating to Demand Side Management (DSM) costs and the DSM Stipulation is contained in the testimony of Company witnesses Lee, Denton,

Reinke, and Stimart; Consumer Advocate witnesses Chernick, Miller, and LanzaIotta; Commission Staff witness Watts; and SCEUC witness Phillips.

Pursuant to Docket No. 87-223-E, the Company, as well as other parties including the Consumer Advocate and Commission Staff, have agreed to comprehensive integrated resource planning procedures, including the requirement for utilities to submit by April 30, 1992, Integrated Resource Plans (IRPS) in accordance with the procedures agreed to and approved by the Commission therein.

Company witness Denton testified that the Company has been engaged in least cost planning since 1974 when the Company recognized the need for an alternative to building generation. (Tr. Vol. 6, p. 124) This planning process became more formalized in recent years and the least cost planning analysis produced a Least Cost Integrated Resource Plan in 1989 followed by two Short Term Action Plans which were submitted to the North Carolina Utilities Commission in 1990 and 1991. Duke will file the results of its current least cost planning cycle with this Commission in April, 1992. (Tr. Vol. 6, p. 125) Mr. Denton testified at length in his prefiled testimony and in his rebuttal testimony as to the comprehensive methodology used by Duke to assess the value of demand-side options as part of the least cost planning process. He testified that the purpose of the process is to select the most appropriate least cost alternative to meet future resource requirements. This is done by subjecting demand-side programs to a complex analysis, the results of which will be to create a blend of available options that will dependably and reliably meet customers' needs at the lowest reasonable cost. (Tr. Vol. 2, pp. 92-93) Witness Denton testified that all of the programs implemented by Duke for which Duke is seeking recovery have been stringently tested to ensure that they are cost effective. (Tr. Vol. 6, p. 127)

Company witness Reinke offered testimony to show how demand-side programs are evaluated as part of Duke's Short Term Action Plan to offset the need for generating capacity. (Tr. Vol. 6, p. 89)

Company witnesses Lee and Denton testified that the Company has accelerated its demand-side expenditures. These increased expenditures are included in cost of service in this case. (Tr. Vol. 1, p. 54; Vol. 2, p. 94) Mr. Stimart testified that test year expenses were adjusted to reflect incremental operating expenses for expansion of DSM programs. (Tr. Vol. 2, p. 151) Mr. Denton testified that the Company is seeking to recover incremental DSM costs of \$6,475,000 in this case. (Tr. Vol. 2, p. 95) Commission Staff witness Watts reflected a similar adjustment in his analysis. Mr. Watts testified that the Staff had reviewed the demand-side programs, analyzed cost data from programs in effect in 1990, and concurs with Mr. Stimart's adjustment. These programs include many currently ongoing programs such as Residential Air Conditioning Load Control, Water Heater Load Control, Interruptible Service, Standby Generator, and Residential Off-Peak Water Heater Sales as well as an end-use research project. (Tr. Vol. 5, pp. 230-231)

Consumer Advocate witness Chernick testified that since the Company has not submitted its integrated resource plan for regulatory review, it has failed to establish that the plan is truly least cost. Mr. Chernick contends that the Company has provided no basis to evaluate the prudence of its demand-side program expenditures. Therefore, Mr. Chernick recommended that the \$6,475,000 should not be recovered in rates in this proceeding until the Company could show the prudence of these costs. If the Company can demonstrate in this proceeding that certain of these expenditures can be prudently committed, then those costs may be approved for recovery through expensing, rate basing, and/or deferrals. For DSM costs that cannot be supported in this case, Mr. Chernick proposed that Duke file for Commission review at a later time. In addition, Mr. Chernick

testified that there were a number of features of the Company's DSM programs that were inconsistent with least-cost principles including: (1) the cost effectiveness of certain programs referred to as "load building", (2) the "lost opportunities" due to the way Duke structured its programs, (3) the possibility of cream skimming, and (4) rate design that encourages customers to "take back" their energy savings through increased consumption. (Tr. Vol. 5, pp. 182-186)

Following the submission of prefiled direct testimony, the Commission Staff, the Company, and the Consumer Advocate reached agreement on a Stipulation for recovery in this proceeding of DSM expenditures related to the Company's least cost plan. (Hearing Exhibit No. 45, Attachment B)

The Stipulation provides first, that the test year (1990) expenditures including advertising expense may be recovered as proposed by the Company in this proceeding. Second, \$6.475 million of DSM costs for programs listed on page 15 of Mr. Denton's prefiled testimony actually incurred by the Company above the test year level may be booked by the Company into a deferred account. Advertising expenditures for these programs that are reasonable and designed to achieve the goals of the respective programs may also be booked into the deferred account. Further, the Company will credit the deferred account for found revenues to the extent lost revenues resulting from lost KWh sales due to DSM conservation programs are included in the deferred account. A return on the deferred balance will be computed monthly and added to the balance. The rate of return will equal the net of tax rate of return approved by the Commission in Docket No. 91-216-E or subsequent rate cases. The Stipulation provides further that if it is determined that the expenditures were prudent and for used and useful DSM programs, the balance in the deferred account will be reflected in the Company's next rate case or appropriate IRP docket by amortizing the then existing balance over a period of five years, except that

the Commission can order a different period if the amount in the deferred account would have a significant impact on rates.

Paragraph 8 of the Stipulation provides that the Commission may consider for inclusion in rates in this proceeding additional DSM costs that are actual and prudently incurred by the Company in 1991 attributable to the Company's Interruptible Service Program, Stand-by Generator Program, Water Heater and Air Conditioner Load Control Programs and associated advertising costs. These programs are listed on Appendix 2 to the Stipulation and amount to \$3,910,814.

Finally, the Stipulation provides that although the parties have entered into the Stipulation, all relevant prefiled testimony, rebuttal and surrebuttal testimony, will be entered into the record as if given orally, and the parties will not cross-examine the witnesses on the testimony. Accordingly, rebuttal testimony was offered by Company witness Denton in response to points raised by Consumer Advocate witness Chernick and surrebuttal testimony was offered by Consumer Advocate witnesses Chernick and Miller.

In rebuttal testimony, Company witness Denton addressed each of the points raised by Mr. Chernick in his direct testimony. Mr. Denton testified that the load building programs referred to by Mr. Chernick and implemented by the Company have been stringently tested to ensure that they are cost effective. Mr. Denton testified further that these programs are cost effective because the marginal revenues exceed the marginal costs and therefore reduce rates for all customers. In particular, Mr. Denton testified that the Company's residential MAX program is not load building but rather is a program that combines high efficiency home insulation techniques with high efficiency heating and cooling equipment. Further, Mr. Denton explained that the dual fuel heat pump program utilizes a high efficiency unit to replace an existing cooling unit which will have a significant demand and energy reduction in the summer months. (Tr. Vol. 6, pp. 127-128)

With regard to the second point raised by Mr. Chernick -- "lost opportunities" --, Mr. Denton testified that the Company agrees with the principle of "lost opportunity" resources and includes this concept in its demand-side program design. In response to Mr. Chernick's concerns regarding the residential MAX program and high efficiency refrigerator and freezer programs, Mr. Denton testified that by specifying a total energy efficiency structure prior to construction, lost opportunities are eliminated. The high efficiency refrigerator and freezer program also makes use of opportunity resources by providing incentives at the time of purchase or replacement of existing units. Finally, Mr. Denton testified that the High Efficiency Heat Pump and Air Conditioning Incentive Program supports opportunity resources by providing a sliding scale rebate that directly provides the economic incentive to purchase the most energy efficient heating and cooling. (Tr. Vol. 6, p. 129)

Mr. Denton also offered testimony rebutting Mr. Chernick's concerns about "cream-skimming". Mr. Denton testified that DSM programs considered by Duke are evaluated for cost effectiveness through the least cost planning process. He pointed out that these programs are designed to maximize total KW and KWh reductions by taking into consideration anticipated customer participation. Mr. Denton concluded that Mr. Chernick was incorrect in his assertions concerning "cream skimming". (Tr. Vol. 6, p. 130)

Mr. Chernick's fourth area of concern dealt with what he called inappropriate conservation rate designs. He stated that Duke's pricing "fits poorly" with least cost planning. (Tr. Vol. 5, p. 211) Company witness Denton testified in rebuttal that Duke uses an established cost of service methodology for rate design which reflects the costs associated with serving customers in particular rate categories. (Tr. Vol. 6, p. 130)

Mr. Denton offered extensive testimony on the Company's least cost planning process. He stated that all DSM programs are stringently tested to ensure their

cost effectiveness. He testified further that all DSM dollars have been prudently spent according to the Company's Short Term Action Plan. (Tr. Vol. 6, pp. 131-132)

Consumer Advocate witness Chernick recommended disallowance of the costs associated with the Company's DSM pilot programs. (Tr. Vol. 6, p. 213) The Company disagreed with this position. Witness Denton testified that the seven pilot programs in place in 1991 are an expansion of these types of programs following the recommendations of certain DSM experts advising the NCUC Public Staff. Mr. Denton stated that these programs will provide important information that will reduce the costs of full scale implementation. Similar testimony was offered by Mr. Denton with regard to funds for evaluation procedures. Mr. Denton testified that such evaluation procedures were needed to ensure accomplishment of objectives for ongoing programs and to verify least cost planning accomplishments. (Tr. Vol. 6, pp. 133-134)

With regard to the Stipulation, witness Denton recommended that the Commission approve the deferred accounting provided for in the Stipulation so that the Company will not be penalized for prudent DSM expenditures. In addition, Mr. Denton testified that 1991 costs referred to in Appendix 1 of the Stipulation were actual costs incurred by the Company with regard to the interruptible service and load control payments that were in excess of the 1990 test year costs. Mr. Denton offered evidence to show that an additional \$3,668,342 was incurred by the Company in 1991 with regard to the Interruptible Service and an additional \$242,472 was incurred with regard to load control payments. Mr. Denton testified that these costs were actual and prudent and should be included in rates in this proceeding. He testified further that Standby Generator payments and advertising were at the same level as 1990 costs. (Tr. Vol. 6, pp. 134-137)

case and defer the costs until Duke documents its expenditures and demonstrates the prudence and cost effectiveness of the DSM programs. As a basis for this recommendation, Mr. Chernick states that Duke has failed to provide adequate evidence of the prudence of the 1991 expenditures. (Tr. Vol. 6, p. 151)

With regard to the load control programs, which include interruptible contracts, residential load control and standby generators, Mr. Chernick states that the Company has failed to adequately demonstrate that the costs of these programs are less than the cost of combustion turbine (CT) capacity. In addition, he states that the Company has failed to consider the effects of load control on the transmission and distribution system. Mr. Chernick also states that the fact that the load control programs are operated under Commission-approved tariffs does not mean that such expenditures are prudent. Finally, Mr. Chernick takes issue with what he states is the Company's failure to demonstrate the prudence of the evaluation and pilot programs and advertising. Witness Chernick recommends that all recovery of incremental DSM expenditures associated with these programs be deferred until the Company documents its expenditures and programs and demonstrates their prudence and cost effectiveness. (Tr. Vol. 6, pp. 146-151)

Consumer Advocate witness Miller testified that the \$3,911,000 of 1991 DSM incremental costs should not be included in rates because the Company has provided no support for these costs even though the Consumer Advocate requested supporting workpapers. Therefore, Mr. Miller states that these costs are not known and measurable. (Tr. Vol. 6, p. 153) In a letter to the Executive Director of the Commission dated October 18, 1991, the Company stated there was no specific request for DSM workpapers. The Company further stated that the \$3,911,000 was set forth in the Stipulation to which the Consumer Advocate agreed.

Duke, the Commission Staff, and the Consumer Advocate have submitted their Stipulation to the Commission for approval in this proceeding. No party has objected to approval of the Stipulation. The Commission has carefully reviewed the Stipulation and the testimony of the parties concerning the recovery of DSM costs. The Commission concludes that the Stipulation is reasonable and it is hereby approved. The Commission authorizes deferral accounting as requested in the Stipulation. The Company shall utilize Account No. 188, miscellaneous deferred debits, for the net deferral.

Although the Company, the Commission Staff, and the Consumer Advocate entered into a Stipulation, certain matters were left open for the Commission to decide. Paragraph 5 of the Stipulation provides for deferred accounting of up to \$6,475,000 of incremental DSM expenses incurred above the 1990 test year level of expenses. This \$6,475,000 was the amount included in the Company's original request for incremental DSM expenses. Paragraph 8 of the Stipulation provides that the Commission may include in rates additional DSM costs that are presented in Appendix 1 to the Stipulation and that it finds are actually and prudently incurred or prudently committed costs. Appendix 1 to the Stipulation identifies these costs as \$3,668,342 for Interruptible Service credits and \$242,472 for load control costs as discussed previously. Company witness Denton and Consumer Advocate witnesses Chernick and Miller have offered testimony on the prudence of the \$3,911,000 expenditures. Commission Staff witness Watts recommended allowance of the \$6,475,000 originally requested as an expense item and did not update the adjustment after the parties entered into the Stipulation.

The Commission has carefully considered the testimony and exhibits of each party. Based on the totality of evidence presented, the Commission finds that the \$3,911,000 of 1991 DSM costs have been actually and prudently incurred and should be included in rates in this proceeding. Mr. Denton also testified that

these 1991 costs are ongoing and will continue to escalate. The more costs deferred now will only result in higher rates for future customers and a disincentive for DSM expenditures. Although Mr. Chernick and Mr. Miller contend that these costs were unsupported, Mr. Denton's testimony clearly showed that these 1991 costs were actually incurred by the Company in 1991. Therefore, they are known and measurable. These amounts were agreed to by the parties to the Stipulation, and no party reserved the right to cross-examine the Company with regard to these costs. Although Consumer Advocate witness Miller stated that the Company did not provide support for the DSM costs, this claim is not supported by the facts. Having reviewed the evidence of all of the parties, the Commission finds without merit the Consumer Advocate's arguments that the \$3,911,000 were not known and measurable costs incurred by the Company.

With regard to prudence, the Commission finds that Mr. Denton's testimony with regard to the least-cost planning process and the fact that these DSM programs allow Duke to avoid capacity additions at a cost less than Duke could have built supply-side capacity is compelling on the question of prudence. Mr. Denton's extensive experience in the area of least-cost planning and DSM programs gives additional weight to his testimony on these matters. In addition, SCEUC witness Phillips testified specifically that the interruptible service credits included in these costs were too low. The Commission notes that the interruptible service credits and the load control credits, which comprise the \$3,911,000 amount, are included in the tariffs of the Company previously approved by this Commission. Therefore, the Commission finds that based on the evidence presented by the Company and Mr. Phillips, the \$3,911,000 incremental DSM costs are prudent and should be reflected in the cost of service in this proceeding.

The Consumer Advocate has challenged other features of Duke's DSM programs. The Commission has carefully reviewed this testimony and exhibits. The remaining objections and proposals, while not specifically addressed, must be rejected by the Commission. The Commission finds that the cost of DSM programs included in the test year and the incremental 1991 DSM costs are prudent and in the best interests of the customers.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 14, 15 AND 16

The evidence for these findings concerning the appropriate level of depreciation and decommissioning expense is contained in the testimony of Company witnesses Stimart, White, and LaGuardia, Commission Staff witness Watts, and Consumer Advocate witness Lanzalotta.

Duke adjusted depreciation expense to reflect its proposed depreciation rates and nuclear decommissioning expense. The Company based its proposed depreciation rates on a study prepared by Foster Associates, Inc. which is discussed in the testimony of Company witness Ronald White.

The following table sets forth the Company's current and proposed depreciation rates:

<u>Function</u>	<u>Present</u>	<u>Proposed</u>	<u>Difference</u>
Production			
Steam	3.57%	2.57%	(1.00%)
Nuclear			
Decommissioning	0.67%	1.61%	0.94%
Investment	3.33%	3.09%	(0.24%)
Total Nuclear	4.00%	4.70%	0.70%
Hydraulic	1.50%	1.98%	0.48%
Other	0.00%	0.74%	0.74%
Transmission	3.00%	2.57%	(0.43%)
Distribution	3.40%	3.59%	0.19%
General	5.48%	3.59%	(1.89%)
Total Utility	3.68%	3.69%	0.01%

This study also included the annual funding requirements of the nuclear decommissioning amounts based on the site specific decommissioning costs

studies included in Mr. LaGuardia's testimony. Commission Staff witness Watts testified that both the depreciation and decommissioning studies were reviewed by the Commission Staff and were just and reasonable and in line with the studies previously approved by this Commission. (Tr. Vol. 5, pp. 249-250)

Consumer Advocate witness Lanzaletta also reviewed the decommissioning study performed by Mr. LaGuardia. Mr. Lanzaletta testified that he did not propose any changes to the decommissioning costs developed by Mr. LaGuardia and noted that Mr. LaGuardia's costs were very much in line with the results of the Battelle decommissioning study funded by the Federal Government. (Tr. Vol. 5, p. 158)

The Company proposed in this proceeding to change its decommissioning expense for its nuclear reactors. Mr. Stimart testified that in the past a .67% rate for decommissioning was included in the Company's 4% nuclear depreciation rate. The Company proposed to change the decommissioning expense reflected in rates based upon current studies of the expected cost of nuclear decommissioning expense. The amounts in the study are based on the prompt dismantlement method of decommissioning because the Nuclear Regulatory Commission requires total funding of the contaminated components as of the date of termination of the operating license of each unit. In order to minimize costs, Duke decided to utilize a combination of internal and external funds to fund decommissioning. The Nuclear Regulatory Commission requires external funding for decommissioning the contaminated portion of each unit. The external fund amount is based on estimates contained in the site specific studies conducted by TLG Engineering, Inc. in 1989 and 1990 for each Duke nuclear unit. The external fund will be tax qualified to the extent possible under IRS rules and guidelines. The cost of decommissioning the rest of the plant will be funded internally and accrued based on a sinking fund methodology. (Tr. Vol. 2, pp. 147-148)

The study supporting the annual decommissioning expense is discussed in the testimony of Thomas LaGuardia. The following table sets forth the components of decommissioning expense included in cost of service in this proceeding:

(Dollars in Thousands)		<u>Annual Cost</u>	
<u>Unit</u>	<u>Total Cost*</u>	<u>System</u>	<u>S.C. Retail</u>
Oconee 1	\$164,792	\$10,491	\$ 2,722
Oconee 2	158,311	10,101	2,621
Oconee 3	202,855	12,218	3,171
Oconee ISFSI	21,750	1,325	344
McGuire 1	171,246	8,950	2,323
McGuire 2	186,265	9,294	2,412
Catawba 1	23,476	1,199	311
Catawba 2	26,163	1,271	330
	-----	-----	-----
Total	\$954,858	\$54,849	\$14,234
	=====	=====	=====

*1990 Dollars

All parties agreed with the Company's adjustment to use 1% real return for nonqualified nuclear decommissioning trust investments. The only area of difference between the Company and the Consumer Advocate relates to the appropriate real after tax return on funds invested in qualified nuclear decommissioning trusts. Consumer Advocate witness Lanzalotta proposed that Duke assume a 1.5% real after tax return on these funds instead of a zero real return assumption. Lanzalotta based his recommendation on a study of selected bond yields during the past ten years. (Tr. Vol. 5, pp. 134-140) On cross-examination of Lanzalotta, Duke presented evidence that, based on data from 1960 to 1988, no class of assets allowable for investment by qualified decommissioning trusts earned a real return as reported in a 1991 volume of The Energy Journal. Another study in the same volume reports that a zero real return assumption is "the only realistic alternative" for qualified fund securities. Returns on nonqualified funds should not be expected to be

significantly higher unless the utility accepts an amount of risk which is not appropriate for such funds. (Tr. Vol. 5, pp. 174-175) (Hearing Exhibit No. 42)

Mr. Stimart also testified that the Company will reassess its decommissioning provision every four years in order to consider changes in the estimate of the cost of decommissioning (including the effect of any life extensions granted to the Company by the NRC) and how well the decommissioning fund has performed. (Tr. Vol. 4, pp. 74-76)

Based on all the evidence, the Commission finds the Company's depreciation rates reasonable and approves the rates. The Commission also finds that it is appropriate to adopt the Company's annual decommissioning provision to include in cost of service. The Commission further finds that the Company's assumption of a zero real return on funds invested in qualified nuclear decommissioning trusts is reasonable and well supported by the evidence.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 17

The evidence for this finding concerning the reasonable level of test-year electric operating expenses is found in the testimony and exhibits of Company witnesses Stimart, White and LaGuardia, Commission Staff witnesses Price and Watts, and Consumer Advocate witnesses Miller and Lanzalotta. The Company proposed total electric operating expense of \$837,757,000. 3/

The differences between the Company, the Commission Staff, and Consumer Advocate are summarized below:

3/ Unless otherwise specified, all numbers throughout the remainder of this Order are allocated as South Carolina retail.

Electric Operating Expenses

	<u>Company</u>	<u>Commission Staff</u>	<u>Consumer Advocate</u>
O&M Expenses:			
Fuel Used in Electric Generation	\$197,625	\$196,592	\$196,592
Purchased Power and Net Interchange	141,680	141,680	130,192
Wages, Benefits, Materials, etc.	274,563	267,974	251,058
Depreciation and Amortization	121,499	116,895	119,855
General Taxes	48,755	42,122	46,091
Interest on Customer Deposits	468	474	468
Income Taxes	57,562	61,465	69,709
Amortization of ITC	(4,395)	(4,395)	(4,395)
	<u>-----</u>	<u>-----</u>	<u>-----</u>
Total Electric Operating Expenses	<u>\$837,757</u>	<u>\$822,807</u>	<u>\$809,570</u>

O&M Expenses

The three categories of O&M expenses are fuel, purchased power and net interchange, and other O&M expenses, i.e., wages, benefits and materials. The Commission will discuss each area separately. The only difference between the Company, the Commission Staff, and Consumer Advocate with respect to fuel used in electric generation is related to the fuel expense derived from the Company's customer growth adjustment. This adjustment has been considered by the Commission previously. Having accepted the Company's proposed adjustment for customer growth, the Commission concludes that \$197,625,000 is the appropriate level of fuel expense for use in this proceeding.

The difference between the Company and the Consumer Advocate with respect to purchased power expense is the 400 MW Schedule J sale to Carolina Power & Light Company. The Commission's findings concerning this item were previously discussed under Finding of Fact No. 8 and will not be repeated here.

Other O&M Expenses (Wages, Benefits, Materials, etc.)

The difference between the Company, Commission Staff, and Consumer Advocate with respect to other O&M expenses is summarized below:

(000's)

	<u>Company</u>	<u>Commission Staff</u>	<u>Consumer Advocate</u>
Wages, Benefits, Materials, etc,	\$274,563	\$267,974	\$251,058
Difference		\$(6,589)	\$(23,505)

Analysis of Differences

1.	Disallowance of Test Year Growth and Inflation	\$(3,796)	\$(3,796)
2.	Post-Test Year Cost Increases:		
	NRC Fees		(1,048)
	Wage Increases	(4,287)	(4,287)
3.	Reclassification of Expenses as Nonelectric	(274)	
4.	Increase for Wage Rate Changes During the Test Year	--	(4,832)
5.	Removal of LES amortization	(616)	(574)
6.	Disallowance of Portion of Officers' Salaries	(180)	(15)
7.	Demand Side Management Costs	2,564	(3,911)
8.	Industry Association Dues	--	(469)
9.	Employee Moving Expense	--	(455)
10.	Advertising Expense	--	(110)
11.	Storm Damage Costs	--	(121)
12.	Lobbying Expense	--	(57)
13.	Implementation of SFAS 106	--	(3,830)
		-----	-----
	TOTAL DIFFERENCE	\$(6,589)	\$(23,505)

Item 1. Test Year Growth and Inflation

Company witness Stimart proposed adjustments for growth and inflation during the test year. The Company made an adjustment of \$859,000 to annualize O&M expenses other than fuel, purchased power, wages and benefits based on growth in customers during the test period. The Company also adjusted test period operating expenses, primarily operating materials and supplies, by \$2,937,000 to reflect the continual rise in unit costs which occurred during the test period. This adjustment annualizes the effect of inflation which took

place throughout the test period. (Tr. Vol. 2, p. 150) Both Commission Staff witness Price and Consumer Advocate witness Miller proposed to disallow adjustments for test year inflation as not being known and measurable. (Tr. Vol. 5, pp. 25, 79-80)

Witness Stimart testified that this type of adjustment is necessary to make test period O&M expenses representative of the expenses which will be incurred while the proposed rates are in effect. (Tr. Vol. 2, p. 150) However, neither the Commission Staff nor the Consumer Advocate witness disputed the fact that inflation occurred both before and during the test period, and is likely to continue for years to come.

The Commission finds that the Company's adjustments for test year inflation and growth are appropriate. The objective of the test period is to be representative of the conditions expected to exist during the period of time the rates determined in this proceeding will be in effect. Various adjustments to the historical test year are made to accomplish this objective. The Commission acknowledges that inflation is and has been a "fact of life" in the modern economic environment. The level of inflation can be reasonably measured, and the Company's calculation of these adjustments is reasonable. The Commission believes it is necessary to reflect cost escalation in cost of service in order to present a representative picture of the conditions expected to exist during the time the rates approved in this Order will be in effect.

Item 2. Post-Test Year Cost Increases

The Commission's findings concerning this issue have already been discussed under Finding of Fact No. 10 and will not be repeated here.

Item 3. Reclassification of Expense as Nonelectric

Commission Staff witness Price eliminated certain actual cost of service items and reclassified them as costs to be borne by the Company's stockholders.

Those costs include:

(000's)

Payments to EEI for Media	
Communications	\$ 64
Dues and Subscriptions	99
General Advertising	40
Recreation Expense	71

TOTAL	<u>\$274</u>

As explanation for the adjustment, witness Price testified that the Commission has traditionally held that these types of expenses should not be ratepayer supported since they are not necessary to provide electric service. (Tr. Vol. 5, p. 80)

The Commission has adopted the Uniform System of Accounts which provides for costs of this nature to be supported by ratepayers as an electric expense. The Commission therefore rejects witness Price's adjustment. These costs are a necessary part of doing business and they are recorded in the proper accounts according to the Uniform System of Accounts. (Tr. Vol. 4, p. 87)

Item 4. Increase in Wage Rate and Fringe Benefits

The Commission's findings concerning this issue have already been discussed in Finding of Fact No. 9 and will not be repeated here.

Item 5. Louisiana Energy Services

The Company has included in its total Company per book figures \$2,209,000 for the amortization of the Company's investment in Louisiana Energy Services (LES). The Company seeks recovery from South Carolina ratepayers of \$616,000 in this case, which is South Carolina's portion of the amortization. Duke has

classified LES expenditures as research and development (R&D). (Tr. Vol. 1, p. 63)

LES is a partnership between a Duke subsidiary and four other entities. LES is exploring the construction and licensing of a uranium enrichment services technology that has not previously been utilized or licensed in this country. Presently the only provider of uranium enrichment services in the United States is the Department of Energy (DOE). (Tr. Vol. 1, pp. 63-65)

Mr. Lee testified that participation in LES was necessary in order for the project to be viable. The project would supply needed competition to the uranium enrichment services market which will lower the price of uranium enrichment services. Mr. Lee testified that the Department of Energy price is high compared to the costs of uranium enrichment services utilizing centrifuge technology such as LES would employ. In addition, Mr. Lee testified that Duke would receive a favorable uranium enrichment services contract if the LES project was successful. Finally, Mr. Lee testified that as a result of the potential competition provided by LES the Department of Energy had already lowered its uranium enrichment services prices. These lower prices more than offset Duke's total expenditures in connection with LES. (Tr. Vol. 1, pp. 63-65)

Commission witness Price recommended that LES costs be removed from the cost of service for South Carolina ratepayers for several reasons including the almost complete amortization of the LES costs as of the date of this hearing, the fact that the construction and operating licenses were not docketed by the NRC until May 15, 1991, the likelihood of no response from the NRC until late 1991, the uncertainty of the decision to proceed with the project unless reasonable financing is obtained, the possibility of reduced prices from the DOE with competitive pressure, Duke's lack of experience with this technology,

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and the reduction in investment if Duke sells its interest in LES.
(Tr. Vol. 5, pp. 85-86)

Consumer Advocate witness Miller recommended that LES costs be removed from test year operating expenses and set up in a deferred account because of the contingencies surrounding licensing, the decision to proceed to construction, and Duke's plans to sell or redeem its investment at the end of the venture period. (Tr. Vol. 5, p. 16)

The Commission finds that it is appropriate in this proceeding to amortize LES expenditures as proposed by the Company. No party has contested that these expenditures have been reasonably and prudently incurred and are for the benefit of Duke's customers. Furthermore, no party has challenged the research and development nature of these expenditures. There is no reason to treat LES expenditures any differently than any other research and development costs. The points outlined by Mr. Price further indicate the R&D nature of these expenditures as an attempt by the Company to seek innovative ways to supply electricity at least cost. Indeed, the evidence in this case indicates that Duke's present customers already are receiving benefits from LES expenditures because of the reduction of Department of Energy prices. The Commission continues to encourage R&D expenditures especially when there exists a strong potential to benefit electric customers.

Item 6. Officers' Salaries

Both Commission Staff witness Price and Consumer Advocate witness Miller proposed to eliminate the increases in officers' salaries for the test year in accordance with established Commission policy. Mr. Stimart testified that officers' salaries are already allocated to nonelectric operations. First, salaries are allocated to the extent officers can identify time spent on nonelectric business. Second, salaries are allocated to nonelectric through the application of the Massachusetts formula. (Tr. Vol. 4, p. 40)

Based on this evidence, the Commission determines a further allocation of officers' salaries is not required as proposed by Mr. Price and Mr. Miller.

Item 7. Demand-Side Management Stipulation

The Evidence and Conclusions for this item have previously been discussed under Findings of Fact Nos. 12 and 13. The Commission will not repeat that discussion here.

Item 8. Industry Association Dues

Duke included in cost of service dues for Edison Electric Institute (EEI) and the United States Council for Energy Awareness (USCEA). Consumer Advocate witness Miller proposed the elimination of these dues from test year operation and maintenance expenses based on his belief that these two associations' activities do not provide a direct and primary benefit to ratepayers. (Tr. Vol. 5, pp. 38, 44)

The Commission notes that EEI is recognized as a central source of authoritative information on electric energy and provides factual information to congressional committees and regulatory agencies. EEI's efforts have saved electric companies and their ratepayers millions of dollars thus directly benefitting South Carolina retail customers. Mr. Stimart testified that a portion of the EEI dues have already been recorded as a nonelectric expense. Each year EEI tells each of its member companies the portion of EEI dues not related to electric operations. The amount indicated in this letter is the result of audits and negotiations between the NARUC management and EEI. (Tr. Vol. 4, p. 59) As a result, EEI expenses for lobbying and certain media activities are not accounted for in electric utility operations.

The USCEA's activities are primarily related to nuclear energy. Its activities include the examination of generic issues related to nuclear power and the collection and publication of statistical and other information related to nuclear power. Duke and its customers rely heavily on nuclear power for the

reliable delivery of electricity. It clearly benefits the Company's customers to have a reliable source of information in the constantly changing nuclear environment. Based on the foregoing discussion, the Commission finds that witness Miller's adjustments for EEI and USCEA dues are inappropriate.

Item 9. Employee Moving Expense

Witness Miller proposed to adjust the test year costs associated with employee moves and relocations to reflect the average employee moving expense incurred over the 5-year period from 1986-1990 because of fluctuations in moving expense from year to year. Witness Miller explained "it is important that any abnormally low or high expenditure be normalized for rate making purposes in order that the test year expenditure will be as representative as possible of the expenses that are anticipated to be incurred during the time the rates will be in effect." (Tr. Vol. 5, p. 32) Witness Stimart testified on cross-examination that with the ongoing aggressive assessment of costs, the movement of the Company's workforce experienced in 1990 should continue at an even higher rate. He concludes that 1990 costs for employee moving expense are representative of the upcoming years. (Tr. Vol. 4, pp. 81 & 82) The Commission finds that witness Miller's proposed adjustment is not supported by any evidence indicating that the 1990 expense level is unrepresentatively high.

Item 10. Advertising Expense

Witness Miller proposed to exclude advertising expense associated with ads which he alleged were of a goodwill or image building nature, ads which are purportedly contributions to various organizations, and a single billing error in the month of December for which the Company received a credit for \$135,857 in January, 1991. Mr. Miller contended that these advertising expenses do not provide a direct and primary benefit to the ratapayers. (Tr. Vol. 5, pp. 39-41) Mr. Stimart testified that these costs are a necessary part of doing business

and have been recorded in the proper electric operating expense account.
(Tr. Vol. 4, p. 87)

This Commission has adopted the FERC Uniform System of Accounts for recording utility transactions. These advertising costs were recorded as an electric operating expense as prescribed by this accounting system and as such are an appropriate expense for cost of service.

Item 11. Storm Damage Costs

The Commission approved deferred accounting of storm damage costs incurred in 1989 with a five-year amortization. In 1989, Duke experienced two of the most devastating storms in its history, the largest being Hurricane Hugo.

Consumer Advocate witness Miller proposed to adjust the annual amortization of deferred storm damage costs by removing 10.2% of the amortization because the deferred costs include certain labor and associated benefits that Mr. Miller alleges were already included in base rates. (Tr. Vol. 5, pp. 50-51)

The Commission notes that witness Miller incorrectly calculated his adjustment to remove a certain amount of labor by using a jurisdictional allocation factor. The Company's cost of service for South Carolina retail includes storm damage amortization expense on a direct charge basis. Witness Miller acknowledged on cross-examination by the Company that use of a jurisdictional allocation factor is inappropriate when expenses have been directly assigned. (Tr. Vol. 5, p. 64)

Based on the evidence, the Commission finds that the Company's treatment of storm damage expense is appropriate.

Item 12. Lobbying

Witness Miller recommended that 50% of all Public Affairs Department expenses be excluded from test year operating expenses and charged below the line as lobbying. Miller contended that the portion of the expense charged below the line by the Company is not representative of the lobbying-related

efforts conducted by employees in the Company's Public Affairs Department.
(Tr. Vol. 5, pp. 42-43)

Mr. Stimart testified that the Company charges employee wages and expenses to nonelectric while they perform their job with respect to lobbying.
(Tr. Vol. 4, p. 53) This is in accordance with the Uniform System of Accounts. He further testified that the amount charged to nonelectric is greater than it should be because the Company assumes the employee is lobbying 100% of the time while the employee is in the state capital during legislative session.
(Tr. Vol. 4, p. 54)

The Commission disagrees with the Consumer Advocate's lobbying adjustment. Legislation can materially affect utility costs. The Clean Air Act is an example. The Consumer Advocate would eliminate all costs incurred in the Company's attempt to "influence the passage, defeat or amendment of legislation of interest to the Company." The Company has already allocated costs to nonelectric operations for lobbying.

Item 13. Implementation of SFAS 106

The Commission's findings concerning this issue have been discussed under Finding of Fact No. 11 and will not be repeated here.

Depreciation and Amortization

The Company proposes depreciation and amortization expense of \$121,499,000. The differences between the Company, Commission Staff, and Consumer Advocate are summarized below:

	(000's)		
	<u>Company</u>	<u>Commission Staff</u>	<u>Consumer Advocate</u>
Depreciation and Amortization	\$121,499	\$116,895	\$119,855
Difference		\$(4,604)	\$(1,644)

Analysis of Differences

1. Bad Creek Depreciation	\$ (109)	\$ 270
2. Bad Creek Deferred Cost	(4,915)	955
3. Decommissioning Expense	--	(2,869)
4. Amortization of Coley Creek Costs	--	*
5. Amortization of Catawba Costs	420	--
	-----	-----
Total Difference	<u>\$(4,604)</u>	<u>\$ (1,644)</u>

* Adjustment recommended but not reflected

Item 1. Bad Creek Depreciation

The first area of difference relates to the amount of Bad Creek dollars included in electric plant in service. The Company included all four units; however, Commission witness Price recommended that only the Bad Creek balance through August 31, 1991, be included in gross plant because the Commission Staff had not audited the Company's updated numbers. Because of the difference in plant balance, the Commission Staff and the Company recommended different amounts for depreciation expenses.

Consumer Advocate witness Lanzalotta recommended disallowance of operating costs related to Units 3 and 4 as excess capacity but did not reflect this reduction in any of his exhibits or those of Consumer Advocate witness Miller.

The difference between the Company and the Consumer Advocate results from witness Miller not adjusting his exhibits to consider the Company's update of Bad Creek Costs.

Based on the evidence, the Commission finds that it is appropriate to include \$5,182,000 of depreciation related to Bad Creek in cost of service as proposed by the Company.

Item 2. Bad Creek Deferred Cost

(000's)	
<u>Company</u>	<u>Commission Staff</u>
\$6,649	\$1,734
Difference	\$(4,915)

This difference results from the Commission Staff's recommendation of a ten-year amortization of the deferred cost related to the commercial operation of Bad Creek. The Company included in cost of service a three-year amortization of these costs together with the carrying cost on the unamortized cost during this three-year period. (Tr. Vol. 2, p. 151) The Commission Staff recommends the unamortized balance be included in rate base in order to allow the Company to recover the carrying cost of the unamortized balance during their recommended ten-year amortization period.

Witness Miller made no adjustment to the Company's proposed adjustment (Tr. Vol. 5, p. 62) nor did witness Miller update his exhibits to reflect the lower deferred costs as updated by the Company.

The Commission takes notice of its approval of deferral accounting for the start-up costs of Bad Creek from the commercial operation dates to the effective date of new rates resulting from this proceeding. In order to reduce the carrying cost South Carolina customers pay, the Commission finds the Company's adjustment appropriate.

Item 3. Decommissioning Expense

The Commission's findings concerning this issue have already been discussed under Finding of Fact Nos. 14, 15, and 16 and will not be repeated.

Item 4. Amortization of Coley Creek Costs

Duke proposed amortization over five years of the abandoned Coley Creek costs. The Commission approved the Company's accounting treatment of Coley Creek costs in a letter to Company witness Stimart dated October 29, 1990, reserving further review in this proceeding. Consumer Advocate witness Miller recommended amortization of these costs over a ten-year period. The Commission Staff accepted the Company's five-year write off. (Tr. Vol. 5, p. 92) Mr. Stimart testified that this Commission has tended to amortize items of this nature over varying periods of time depending on the magnitude of the dollars to be amortized. (Tr. Vol. 4, p. 44)

The Commission finds that the Company's accounting treatment of Coley Creek costs is appropriate and approves a five-year amortization period.

Item 5. Amortization of Catawba Costs

The Commission Staff included in cost of service the annual amortization of the Catawba deferred costs. This results from prior Commission decisions to amortize the reasonable and prudently incurred Catawba deferred costs over a ten-year period. No other evidence was submitted by the parties.

Based on the evidence, the Commission finds that the appropriate level of expense for depreciation and amortization is \$121,499,000.

General Taxes

The Company proposed \$48,755,000 as the appropriate level of general taxes. The differences between the Company, Commission Staff, and Consumer Advocate are summarized below:

(000's)

	<u>Company</u>	<u>Commission Staff</u>	<u>Consumer Advocate</u>
General Taxes	\$48,755	\$42,122	\$46,091
Difference		\$(6,633)	\$(2,664)

Analysis of Differences

1. Bad Creek Property Tax	(38)	.94
2. Customer Growth Adjustment	(26)	(26)
3. Reconnect Fee	1	--
4. Payroll Tax	--	(419)
5. Franchise Fee	(6,570)	--
6. Property Tax	--	(2,313)
TOTAL DIFFERENCE	\$(6,633)	\$(2,664)

Items 1-4. Bad Creek Property Tax, Customer Growth Adjustment, Reconnect Fee
and Payroll Tax

Based on the Commission's previous determinations as to the appropriate adjustments for Bad Creek investment, customer growth, the Company's proposed increase in reconnect fees and increased wage rates, the Commission finds that the general tax adjustments related to these items proposed by the Commission Staff and Consumer Advocate are not appropriate.

Item 5. Franchise Fees

Commission Staff witness Watts recommended removal of franchise fees/municipal license fees as part of the Cost of Service Study, listed in General Taxes as Revenue Related Taxes. (Tr. Vol. 5, p. 235) Mr. Watts cited the Commission's decision in City of Spartanburg v. Public Service Commission of South Carolina, 281 S.C. 223, 314 S.E.2d 599 (1984) as support for his recommendation. These fees, imposed by certain municipalities, would only be charged to those customers living within the corporate limits of that municipality, therefore not affecting all ratepayers.

For purposes of the rates adopted in this Order, the Commission finds that the franchise fees/municipal license fees are to be included in base rates.

The Company shall remove these fees beginning in January, 1992. The Commission requires the Company to give notice to all customers concerning the removal of these fees from the cost of service. After this notice period, the Commission finds it appropriate to reduce base rates for removal of franchise fees/municipal license fees and include these fees as a separate line component on affected customers' bills effective with the first billing cycle in January, 1992.

Item 6. Property Taxes

The Company annualized test period property taxes on plant in service at December 31, 1990. Witness Stimart testified that property taxes for calendar year 1990 were assessed based upon property balances at the end of 1989. Likewise, property taxes for calendar year 1991 will be assessed based upon property balances at the end of 1990. This adjustment increases property tax expense in the test period to the year-end level of investment. The Company's calculation was based upon actual historically experienced changes in rates. (Tr. Vol. 2, pp. 151-152) Witness Price supported the Company's adjustment. Witness Miller supported the concept of annualizing property taxes to reflect the taxes related to property in service at the end of the test year. However, Miller alleged that the Company's proposed adjustment was not known and measurable because it was an estimate. (Tr. Vol. 5, p. 45)

The Commission determines that the Company's adjustment to annualize property taxes is appropriate and because it is based on end of year actual plant balances, it is based on known and measurable standards.

The Commission finds that the appropriate level of expense for general taxes is \$48,755,000.

Interest on Customer Deposits

The Company proposed that the actual test year level of interest on customer deposits of \$468,000 be reflected in the cost of service. Commission Staff

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witness Price proposed to annualize interest on customer deposits. (Tr. Vol. 5, p. 86) The Commission is not persuaded by the evidence that it is necessary to make any adjustment to the actual test year level of interest on customer deposits. Therefore, the Commission finds that \$468,000 is the appropriate level of interest on customer deposits to include in the cost of service.

Income Taxes

The positions of the Company, Commission Staff, and Consumer Advocate regarding income taxes are summarized below:

(000's)

	<u>Company</u>	<u>Commission Staff</u>	<u>Consumer Advocate</u>
Income Taxes	\$57,562	\$61,465	\$69,709
Difference		\$ 3,903	\$12,147

The differences in the parties' positions regarding the appropriate level of income taxes are due to the different levels of operating revenues and operating expenses proposed by each party as well as the rate bases proposed by each party. Based on the Commission's previous decisions regarding each of these items, the Commission finds that the appropriate level of expense for income taxes is \$57,562,000.

Amortization of ITC

All parties agreed on the Company's proposed level of (\$4,395,000) for amortization of ITC, which the Commission determines is the appropriate level of expense.

Based on the entire record in this proceeding, the Commission concludes that the appropriate level of operating revenue deductions for use in this proceeding is \$837,757,000, calculated as follows:

Operating Revenue Deductions
(000's)

O&M Expenses:

Fuel	\$ 197,625
Purchased Power and Net Interchange	141,680
Wages, Benefits & Materials	274,563
Depreciation and Amortization	121,499
General Taxes	48,755
Interest on Customer Deposits	468
Income Taxes	57,562
Amortization of ITC	(4,395)

Total Operating Revenue Deductions	\$ 837,757
	=====

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 18

The evidence concerning the appropriate capital structure is presented in the testimony and exhibits of Company witnesses Lee, Osborne and Ibbotson, Commission Staff witness Spearman and Consumer Advocate witness Legler. In its Application, the Company utilized its actual per book capital structure as of December 31, 1990, consisting of 49.82% common equity, 9.68% preferred stock and 40.50% long-term debt.

Both Mr. Lee and Mr. Osborne testified that maintaining the Company's AA bond rating is a major financial goal of the Company and a key to the retention of the Company's credit worthiness and financial strength so that the Company can obtain new financing when necessary, in both good and bad capital markets. They testified that one of the most important determinants of the Company's bond rating is its coverage of fixed charges, and they pointed out that Duke's SEC interest coverage ratio is currently lower than it has been at any time since 1983. (Tr. Vol. 1, p. 56) (Tr. Vol. 2, p. 48) Mr. Osborne testified that maintaining the capital structure of the Company at approximately its present levels of common equity and long-term debt is necessary in order to enable the Company to maintain a fixed charges coverage ratio at a level necessary to retain its AA bond rating. He testified that the importance of maintaining

Duke's credit quality is shown by what occurred in the mid-1970's when Duke was unable to finance at all in difficult capital markets after its bond rating had dropped to a single A. This resulted in Duke having to stop work at certain construction projects which resulted in increased costs of those projects. He also pointed out that certain rating agencies have expressed concern about the negative trend in Duke's fixed charges coverage and have emphasized the importance of the outcome of this rate case on Duke's credit since Duke is approaching the lower limits of the AA rating. (Tr. Vol. 2, pp. 46-53).

Dr. Ibbotson also testified that, in his opinion, the capital structure of Duke as proposed in this proceeding reflects appropriate financial management and should be maintained. Dr. Ibbotson also stated that an increase in the amount of debt in Duke's capital structure would leave the overall weighted cost of capital unchanged in the long run because while the debt weight would increase, both debt and equity costs of capital would also increase. He pointed out that today's market is understandably very wary of companies with high leverage. (Tr. Vol. 3, pp. 27-29)

Consumer Advocate witness Legler noted that although the Company's equity ratio may appear to be high on the surface, the equity ratio closely approximates the average equity ratio for AA rated electric utilities as reported by Value Line. Legler also noted that the 1990 equity ratio reflects a slight decline from the equity ratio in 1988 and 1989. (Tr. Vol. 6, p. 10)

Having carefully considered all of the evidence, it is our judgment that Duke's actual capital structure, which it is proposing, is within reasonable bounds under all of the circumstances. The Commission finds and concludes that the appropriate capital structure for Duke for use in this proceeding is as follows:

Long-Term Debt	40.50%
Preferred Stock	9.68%
Common Equity	49.82%

	100.00%
	=====

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 19

The evidence concerning the proper embedded cost rates for long-term debt and preferred stock is presented in the testimony and exhibits of Company witnesses Lee, Osborne, and Ibbotson, Commission Staff witness Spearman and Consumer Advocate witness Legler.

The positions of the Company, the Commission Staff and the Consumer Advocate with respect to the embedded cost rates for long-term debt and preferred stock are as follows:

	<u>Company</u>	<u>Commission Staff</u>	<u>Consumer Advocate</u>
Long-Term Debt	8.78%	8.67%	8.78%
Preferred Stock	7.74%	7.53%	7.74%

The embedded cost rates proposed by the Commission Staff reflect an updating to June 30, 1991. (Hearing Exhibit 37, Accounting Exhibit A-5)

Upon review of the evidence, the Commission finds and concludes that the embedded cost rates as of December 31, 1990, as proposed by the Company and agreed to by the Consumer Advocate which are synchronized with the capital structure as of December 31, 1990, are appropriate for use herein. Accordingly, the Commission finds that the appropriate embedded cost rates for use in this proceeding are as follows:

	<u>Embedded Cost Rate</u>
Long-Term Debt	8.78%
Preferred Stock	7.74%

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 20

The evidence for this finding concerning the appropriate return on common equity is found in the testimony and exhibits of Company witness Ibbotson, Commission Staff witness Spearman, and Consumer Advocate witness Legler. A principal issue in any ratemaking determination involves the proper earnings to be allowed on the common equity investment of the regulated utility. In this proceeding, the Commission heard the expert testimony of three witnesses relating to the fair and reasonable rate of return on common equity for the Company.

This Commission has frequently stated that it adheres to no particular theory or methodology for the determination of a fair rate of return on common equity. (See, e.g., Order No. 85-841, at p. 56) Rather, we perceive our function as that of engaging in a careful and reasoned analysis of the evidence in a practical context. The record of the instant proceeding illustrates the use of several fundamental methods for the determination of the cost of equity capital by the expert witnesses for the Company, the Consumer Advocate, and the Commission Staff. Those methods include the discounted cash flow ("DCF") method, the capital asset pricing model ("CAPM"), the risk premium method, and the comparable earnings approach.

The evidence presented by the witnesses demonstrated an approach to their respective investigations within the parameters of the language of the United States Supreme Court in its decision in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944), at 603:

[T]he return to the equity owner should be commensurate with the return on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

While the independent studies of each witness, either implicitly or explicitly, commenced with those standards, the respective methods employed produced quite different results, presenting the Commission with recommendations ranging from 11.5% to 13.17%. The Commission must weigh the opinions of the expert financial witnesses as to the expectations of investors or the opportunity costs of equity capital in conjunction with the tangible facts of the entire record of the proceeding, including the observable financial condition of the Company. Southern Bell Telephone & Telegraph Co. v. Public Service Commission of South Carolina, 270 S.C. 590, 244 S.E.2d 278 at 282 (1978). In the final analysis, we must determine the credibility and probative value of the testimony of the expert financial witnesses and use our judgment to evaluate this evidence in regard to the cost of common equity.

Furthermore, the Commission cannot determine the fair and reasonable return on common equity for the Company in isolation. Rather, the Commission must carefully consider a variety of relevant factors, including identifiable trends in the market relating to the costs of labor, materials, capital, interest rates and inflation rates; comparisons of past earnings with present earnings and prospective earnings; the prices for which the Company's service must be rendered; the returns of other enterprises and the reasonable opportunities for investment therein; the financial policy and capital structure of the Company and its ability to attract capital; the demonstrable competency and efficiency of the Company's management; the inherent protection against destructive competition afforded the Company through the operation of the regulatory process and the competitive forces that are coming into being that have never been experienced before; general economic conditions; and the public demand for growth and expansion which is required to evaluate the construction program for the foreseeable future. The Commission must strike the balance among these complex and interrelated factors in the context of the record herein.

In its determination of a fair and reasonable rate of return, the Commission maintains the ultimate responsibility of setting the rates to be charged for the utility services provided by the Company. The exercise of that responsibility involves the balancing of the interests of the consumer and the investor. The Commission must gravely balance the interests of the consumer in regard to the price of utility service with the interests of the same consumer in regard to the reliability and adequacy of the supply of energy. The Commission has maintained these interests paramount throughout this proceeding. The Commission's determinations of the Company's revenue requirements and of the proper allocation of those revenues within the approved rate structure embodied in this Order reflect fairly and equitably the interests of those consumers expressed in the record before us.

Duke presented Dr. Roger G. Ibbotson, the Consumer Advocate presented Dr. John B. Legler, and the Commission Staff presented Dr. James E. Spearman to testify on the rate of return to be applied to Duke's common equity. These witnesses updated their prefiled testimony to reflect changes in the capital markets which had occurred after preparation of their testimony. Dr. Ibbotson's testimony was filed on June 24, 1991, and was prepared in February of 1991 and used data current at that time. Dr. Ibbotson updated his prefiled testimony in September 1991 and used data current at that time. Dr. Spearman's testimony was filed on September 23, 1991, and was based on data current as of that date. Dr. Legler's testimony was filed on September 9, 1991, and used data current as of that date. Dr. Legler updated his testimony on September 25, 1991, and used current data as of that date.

A summary of the respective recommended returns on common equity, as updated, is as follows:

<u>PARTY</u>	<u>WITNESS</u>	<u>METHOD</u>	<u>RETURN ON COMMON EQUITY</u>
Company	Dr. Ibbotson	CAPM	13.17%
Staff	Dr. Spearman	CAPM/DCF	12.0% to 12.5%
Consumer Advocate	Dr. Lagler	DCF/CAPM	11.5% to 12.5%

The Company's witness, Dr. Ibbotson, recommended in his prefiled testimony a return on common equity of 13.75%. Prior to the hearing, Dr. Ibbotson updated his recommended return on common equity to 13.17% because of changes in market conditions occurring between the time he prepared his testimony and the time of the hearing. (Tr. Vol. 3, p. 35)

Dr. Roger W. Ibbotson is Professor of Finance at Yale University and President of Ibbotson Associates, a Chicago-based financial consulting firm. Dr. Ibbotson estimated Duke's cost of equity using the Capital Asset Pricing Model (CAPM) which defines the cost of equity to be equal to the sum of the rate of return on a riskless security plus an equity risk premium, which is an additional return for the risk of holding the particular security (in this case Duke Power's common stock). The risk premium is estimated by multiplying the beta (a measure of risk) of Duke's common stock by the additional return which an investor expects to realize by investing in a diversified market portfolio rather than in the riskless security. (Tr. Vol. 3, p. 12) For the riskless security Dr. Ibbotson used an average of recent yields on 20-year U. S. Treasury bonds, selected mainly because that maturity matches more nearly the horizon over which equity capital is committed to Duke Power Company. For his estimate of the expected equity risk premium of the market as a whole, Dr. Ibbotson used 7.1%, which was developed in Ibbotson Associates' Stocks, Bonds, Bills and Inflation 1991 Yearbook, and is the arithmetic average of the differences, or spreads, between the annual total returns on the stock market (represented by the S&P 500), and the average annual income returns on 20-year treasury bonds, over the period 1926 through 1990. (Tr. Vol. 3, p. 25) Dr. Ibbotson explained

that this period was used because it is the longest period for which there is good quality data, and that the use of the longest available period yields the best estimate of the risk premium because the risk premium is a random variable and therefore the accuracy of the estimate increases with the period over which it is measured. (Tr. Vol. 3, pp. 15-18) Using a risk-free rate of 8.55%, a beta for Duke of 0.65 and a market risk premium of 7.1%, Dr. Ibbotson concluded that the current required rate of return on equity for Duke Power Company is 13.17%, which includes no allowance for down markets or flotation costs. (Tr. Vol. 3, pp. 26, 31 & 32)

The Commission Staff's witness, Dr. Spearman, used two independent methods -- the Capital Asset Pricing Model (CAPM) and the Discounted Cash Flow Method (DCF) -- in arriving at his estimates of the cost of capital. Based upon these two methods, he recommended a rate of return on common equity in the range of 12.0% to 12.5%. (Tr. Vol. 5, p. 295) In his DCF analysis, Dr. Spearman utilized a dividend rate of \$1.72 per share and a stock price of \$29.25 to derive a yield of 4.9% and a growth rate of 5% to 6%. Dr. Spearman's DCF analysis which included several variations resulted in an expected cost of common equity of 10.34% to 12.01%. (Tr. Vol. 5, pp. 275)

Dr. Spearman's prefiled testimony indicated a rate of return in the range of 10.59% to 12.50% based on his analysis of the CAPM method. (Tr. Vol. 5, p. 293) Dr. Spearman qualified his rate of return testimony as being perhaps on the low side. He stated that a cost of equity approaching the high end of the range requires that the market returns maintain their long-term average and that the betas "may be understated". (Tr. Vol. 5, pp. 294-295)

The Consumer Advocate's witness, Dr. Legler, primarily used the DCF methodology. Based on a stock price calculated by averaging the prices of Duke stock for June - August, 1991, of \$28.88 per share, dividends of \$1.72 per share, and a growth rate of 5.0% to 6.0%, Dr. Legler arrived at a range of cost

of equity capital for Duke Power Company using the DCF method of 11.0% to 12.0%. Dr. Legler's risk premium method produced a rate of return range of 11.2% to 11.5%. His CAPM method indicated a range of 10.3% to 12.5%. In his prefiled testimony, Dr. Legler's recommended rate of return produced a range of 11.7% to 12.8%. From this he suggested a return on common equity of 12.25%. In his updated testimony his range was 11.5% to 12.5% with a midpoint of 12%, his final recommended rate of return on equity capital. (Tr. Vol. 6, pp. 48-49, 53)

The Commission has been presented with differing testimony and evidence with respect to the cost of common equity. As that is the case, it is therefore our responsibility to weigh and evaluate such evidence and reach a decision after applying our expertise and reasoned judgment. The Commission observes that there are a number of valid approaches to the cost of equity determination, but that, in the final analysis, the results of all these approaches are influenced by the judgments and assumptions of the witnesses. In this case, judgment plays a critical role, for the disparity between the recommendations of the witnesses in their use of the DCF method is not attributable to any fundamental difference in methodology, but rather to legitimate differences of opinion as to what data provides the best evidence of the cost of equity. This Commission must ultimately use its own judgment in evaluating the evidence presented by the witnesses.

It therefore becomes the Commission's responsibility to set a fair and reasonable rate of return on common equity from which can be derived the lawful rates for the Company for its retail electric operations. This responsibility must be discharged in accordance with statutory and judicial standards, and based upon the numerous factors identified herein, and applied in accordance with the informed judgment of the Commission.

In light of all the relevant evidence in the record of this proceeding, the Commission is of the opinion, and so finds, that a fair and proper range of

return on common equity is from 12.5% to 13.17%. The Commission further finds that a fair and proper return on common equity of 13.17% provides the opportunity to produce additional annual revenues of \$68,384,000 for the Company's South Carolina retail electric operations, which the Commission finds fair and reasonable.

The Commission considers 13.17% to represent the reasonable expectation for the equity owner, and therefore, consistent with the standards of the Hone decision. The return found fair and reasonable is sufficient to protect the financial integrity of the Company, to preserve the property of the investor, and to permit the Company to continue to provide reliable service to present and future customers at reasonable rates.

The Commission is influenced that 13.17% is a reasonable rate of return for three (3) additional reasons. First, in the second quarter of this year regulatory Commissions have granted other electric utilities rates of return averaging 12.9%. Included in that figure is the 13% and 13.5% rates of return granted to Virginia Power and Appalachian Power by the Virginia Corporation Commission. (Tr. Vol. 5, p. 302) Second, the electric utilities with a double A bond rating earned, on average, in excess of 13% on equity over the last three (3) years. (Tr. Vol. 5, p. 304) These are comparable companies with which Duke must compete for capital. Third, this Commission granted Duke a 13% rate of return in its last general rate increase case. When that rate order was granted, the rates of return recommended by the Commission's Staff and the Consumer Advocate did not differ a great deal from the recommendations in this case. Since 1986, inflation has increased and Duke's interest coverage has decreased. (Tr. Vol. 2, p. 48) We believe that interest coverage is a significant financial indicator. Fixing a lower rate of return would likely cause a further decline, which this Commission does not believe should occur.

In arriving at a rate of return herein, the Commission is concerned only with the return to be earned on the common equity allocated to that portion of the Company's operations subject to the Commission's jurisdiction in this proceeding.

An important function of ratemaking is the determination of the overall rate of return which the utility should be granted. This Commission has utilized the following definition of "rate of return" in previous decisions, and continues to do so in this proceeding:

For regulatory purposes, the rate of return is the amount of money earned by a regulated company, over and above operating costs, expressed as a percentage of the rate base. In other words, the rate of return includes interest on long-term debt, dividends on preferred stock, the earnings on common stock and surplus. As Garfield and Lovejoy have put it "the return is that money earned from operations which is available for distribution among the various classes of contributors of money capital. In the case of common stockholders, part of their share may be retained as surplus."

Phillips, The Economics of Regulation, pp. 260-261 (1969).

The amount of revenue permitted to be earned by the Company through its rate structure depends upon the rate base and the allowed rate of return on the rate base. As discussed in the preceding section of this Order, the primary issue between the regulated utility and regulatory body most frequently involves the determination of a reasonable return on common equity, since the other components of the overall rate of return, i.e., dividends on preferred stock and cost of debt, are fixed. Although the determination of the return on common equity provides necessary component from which the rate of return on rate base can be derived, the overall rate of return, as set by this Commission, must be fair and reasonable.

The United States Supreme Court's landmark decision in Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679 (1923), delineated general guidelines for determining the fair rate of return in utility regulation. In the Bluefield decision, the Court stated:

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risk and uncertainties; but it has no constitutional rights to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time, and become too high or too low by changes affecting opportunities for investment, the money market, and business generally.

262 U.S. at 692-693.

We held in Federal Power Commission v. Natural Gas Pipeline Co.... that the Commission was not bound to the use of any single formula or combination of formulae in determining its rates. Its ratemaking function, moreover involves the making of 'pragmatic adjustments' (cite omitted)... Under the statutory standard of 'just and reasonable' it is the result reached, not the method employed which is controlling (cites omitted)... The ratemaking process under the Act, i.e., the fixing of 'just and reasonable' rates involves a balancing of the investor and the consumer interests. Thus we stated in the Natural Gas Pipeline Co. case, that regulation does not insure that the business shall produce net revenues. (cite omitted) But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. (cite omitted.) By that standard the return to the equity owner should be commensurate with returns on investments in other

enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

320 U.S. at 602-603

The vitality of these decisions has not been eroded, as indicated by the language of the more recent decision of the Supreme Court in IN RE: Permian Basin Area Rate Cases, 390 U.S. 747 (1968). This Commission has consistently operated within the guidelines set forth in the Hope decision. See, also, Southern Bell, supra, 244 S.E. 2d at 280-3.

The rate of return which the Commission has herein found to be fair and reasonable should enable the Company to maintain and enhance its position in the capital markets. Patently, however, the Company must insure that its operating and maintenance expenses remain at the lowest level consistent with reliable service and exercise appropriate managerial efficiency in all phases of its operations. The Commission has consistently manifested its abiding concern for the establishment and continuation of efficiency programs on the part of its jurisdictional entities. By its Directive of August 27, 1974, the Commission urged the derivation of cost control studies, the adoption of cost reduction programs, and the elimination and reduction of costs "in all possible ways." The continued awareness of the potential efficacy of such programs and their implementation is consistent with the conscious national and State policies to limit the deleterious effects of inflation.

Company witness Lee described the considerable effort made by the Company to reduce its costs of construction and its operations and maintenance expenses. (Tr. Vol. 1, pp. 53, 54, 68-69) (Tr. Vol. 2, pp. 11-18) The Company's construction policies and programs have resulted in favorable comparisons with the construction costs of other electric utilities. In addition, the standards for the measurement of economical generating operations manifest that the

Company has generally demonstrated an ability to produce electrical energy in a measurably efficient manner.

The record of this proceeding indicates that the Company has generally undertaken its cost reduction efforts in the spirit of the Commission's Directive and consistent with our previous Orders, especially the Order in Duke's last rate case in 1986. Since that time Duke has eliminated more than 1,200 work positions and is on a program to eliminate about 600 positions per year over the next three years mainly through attrition. (Tr. Vol. 1, pp. 50-51, 53) The Commission feels that Duke is serious about cost savings. Nonetheless, the Commission cannot ignore the effect of the Company's increasing operating expenses. The Company and the parties before us may take notice of the fact that the Commission is not inclined to be completely satisfied with the cost reduction and efficiency programs of any jurisdictional utility. The Commission will continue to expect the Company to design and implement such programs in the future as an index of good management practice in the interests of its customers and of the Company itself. With the full array of its resources at its disposal, the Company should be able to assure us that such programs produce identifiable and measurable results consistent with the provision of economical and adequate service to the Company's ratepayers. The Commission has found a fair and reasonable return on common equity which the Company should be allowed the opportunity to earn, and has herein set rates to produce revenues to reach that return. The Commission considers that effective programs of cost reductions can operate to enable the Company to improve its financial posture and earn the return approved. In addition to the review of the Company's cost of service in the context of this proceeding and our express expectations of efficient and effective management, the Commission considers the accepted regulatory devices of the use of a year-end rate base, adjustments for customer growth and annualized depreciation, together with adjustments for identifiable

and measurable changes in revenues and expenses to combine to represent a reasonable regulatory approach to the earnings erosion attributable to inflation.

The Commission has found that the capitalization ratios as of December 31, 1990, are appropriate and should be used in the instant proceeding. The Commission has likewise found that the respective embedded cost rates for long-term debt of 8.78% and for preferred stock and preference stock of 7.74%, should be utilized in the determination of a fair overall rate of return. For the purpose of this proceeding, the Commission has herein found the proper cost rate for the Company's common equity capital to be 13.17%.

Using these findings, the overall fair rate of return on rate base for the Company's South Carolina retail electric operations may be derived as computed in the following table:

<u>OVERALL RATE OF RETURN</u>			
	<u>Rate</u>	<u>Cost</u>	<u>Weighted Cost</u>
Long-Term Debt	40.50%	8.78%	3.56%
Preferred Stock	9.68%	7.74%	.75%
Common Equity	49.82%	13.17%	6.56%
	-----		-----
TOTAL	100.00%		10.87%

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NO. 21

This evidence pertaining to the proper amount of materials and supplies investment is found in the testimony of Company witness Stimart. The Company proposed that \$73,668,000 be included for materials and supplies, consisting of \$25,495,000 of fuel stock and \$48,173,000 of other electric materials and operating supplies as presented on Hearing Exhibit 4, Stimart Exhibit 1, page 4c. No party challenged the reasonableness of this figure. The Commission finds that the proper total materials and supplies investment is \$73,668,000.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 22

The evidence pertaining to the proper amount of investment for plant held for future use is found in the testimony of Company witness Stimart. As shown on Hearing Exhibit 4, Stimart Exhibit 1, page 4, the Company proposed that \$4,402,000 be included in rate base to reflect investment in plant held for future use. No party challenged this figure. The Commission therefore finds it appropriate to include \$4,402,000 in rate base for plant held for future use.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 23

The evidence related to the proper working capital investment is contained in the testimony of Company witness Stimart, Commission witness Price, and Consumer Advocate witness Miller. An analysis of the total working capital investment proposed by the parties is set forth in the following table:

Working Capital Investment

(000's)

	<u>Company</u>	<u>Commission Staff</u>	<u>Consumer Advocate</u>
Operating Funds	\$48,489	\$48,489	\$48,489
Average Taxes Accrued	(16,366)	(16,366)	(16,366)
Bank Balances	2,120	2,120	700
Bond Reacquisition Premiums	10,906	10,906	7,890
Prepayments	2,839	2,839	2,839
Miscellaneous Deferred			
Debits and Credits	9,844	-0-	-0-
Deferred Costs	-0-	17,448	-0-
	-----	-----	-----
Total Working Capital	<u>\$57,832</u>	<u>\$65,436</u>	<u>\$43,552</u>
Difference		\$ 7,604	\$(14,280)

The Company computed the cash component (operating funds) of working capital using the Commission's formula method which reflects 1/8 of operation and maintenance expenses exclusive of purchased power and nuclear fuel expense. This amount is then reduced by the average tax accrued balance. No party

contested this component of working capital or the prepayments of \$2,839,000 included in working capital investment. The Commission concludes therefore that the amounts proposed by the Company for operating funds, taxes accrued, and prepayments are appropriate for use in this proceeding. The following components of working capital are in dispute:

Analysis of Differences

(000's)

	<u>Commission Staff</u>	<u>Consumer Advocate</u>
1. Miscellaneous deferred debits and credits	\$(9,844)	\$(9,844)
2. Bad Creek Deferred Costs	15,607	-0-
3. Catawba Deferred Costs	1,841	-0-
4. Required Bank Balances	--	(1,420)
5. Bond Reacquisition Premiums	--	(3,016)
	-----	-----
Total Difference	\$ 7,604	\$(14,280)

Item 1. Miscellaneous Deferred Debits and Credits

The Company proposed that \$9,844,000 be included in working capital for miscellaneous deferred debits and credits. Consumer Advocate witness Miller made an adjustment to exclude this component of working capital from rate base. Commission Staff witness Price did not include miscellaneous deferred debits and credits as a per book item of working capital.

The Staff did not provide any testimony supporting its exclusion of miscellaneous deferred debits and credits from the working capital investment included in rate base.

In support of his adjustment, Consumer Advocate witness Miller testified that such items are more appropriate for inclusion in a lead-lag study. (Tr. Vol. 5, p. 12) Witness Miller's opinion as to the appropriate treatment of deferred debits and credits in a lead-lag study, with no discussion of his reasoning, does not provide sufficient evidence to support his adjustment.

Likewise, his statement that the Commission does not regularly include deferred debits and credits in working capital investment provides no evidence that these items are not appropriate for inclusion in rate base in this proceeding. No party has offered evidence in this proceeding as to why the particular miscellaneous deferred debits and credits included in working capital by the Company are inappropriate for rate base inclusion in this proceeding. The Commission's decisions in prior cases were specific to the items of miscellaneous deferred debits and credits presented in those proceedings. The Commission is aware that the components of miscellaneous deferred debits and credits change over time. Therefore, any party taking exception to the inclusion of such items in rate base must present evidence regarding the specific items proposed to be included in rate base. No party has provided such evidence in this proceeding.

The Commission finds that \$9,844,000 of miscellaneous deferred debits and credits is appropriately included in working capital.

Item 2. Bad Creek Deferred Costs

The difference between the Company and Commission Staff on this item relates to different proposals regarding the recovery of return during the amortization period of the Bad Creek deferred costs. The Company calculated a levelized annual amortization which included a return component based on a three year amortization period. The Staff proposed that the deferred costs be amortized over ten (10) years and that the unamortized balance be included in rate base. (Tr. Vol. 5, p. 81)

The Commission has already determined in the Evidence and Conclusions for Finding of Fact No. 16 that a three-year amortization period for the Bad Creek deferred costs is appropriate. Further, the Commission determined that it was appropriate to calculate a levelized amortization which includes a return component, rather than to include an unamortized balance in rate base. This

treatment recognizes and accounts for the fact that the unamortized balance will decline over time. Inclusion of the unamortized balance in rate base, especially in conjunction with a ten-year amortization period, would overstate the Company's ongoing cost of service. Such a situation can only be resolved by annual rate changes or by use of a levelized amortization as proposed by the Company. The Commission concludes, therefore, that the unamortized Bad Creek deferred costs should not be included in rate base in this proceeding.

Item 3. Catawba Deferred Costs

Commission Staff witness Price has included \$1,841,000 of unamortized Catawba deferred costs in working capital. This adjustment corresponds to his proposal to reflect the Catawba deferred costs amortization in the cost of service. (Tr. Vol. 5, p. 86, Hearing Exhibit 37, Accounting Exhibit A-3)

Based on the Commission's prior discussion concerning Bad Creek deferred costs, the Commission rejects this adjustment.

Item 4. Required Bank Balances

The Company proposed to include bank balances of \$2,120,000 in working capital. The Commission Staff did not dispute this proposal. Consumer Advocate witness Miller disagreed with the Company's inclusion of end-of-period cash balances held in each account. Miller contended that if no adjustment were made, the Company would earn carrying costs on all cash on hand even though not all of that cash is required to maintain minimum and compensating balances and to meet daily cash requirements. Miller recommended that the amount included be limited to compensating balance requirements, working funds needed for daily operations, and miscellaneous special deposits. (Tr. Vol. 5, p. 13)

The Consumer Advocate attempted to show through cross-examination of Mr. Stimart that the cash in banks over and above the approximately \$508,000 required as compensating balances is not appropriately included in cash working capital. (Tr. Vol. 4 at pp. 66-69) In support of its position, the Consumer

Advocate presented Hearing Exhibit 30, copies of portions of data responses provided to the North Carolina Public Staff. Mr. Stimart acknowledged that Hearing Exhibit 30 was a Company provided response, but he did not know what the question was. (Tr. Vol. 4, p. 68) The Commission is not persuaded by the Consumer Advocate's testimony regarding this issue. Further, the Commission cannot rely on portions of data responses provided in another jurisdiction without having access to the entire question and answer as well as all other related questions and answers which may have been raised regarding that issue.

The Commission finds Mr. Stimart's testimony regarding the necessity of having cash balances in the magnitude of \$6,000,000 in view of the \$4 billion worth of activity at its banks annually to be reasonable. (Tr. Vol. 4, pp. 68-69)

Based on the foregoing, the Commission finds that it is appropriate to include bank balances of \$2,120,000 in working capital investment in rate base.

Item 5. Bond Reacquisition Premiums

The Company included \$10,906,000 for bond reacquisition premiums in its working capital investment. (Hearing Exhibit 4, Stimart Exhibit 1, page 4c) The Commission Staff did not take exception to the Company's position. Consumer Advocate witness Miller proposed to adjust this amount in order to allocate a portion to nonelectric operations. Miller contended that reacquisition of bonds benefits all of the Company's operations, not just electric. (Tr. Vol. 5, p. 14)

Mr. Stimart testified that the bonds in question were issued to finance electric operations. (Tr. Vol. 4, p. 65) The Company's treatment of this item is consistent with past Commission practice in Docket Nos. 86-188-E and 85-78-E. The Consumer Advocate's reference to portions of testimony presented in the Company's North Carolina rate case does not constitute sufficient evidence in this proceeding on which the Commission can rely. (Tr. Vol. 4, pp. 65-66) The

Commission would have to have all pertinent evidence from the North Carolina proceeding in the record in this proceeding. The Consumer Advocate made no such offer of evidence in this proceeding.

The Commission finds that the treatment of bond reacquisition premiums proposed by the Company and agreed to by the Commission Staff is appropriate. Therefore, \$10,906,000 of bond reacquisition premiums should be included in working capital investment.

Thus, the Commission concludes that the appropriate allowance for working capital for use in this proceeding is \$57,832,000, as set forth in the table below:

Working Capital Investment

Operating Funds	\$48,489,000
Average Taxes Accrued	(16,366,000)
Bank Balances	2,120,000
Bond Reacquisition Premiums	10,906,000
Prepayments	2,839,000
Miscellaneous Deferred Debits and Credits	9,844,000

Total Working Capital Investment	<u>\$57,832,000</u>

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 24

The evidence supporting this finding concerning the proper value for rate base is found in the testimony of Company witness Stimart, Staff witnesses Price and Watts, and Consumer Advocate witness Miller.

The difference between the Company, the Commission Staff, and the Consumer Advocate concerning rate base is summarized below:

	<u>Rate Base</u> (000's)	<u>Commission</u> <u>Staff</u>	<u>Consumer</u> <u>Advocate</u>
<u>Company</u>			
Electric Plant in Service	\$3,390,362	\$3,384,892	\$3,404,002
Less:			
Accumulated Depreciation and Amortization	(1,357,590)	(1,357,607)	(1,357,860)
Net Electric Plant	2,032,772	2,027,285	2,046,142
Materials and Supplies	73,668	73,668	73,668
Plant Held for Future Use	4,402	4,402	4,402
Working Capital Investment	57,832	65,436	43,552
Less:			
Accumulated Deferred Taxes	(315,569)	(315,569)	(315,569)
Operating Reserves	(14,180)	(14,180)	(14,180)
Customer Deposits	(3,953)	(3,953)	(3,953)
Unclaimed Funds	-0-	-0-	(214)
Construction Work in Progress	-0-	-0-	-0-
Total Rate Base	\$1,834,972	\$1,837,089	\$1,833,848
Difference		\$2,117	\$(1,124)

Areas of Difference

1. Electric Plant in Service	\$(5,470)	\$13,540
2. Accumulated Depreciation and Amortization	(17)	(270)
3. Working Capital Investment	7,604	(14,280)
4. Unclaimed Funds	-0-	(214)
Total Difference	\$ 2,117	\$(1,124)

Item 1. Electric Plant

The difference between the Company, the Staff, and the Consumer Advocate regarding this item stems from the difference in the amount of Bad Creek included in plant in service. The Commission has already determined the prudence of all four units of Bad Creek in the Evidence and Conclusions for Finding of Fact No. 7. The issue remaining to be decided is the appropriate cost of Bad Creek to include in rate base.

The Company originally proposed an adjustment of \$275,391,000 (Hearing Exhibit 4, Stimart Exhibit 1, page 4a) to reflect all four units of Bad Creek in electric plant in service. The Staff originally included \$238,765,000 for Units 1, 2, and 3 in electric plant in service and included \$17,640,000 for Unit 4 in construction work in progress. (Hearing Exhibit 37, Accounting Exhibit A-1, p. 9 of 9) The Staff's reasoning was that Units 1, 2, and 3 were all that could reasonably be expected to be in commercial operation at the date of testimony. (Tr. Vol. 5, p. 81) The Consumer Advocate did not propose any changes to the Company's original adjustment.

The Company subsequently revised its adjustment in order to reflect the actual in service dates of Units 3 and 4. As presented on Stimart Supplemental Exhibit 3, page 4a, the Company's revised adjustment to include Bad Creek in electric plant in service is \$261,751,000. The Commission Staff also revised its recommendation to recognize the fact that Unit 4 began commercial operation on September 13, 1991. The Staff now proposes that \$256,281,000 be included in electric plant in service for Bad Creek. (Tr. Vol. 5, p. 89) The (\$5,470,000) difference between the Company's and Staff's revised adjustments is due to the Staff's exclusion of amounts it has not audited. (Tr. Vol. 5, p. 88) The Commission concludes that the revised adjustment proposed by the Company which reflects the total costs for all four units is appropriate. Based on the "Report of Accounting Department Administration Division" pages 3 and 4 (Hearing Exhibit 37), the Commission finds that there is no reason to conclude that the amounts proposed by the Company would be found to be unreasonable when audited.

Item 2. Accumulated Depreciation and Amortization

The differences between the parties' proposals are set forth below:

	(000's)		
	<u>Company</u>	<u>Commission Staff</u>	<u>Consumer Advocate</u>
Accumulated Depreciation and Amortization	\$(1,357,590)	\$(1,357,607)	\$(1,357,860)
Difference		\$(17)	\$(270)

Analysis of Differences

Difference in Bad Creek Electric Plant In Service	\$109	(\$270)
Depreciation Rate Change	<u>\$(125)</u>	<u>-0-</u>
TOTAL DIFFERENCE	\$ (17)	\$ (270)

The Commission has previously determined that the adjustment to electric plant in service for Bad Creek proposed by the Company is appropriate. Therefore, the adjustments proposed by the Commission Staff and the Consumer Advocate regarding accumulated depreciation associated with their respective proposed levels of investment in Bad Creek are inappropriate.

Staff adjusted accumulated depreciation by the amount of the adjustment to depreciation expense for the Company's proposed depreciation rates. Although the Commission has previously found the Company's proposed depreciation rates to be appropriate for use in this proceeding, there is no evidence in the record supporting this adjustment to accumulated depreciation; therefore, the Commission rejects it. The appropriate level of accumulated depreciation and amortization to be reflected in rate base in this proceeding is (\$1,357,590,000).

Item 3. Working Capital Investment

The differences among the parties concerning working capital have already been discussed in the Evidence and Conclusions for Finding of Fact No. 22 and will not be repeated here.

Item 4. Unclaimed Funds

Consumer Advocate witness Miller testified that unclaimed funds are a noninvestor source of funds which should be subtracted from rate base like other noninvestor sources of funds. Miller therefore deducted \$214,000 from rate base. Witness Miller stated that he believes his recommendation is consistent with Commission precedent on this matter. (Tr. Vol. 5, p. 52) However, he failed to cite a particular case where this Commission had made such a ruling. The Commission concludes that the adjustment proposed by witness Miller is not appropriate for use in determining the level of original cost rate base for use in this proceeding.

Based upon the foregoing discussion, the following table provides the appropriate jurisdictional amounts for rate base as approved by the Commission:

(000's)

Electric Plant in Service	\$3,390,362
Less:	
Accumulated Depreciation and Amortization	(1,357,590)
Net Electric Plant	2,032,772
Materials and Supplies	73,668
Plant Held for Future Use	4,402
Working Capital Investment	57,832
Less:	
Accumulated Deferred Taxes	(315,569)
Operating Reserves	(14,180)
Customer Deposits	(3,953)
Construction Work in Progress	-0-

Total Rate Base	<u>\$1,834,972</u>

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 25

The Commission has previously set forth the evidence supporting its findings of fact and conclusions regarding the fair rate of return which Duke Power Company should be afforded an opportunity to earn.

The following schedules summarize the gross revenues and the rates of return which the Company should have a reasonable opportunity to achieve based upon the determinations made herein. Such Schedules, illustrating the Company's gross revenue requirements incorporate the Findings of Fact and the Conclusions made herein by the Commission.

SCHEDULE I

DUKE POWER COMPANY
SOUTH CAROLINA RETAIL OPERATIONS
Docket No. 91-216-E
STATEMENT OF OPERATING INCOME
Twelve Months Ended December 31, 1990
(Thousands of Dollars)

Item	Before Increase	Approved Increase	After Increase
Electric Operating Revenue	\$994,450	\$68,384	\$1,062,834
Electric Operating Expenses:			
Operation and Maintenance:			
Fuel Used in Electric Generation	197,625		197,625
Purchased Power and Nonfuel			
Net Interchange	141,680		141,680
Wages, Benefits, Materials, etc.	274,563		274,563
Depreciation and Amortization	121,499		121,499
General Taxes	48,755	278	49,033
Interest on Customer Deposits	468		468
Income Taxes	57,562	25,403	82,965
Amortization of ITC	(4,395)		(4,395)
Total Electric Operating Expenses	837,757	25,681	863,438
Operating Income	\$156,693	\$42,703	\$199,396

SCHEDULE II

DUKE POWER COMPANY
SOUTH CAROLINA RETAIL OPERATIONS
Docket No. 91-216-E
STATEMENT OF RATE BASE AND RATE OF RETURN
Twelve Months Ended December 31, 1990
(Thousands of Dollars)

<u>Item</u>	<u>Amount</u>
Electric Plant In Service	\$3,390,362
Less: Accumulated Depreciation and Amortization	(1,357,590)
Net Electric Plant	2,032,772
Add: Materials and Supplies	73,668
Working Capital Investment	57,832
Plant Held for Future Use	4,402
Less: Accumulated Deferred Taxes	(315,569)
Operating Reserves	(14,180)
Customer Deposits	(3,953)
Construction Work in Progress	0
TOTAL RATE BASE	<u>\$1,834,972</u>
RATE OF RETURN	
Present	<u>8.54%</u>
Approved	<u>10.87%</u>

SCHEDULE III
DUKE POWER COMPANY
SOUTH CAROLINA RETAIL OPERATIONS
Docket No. 91-126-E
STATEMENT OF CAPITALIZATION AND RELATED COSTS
Twelve Months Ended December 31, 1990
(Thousands of Dollars)

Item	Capital- ization Ratio	Original Cost Rate Base	Embedded Cost	Net Operating Income
<u>Present Rates - Original Cost Rate Base</u>				
Long-Term Debt	40.50%	743,164	8.78%	65,250
Preferred Stock	9.68%	177,625	7.74%	13,748
Common Equity	49.82%	914,183	8.50%	77,696
Total	100.00%	\$1,834,972		\$156,693
<u>Approved Rates - Original Cost Rate Base</u>				
Long-Term Debt	40.50%	743,164	8.78%	65,250
Preferred Stock	9.68%	177,625	7.74%	13,748
Common Equity	49.82%	914,183	13.17%	120,399
Total	100.00%	\$1,834,972		\$199,396

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 26

The evidence supporting this finding of fact is contained in the testimony and exhibits of Company witness Denton, Staff witness Watts, Consumer Advocate witness LanzaLotta and SCEUC witness Phillips. Mr. Denton described the changes Duke proposes for the Company's various rate schedules. The Company proposes to consolidate its three non-time-of-use residential rates into two new rate schedules: (1) RS, residential service; and (2) RE, residential service, electric water heating and space conditioning. Both rates include conservation discounts. These proposed rate schedules eliminate present rate Schedules R, RC, and RA and reassign customers to new Schedules RS and RE. Schedule RS consists of four categories. Category 1 applies to any residential

customer. Category 2 applies to residential customers with qualifying electric water heaters. Category 3 applies to residential customers meeting certain thermal conditioning requirements. Category 4 applies to residential customers meeting both the requirements for Categories 2 and 3. Schedule RE applies to residential customers where all energy required for water heating, cooking, clothes drying, and space conditioning is supplied electrically. This schedule consists of two categories. Category 1 applies to customers meeting specific requirements for electric water heaters and electric space conditioning. Category 2 applies to customers meeting the same specific thermal conditioning requirements as those required by Schedule RS, Category 3 and 4. Mr. Denton explained that the new schedules place customers in more homogeneous groups based on the equipment installed in their homes and permits targeted price signals to these homogenous groups.

As a result of the proposed residential rate design charges, some customers on each rate schedule will receive bill increases greater than the percentage increase for the residential class. Duke proposes to create Schedule RB for these customers who would otherwise receive an increase of 5% or more above the average residential class increase, and limit the magnitude of the increase to Schedule RB customers to 5% above the average residential increase. Duke also plans to encourage customers who will receive an increase greater than the increase for the class to move to time-of-use Schedule RT, which may minimize the impact of the proposed increase.

Mr. Denton also explained the proposed modifications to general service and industrial rate schedules. Duke proposes to modify Schedules G, GA, and I to eliminate the confusion caused by GA being available to both general service and industrial customers. Under the current rate design, it is sometimes difficult for customers to determine the appropriate rate for their usage. Duke proposes that industrial customers be served on Schedule I, and that general

service customers be served on Schedules G and GA. The billing demand provision of Schedule GA currently applied to industrial customers would be maintained for Schedule GA customers moving to Schedule I. For general service customers, Duke proposes to retain Schedules G and GA with certain modifications. Under each rate, the price during April through November will be the same. The months of December through March will have lower energy charges for Schedule GA. These changes will reduce customer confusion in the general service class over which rate is more advantageous. Bills under Schedule GA will always be equal to or lower than bills under Schedule G.

The Company proposes to reduce the Schedule OPT summer on-peak hours from ten to eight, with the on-peak period beginning at 1:00 p.m. and ending at 9:00 p.m. The reduction is proposed to make it easier for customers to shift production off-peak by allowing them to operate two eight-hour shifts during the off-peak period. SCEUC witness Phillips agrees with the proposed change, in on-peak hours. (Tr. Vol. 4, p. 125) No other party expressed opposition to the modified hours. Therefore, the Commission concludes that the modified summer on-peak hours on Schedule OPT proposed by the Company should be adopted.

The Company proposes to increase closed rate schedules GB, GT, and IT 2% more than the overall general increase to encourage customers to move from these rates to open rate schedules. This proposal was opposed by SCEUC witness Phillips, who proposes that Schedule OPT be revised by lowering demand and energy charges to make it more attractive to Schedule I and IT customers, rather than simply increasing the rate to move customers. Mr. Phillips also proposes that the increase for Schedule GB, GT, IT, and I be limited to the average of the industrial class increase. (Tr. Vol. 4, pp. 126-127)

Mr. Denton also described the proposed changes to lighting schedules. Duke currently has four lighting schedules, Schedules T, T2, T2X, and FL. Schedule T, Street Lighting Service, is available to governments for public

lighting. Duke proposes to change the name to Schedule PL, Street and Public Lighting Service. Schedule T2, Outdoor Lighting Service, would be designated Schedule OL. The designation of Schedule FL, Floodlighting Service, would not change.

Duke is proposing additional pricing levels for Schedules OL and FL to cause new customers to pay the higher cost of installing lights when a pole installation is requested by the customer. The proposed rates include pricing for a new luminaire on an existing pole, for the installation of a new pole, and a price for a new pole installation and underground service. Existing installations would be served on the luminaire-only rate. Schedule T2X, Subdivision Entrance Lighting Service, is currently available for lighting entrances to subdivisions and other public areas. Duke is proposing to cancel Schedule T2X and offer new mercury vapor and high pressure sodium vapor post-top luminaires on Schedule OL.

Finally, Duke proposes that a pilot program named "Limited Demand Charge Days" (LDCD) be approved. The pilot program will be used to determine to what extent industrial customers will change their consumption characteristics during times of adequate supply by limiting demand charges during these periods. Customers would be able to increase their consumption during these periods without incurring an increased billing demand.

Staff witness Watts testified that the Electric Department reviewed Duke's rates, tariffs and service regulations, and verified the requested increase by rate schedule. Based on the Staff's review and audit, it concurs with the Company's proposed rate design changes.

Consumer Advocate witness Lanzaletta testified that the increase in Schedule RS should be no larger than the increase for the residential class, and that the proposed tailblock rate in Schedule RE should not be less than the tailblock rate in Schedule RS. This proposal would eliminate the discount for

efficient air conditioning and high levels of insulation. Mr. Lanzaletta testified that Duke's residential rate design improperly encourages the use of electric space heating, water heating, and air conditioning. Mr. Lanzaletta is correct when he asserts that Duke's rate design will encourage electric heating and water heating. Duke has encouraged efficient heat pumps on its system to create off-peak winter sales. Such sales improve Duke's load factor, which enables fixed costs to be spread over a large number of kilowatt/hours. This benefits all customers by lowering the unit cost of electricity. (Tr. Vol. 4, pp. 106-107; 110-111) Mr. Lanzaletta's recommendations are inconsistent with Duke's efforts that are clearly beneficial to Duke's customers. Mr. Lanzaletta's criticisms of Duke's discounts for efficient air conditioning and high levels of insulation is also misplaced. Duke is a summer peaking utility, with a significant air conditioning load. The discount in Schedule RE which Mr. Lanzaletta criticizes will encourage efficient air conditioning and conservation. These are appropriate goals of rate design which the Commission has adopted in prior cases and will continue.

The parties have made other proposed revisions to the rate schedules proposed by Duke which are not specifically addressed in this Order. The Commission has carefully considered the testimony and exhibits of each party. The remaining proposals, while not specifically addressed, must be rejected by the Commission. Duke's proposed rate design, rate schedules, miscellaneous charges, and terms and conditions should be approved, except as specifically modified in this Order.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 27

The evidence supporting this finding of fact is contained in the testimony and exhibits of Company witness Denton, Staff witness Watts, and SCEUC witness Phillips. In his direct testimony, Mr. Denton explained that different percentage increases were applied to customer classes to help move the

Residential and Industrial classes toward the "band of reasonableness", a band or range of plus or minus 10% of the average retail rate of return. Mr. Denton testified that the industrial class is experiencing a significantly higher rate of return than average, and the residential class is experiencing a significantly lower return than average. Duke proposes to allocate the increase in revenue to trend toward equal rates of return.

SCEUC witness Phillips testified that Duke's proposed allocation of the revenue increase does not adequately move class rates of return toward equality. Under Mr. Phillips proposal, the remaining difference would be reduced in future rate cases. Mr. Phillips proposed as an alternative that the Commission utilize the difference between Duke's requested increase and the actual increase granted to reduce or eliminate overpayments made by the industrial class. (Tr. Vol. 4, pp. 121-122)

Staff witness Watts recommended adoption of the Company's Cost of Service Studies with certain modifications. (Tr. Vol. 5, p. 238)

The Commission concludes for purposes of this proceeding that the revenue increase should be allocated to the extent practical to bring the Industrial class return to the band of reasonableness.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 28

The evidence supporting this Finding of Fact is contained in the testimony and exhibits of Company witness Denton and SCEUC witness Phillips. Rider IS is the interruptible service rider under which general service and industrial customers receive a credit from Duke to curtail their load at Duke's request. Duke proposes to increase the cost to the customer in each situation where the customer does not interrupt his load at Duke's request. The current cost to the customer for failing to interrupt is \$1.58/KW. Under the proposed revised Rider IS, each time the customer fails to interrupt, approximately one third of the credits paid to the customer during the year are to be repaid to Duke.

If a customer fails to interrupt three times during the year, all credits paid during the prior twelve months would be repaid to Duke and the customer would be removed from Rider IS. Mr. Denton testified that this change will send a much stronger price signal to customers so that when Duke requests an interruption of load, the Company can expect customers to reduce their load to the level agreed to in their Rider IS contracts. Duke also proposes to make the exposure period consistent with Schedule OPT by reducing the exposure hours during the summer to equal the proposed summer on-peak hours.

No party objected to the proposed change in penalty provision. However, SCEUC witness Phillips proposes that the credit rate be increased from the present \$3.50/KW to a range of \$6.25/KW to \$7.50/KW per month. (Tr. Vol. 4, pp. 129-130). Duke is attracting a sufficient amount of interruptible load at the present credit and has requested an increase in the system cap to 1100 megawatts.

The Commission agrees with the Company that an increase in the Rider IS credit is not necessary to attract a sufficient level of interruptible load.

IT IS, THEREFORE, ORDERED AS FOLLOWS:

1. That Duke Power Company be, and is hereby, allowed to adjust its electric rates and charges so as to produce, based upon the adjusted test year level of operations, an increase in annual gross revenues of \$68,384,000 from its South Carolina retail operations. This increase shall be effective for service rendered on and after the date of this Order.

2. That within _____ working days after the date of this Order, the Company shall file with the Commission _____ copies of computations showing the overall South Carolina retail rate of return which will be produced by the revenues approved by this Order. Such computations shall be based on the cost allocation methodology approved herein.

ENGINEERING DESIGN & TESTING Corp.
ENGINEERS / CONSULTANTS / LABORATORIES

August 31, 2011
E-MAIL TRANSMITTAL

INVOICE NUMBER: 811441 (Rev.1 October 11, 2011)

COLUMBIA DISTRICT OFFICE:
Post Office Box 8027
Columbia, South Carolina 29202

(803) 791-8800
Facsimile Transmission:
(803) 791-0427

INVOICE TO:

South Carolina Department of Revenue
Counsel for Litigation
Post Office Box 12265
Columbia, South Carolina 29211

ATTN: Mr. Harry Hancock, Esq. hancoch@sctax.org

REFERENCE:

SC Department of Revenue v. Dulce Energy
Insured: South Carolina Department of Revenue
D.o.I.: Not Applicable to File
L.o.I.: Columbia, South Carolina
Claim Number: Not Applicable to File
ED&T File Number: COL14782-76140
Engineer-in-Charge: Glenn J. Robinson, M.S., P.E.

INVOICE FOR SERVICES RENDERED THROUGH: August 31, 2011

FEDERAL EMPLOYERS IDENTIFICATION NUMBER: 57-0693571

PROFESSIONAL SERVICES:

Engineer (11.60 hour(s) @ \$250 /hour)..... \$ 2,900.00

SUPPLIES \$ 2.50

LONG DISTANCE / TELEPHONE CALLS \$ 6.60

AMOUNT DUE \$ 2,909.10



Glenn J. Robinson, M.S., P.E.

CORPORATE OFFICES: ENGINEERING DESIGN & TESTING Corp.

Post Office Box 8027/Columbia, South Carolina 29202/(803) 798-6975

DISTRICT OFFICES:

Columbia, SC / Charlotte, NC / Houston, TX / Charleston, SC / Birmingham, AL

Kansas City, KS / Oakland, CA / Asheville, NC / Orlando, FL / Santa Rosa, CA

Hartford, CT / Cleveland, OH / Dallas-Fort Worth, TX / Charleston, WV / Cherry Hill, NJ

San Juan, PR

SCDOR00017066

PAGE 2

ED&T FILE NUMBER: COL14782-76140

INVOICE NUMBER: 811441 (Rev.1 October 11, 2011)

ENGINEER

PROFESSIONAL SERVICES RENDERED AT
\$250.00 PER HOUR:

DATE	TIME	DESCRIPTION
02/10/11	0.00 hour	Return telephone call to client (discuss upcoming deposition preparation)
02/14/11	1.70 hours	Review e-mail documents; file review (deposition preparation)
02/15/11	1.00 hour	Meet with client for preparation of upcoming deposition
02/17/11	0.00 hour	Multiple telephone calls to and from client regarding next steps
02/23/11	1.00 hour	Receive telephone call from client regarding status; begin analysis of tangible personal property
02/25/11	1.50 hours	Review client provided materials; print draft on tangible personal
03/02/11	1.75 hours	Meet with client for preparation of upcoming deposition; conduct Internet research
03/08/11	0.40 hour	Receive telephone call from client regarding questions; research answers, e-mail link to client
06/02/11	0.00 hour	Telephone call to client regarding status (leave message)
06/16/11	0.15 hour	Telephone call to client regarding status (briefing at client's office June 23, 2011)
06/23/11	1.80 hours	Meet with client for briefing; receive documents for review; send e-mail to client for document forwarding; create document list
07/11/11	1.30 hours	Review Carter transcript and portion of Jamil transcript
07/12/11	1.00 hour	Telephone call from client regarding transcript review; finish Jamil transcript

11.60 Hours

SCDOR00017067

Jan Musante

14782

From: Glenn Robinson
Sent: Friday, October 07, 2011 3:30 PM
To: Harry Hancock
Cc: Jan Musante; Gloria Smoak
Subject: RE: latest Invoice
Harry,

Thank you for bringing this matter to my attention. Upon review, several errors were found. Beside the inclusion of local travel, which is client-specific, a couple of too-small items were billed, the description of services was unclear and the 2011 billing rate was not used. A corrected invoice is being prepared. I will give it an extra review before it is sent.

I apologize for this inconvenience. Thank you again for your patience.

Regards,

Glenn Robinson
Consulting Engineer
Engineering Design & Testing (ED&T)
Tel 803-791-8800 Fax 803-791-0427 Cell 803-960-7815

From: Harry Hancock [mailto:Hancoch@sctax.org]
Sent: Tuesday, October 04, 2011 2:45 PM
To: Glenn Robinson
Subject: latest Invoice

Glen,

Accounting called and advised me that we did not pay for local travel. If you can submit a bill without the local travel time, I can get it paid.

Thanks,

Harry
Managing Attorney for Revenue Litigation
South Carolina Department of Revenue
Tel.- 803 898 5598

10/10/2011

SCDOR00017068

Jan Musante

14782

From: Glenn Robinson
Sent: Wednesday, October 05, 2011 6:48 PM
To: Jan Musante
Subject: FW: latest invoice

-----Original Message-----

From: Harry Hancock [mailto:Hancoch@sctax.org]
Sent: Tue 10/4/2011 2:45 PM
To: Glenn Robinson
Subject: latest invoice

Glen,

Accounting called and advised me that we did not pay for local travel.
If you can submit a bill without the local travel time, I can get it paid.

Thanks,

Harry

Managing Attorney for Revenue Litigation

South Carolina Department of Revenue

Tel.- 803 898 5598

New File

Jan Musante

14782 GJR client # 76140

From: Tim Jur [tajur@edtengineers.com]
Sent: Friday, August 13, 2010 9:01 AM
To: Harry Hancock
Cc: Glenn Robinson
Subject: RE: Expert witnesses
Attachments: 20100813075012.pdf

Mr. Hancock:

Attached is signed and notarized copy of the Confidentiality Agreement covering this matter. A hard copy is being mailed to your attention.

Regards,

Betty L. Boatwright

Administrative Assistant to Dr. Tim A. Jur
Engineering Design & Testing Corp.
Telephone: 803-796-9032
Fax: 803-796-5225
E-mail: blboatwright@edtengineers.com
Website: www.edtengineers.com

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From: Harry Hancock [mailto:Hancoch@sctax.org]
Sent: Tuesday, August 03, 2010 11:56 AM
To: Tim Jur
Cc: Lynn Baker
Subject: Expert witnesses

Dr. Jur,

I hope all is well with you.

I am writing on behalf of the SC Dept. of Revenue as we need the services of an expert witness. We are engaged in a matter wherein the principal issue is whether or not a tax payer is a "manufacturer" of electricity.

Is this a matter in which you may be interested?

Thanks for your time in considering this matter.

Harry Hancock, Esq.
Counsel for Litigation
SC Department of Revenue

8/13/2010

SCDOR00017079

301 Gervais Street
PO BOX 12265
Columbia, SC 29211.
803 898 5598

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8/13/2010

SCDOR00017074

3675

Glenn Robinson

From: Tim Jur [tajur@edtengineers.com]
Sent: Wednesday, August 04, 2010 3:45 PM
To: Glenn Robinson
Cc: Jan Musante
Subject: FW: Expert witnesses
Glenn,

Please put next Monday at 3:30 pm on your calendar for a meeting at Mr. Hancock's office (address below). Any questions, please call.

Thx,

Betty L. Boatwright
Administrative Assistant to Dr. Tim A. Jur
Engineering Design & Testing Corp.
Telephone: 803-796-9032
Fax: 803-796-5225
E-mail: blboatwright@edtengineers.com
Website: www.edtengineers.com

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From: Harry Hancock [mailto:HancockH@sctax.org]
Sent: Wednesday, August 04, 2010 3:36 PM
To: Tim Jur
Subject: RE: Expert witnesses

This works fine for me.

Thanks,

Harry

From: Tim Jur [mailto:tajur@edtengineers.com]
Sent: Wednesday, August 04, 2010 3:27 PM
To: Harry Hancock
Cc: Glen Robinson
Subject: RE: Expert witnesses

Mr. Hancock:

Dr. Jur is out of town and asked that I contact you to verify if next Monday, August 9 at 3:30 pm would be suitable for he and his colleague, Glenn Robinson, to come to your office for a meeting concerning your need for an expert witness.

I have previously left a telephone message for you, but have since decided that perhaps e-mail would be the best contact method.

8/5/2010

SCDOR00017072

We are awaiting a reply from you.

Regards,

Betty L. Boatwright

Administrative Assistant to Dr. Tim A. Jur

Engineering Design & Testing Corp.

Telephone: 803-796-9032

Fax: 803-796-5225

E-mail: blboatwright@edtengineers.com

Website: www.edtengineers.com

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From: Harry Hancock [mailto:HancockH@sctax.org]

Sent: Tuesday, August 03, 2010 11:56 AM

To: Tim Jur

Cc: Lynn Baker

Subject: Expert witnesses

Dr. Jur,

I hope all is well with you.

I am writing on behalf of the SC Dept. of Revenue as we need the services of an expert witness. We are engaged in a matter wherein the principal issue is whether or not a tax payer is a "manufacturer" of electricity.

Is this a matter in which you may be interested?

Thanks for your time in considering this matter.

Harry Hancock, Esq.
Counsel for Litigation
SC Department of Revenue
301 Gervais Street
PO BOX 12265
Columbia, SC 29211
803 898 5598

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8/5/2010

SCDOR00017073

14782

State of South Carolina
Department of Revenue
Office of General Counsel for Litigation
301 Gervais Street, P.O. Box 12265, Columbia, South Carolina 29211
Telephone (803) 898-5130 Telecopier (803) 898-5147

August 18, 2010

Glenn Robinson
West Columbia, S.C. 29201

Re: Duke Energy and Related Entities

Dear Mr. Robinson:

Please consider this correspondence as a letter of engagement for your services as a potential expert witness. The terms of such engagement are as follows:

1. At the request of the Department, you will gather facts, documents, research and other information pertaining to the South Carolina corporate income and license taxes and related issues of Duke Energy and affiliates and its entities.
2. At the request of the Department, you will prepare reports concerning the facts, documents, and other evidence you have gathered with regard to certain specified job development credits and related matters;
3. At the request of the Department, you will provide trial testimony concerning any facts, documents, or other evidence you have gathered with regard to certain specified job development credits and related matters.
4. The Department agrees to compensate you for your services at the rate of \$200.00 per hour, for all services provided herein except as noted below, and will be payable within 30 days from each billing cycle after the execution of this Agreement. You shall be paid an hourly fee of \$200.00 for testimony in any deposition or tribunal. Further, the Department will pay for all expenses related to the services of you as an expert witness, provided that you will notify the Department in advance of incurring any expenses other than for travel, copies, telephone, fax or courier or mailing expenses - all such ordinary expenses will be either paid for in advance or reimbursement will be timely made to you.
5. All bills submitted by you to the Department will be itemized.

SCDOR00017074

August 18, 2010

Page Two

6. You agree not to bill the Department for any time expended discussing the terms of this Agreement or expended preparing your itemized bill.

Please contact me should you have any questions. Otherwise, kindly acknowledge your consent by signing below and returning this letter to me, along with a signed copy of the enclosed Confidentiality Agreement.

Yours truly,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

Harry A. Hancock
Counsel for Revenue Litigation

Enclosure

I Consent:


Glenn Robinson.

SCDOR00017075

State of South Carolina
Department of Revenue
Office of General Counsel for Litigation
301 Gervais Street, P.O. Box 12265, Columbia, South Carolina 29211
Telephone (803) 898-5130 Telecopier (803) 898-5147

August 18, 2010

Tim Jur
West Columbia, S.C. 29201

Re: Duke Energy and Related Entities

Dear Mr. Jur:

Please consider this correspondence as a letter of engagement for your services as a potential expert witness. The terms of such engagement are as follows:

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2. At the request of the Department, you will prepare reports concerning the facts, documents, and other evidence you have gathered with regard to certain specified job development credits and related matters;
3. At the request of the Department, you will provide trial testimony concerning any facts, documents, or other evidence you have gathered with regard to certain specified job development credits and related matters.
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5. All bills submitted by you to the Department will be itemized.

SCDOR00017076

August 18, 2010
Page Two

6. You agree not to bill the Department for any time expended discussing the terms of this Agreement or expended preparing your itemized bill.

Please contact me should you have any questions. Otherwise, kindly acknowledge your consent by signing below and returning this letter to me, along with a signed copy of the enclosed Confidentiality Agreement.

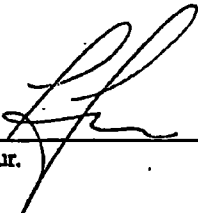
Yours truly,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

Harry A. Hancock
Counsel for Revenue Litigation

Enclosure

I Consent:



Tim Jur.

SCDOR00017077

Jan Musante

14782

From: Harry Hancock [Hancoch@sctax.org]
To: Jan Musante
Sent: Monday, August 23, 2010 8:48 AM
Subject: Read: Emailing: 14782-Billing Agreement

Your message

To: Hancoch@sctax.org
Subject:

was read on 8/23/2010 8:46 AM.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
CONFIDENTIALITY AGREEMENT

INTRODUCTION

The undersigned has been retained by the South Carolina Department of Revenue (Department) as an expert to assist in a matter concerning the tax liability of Duke Energy & Affiliates. As a result, the undersigned may review or come into contact with confidential or sensitive information maintained in the Department's files.

In recognition of the confidential nature of this information, the undersigned agrees to be bound by the following terms unless such terms are otherwise waived by the Department at a later date.

TERMS OF AGREEMENT

1. Subject to all subsequent paragraphs of this Agreement and the confidentiality provisions of the South Carolina Code of Laws, the undersigned agrees to hold confidential all information received by him concerning Duke Energy & Affiliates which is not independently or publicly available. He further agrees to restrict access to all confidential information, subject to the paragraphs below, to persons who are required by their duties on behalf of the undersigned to be privy to such knowledge.
2. All information shall be used by the undersigned solely for the purpose of rendering professional services to the Department in regard to the tax liability of Duke Energy & Affiliates.
3. Except with the prior written consent of Duke Energy & Affiliates, no confidential information may be disclosed by the undersigned to any person other than:
 - a. Counsel for Duke Energy & Affiliates and the Department;

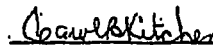
SCDOR00017079

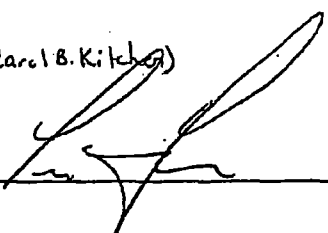
- b. Secretaries, legal assistants, and other employees of the undersigned, or of the Department who are actively engaged in assisting counsel in this matter;
 - c. Other consultants and experts engaged in this matter who have a bona fide need for the confidential information in order to perform their duties and who have also executed a similar confidentiality agreement;
 - d. The courts (including the Administrative Law Court) and all necessary court personnel;
 - e. Persons subpoenaed or noticed for depositions or formally designated as hearing/trial witnesses in this action and their counsel to the extent necessary for the witnesses' preparation for testimony.
4. South Carolina Law governs the provisions of this Agreement.

Glenn Robinson & Tim Jur consent to be bound by the foregoing agreement. Both consents are acknowledged by each signature below.


Glenn Robinson

Subscribed to and sworn before
me this 13 day of August, 2010.

 (L.S.) (Carol B. Kitchen)
Notary Public for South Carolina
My Commission Expires 9/3/2012


Tim Jur

Subscribed to and sworn before
me this 13th day of August, 2010.

 (L.S.)
Notary Public for South Carolina (Lexington)
My Commission Expires August 13, 2011

Glenn,

Here is our statute, tell me if you believe an electric utility is covered by this?

Best,

Harry

2/14/2011

SCDOR00017081

ARTICLE 9.
MANUFACTURERS, PAWNBROKERS, MINES AND MINING CLAIMS

SECTION 12-37-1310. "Manufacturer" defined.

Every person engaged in making, fabricating or changing things into new forms for use or in refining, rectifying or combining different materials for use shall be held to be a "manufacturer."

SCDOR00017082

Glenn Robinson

From: Glenn Robinson
Sent: Wednesday, September 01, 2010 2:29 PM
To: 'Harry Hancock'
Subject: RE: Document3
Harry,

The wording here is closely tied to materials, but if the "thing" is electrical energy, then the clause "changing things into new forms for use" would cover electric generation. This would be consistent with the earlier material I sent you regarding the definition of manufacture.

Noun

thing (plural things)

1. That which is considered to exist as a separate entity, object, quality or concept.
2. A word, symbol, sign or other referent that can be used to refer to any entity.
3. An individual object or distinct entity.
4. (*law*) whatever can be owned.
5. the latest fad or fashion.
6. (*In plural*) clothes, possessions or equipment.
7. (*Informal*) A unit.
Get me a thing of apple juice at the store.
8. In Scandinavian countries, a legislative or judicial assembly.
9. (*In certain fixed expressions*) A problem, dilemma, or complicating factor.
The car looks cheap, but the thing is, I have doubts about its safety.
10. (*slang*) A penis.
11. A living being or creature.
you poor thing
12. That which matters; the crux.
That's the thing; we don't know where he went.
The thing is, I don't have any money.

Considering its origin as a legislative assembly (definition 8), the term thing is pretty elastic; moreso than one would initially expect.

Bottom line: Yes, generation of electrical energy would be consistent (is not inconsistent) with the definition of "manufacturer" you provided.

Regards,

Glenn Robinson
Consulting Engineer
Engineering Design & Testing (ED&T)
Tel 803-791-8800 Fax 803-791-0427 Cell 803-960-7815

From: Harry Hancock [mailto:Hancoch@sctax.org]
Sent: Monday, August 30, 2010 12:46 PM
To: Glenn Robinson
Cc: Jonathon A. Gutting
Subject: Document3

2/14/2011

SCDOR00017083

3-2-11

14782

Google search
"electricity as fungible
personal property"

AMPAD

SCDOR00017084

Science: Electricity in Court

Monday, July 30, 2012

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In his Chicago courtroom last week Circuit Judge Harry M. Fisher stared at a voltmeter which had been placed before him on the bench. The voltmeter was connected to a switch, and the switch was connected with the courtroom lights. When the switch was closed Judge Fisher saw the voltmeter needle leap from 0 to 110 on the dial. What he had to decide was whether the thing that made the needle leap was tangible or intangible. There to help him, but arguing on opposite sides of the dispute, were two distinguished Nobel Prize men.

Point at issue was whether electric current was subject to Illinois 2% occupation tax. Twenty power companies headed by Commonwealth Edison, Peoples Gas Light & Coke, and Central Illinois Public Service contended that current was an intangible, hence nontaxable. The State contended that current was a tangible and taxable commodity. The companies stood to lose in taxes, the State to gain in revenue, some \$5,000,000 annually.

No one attacked the orthodox teaching of physics that electric current is a flow of matter having mass. A current of one ampere is a flow of 6,281 billion billion electrons per second past a given point. An electron is a particle of matter weighing 0.8999 billionths of a billionth of a billionth of a gram. But was electric current tangible?

Up rose beetle-browed Dr. Arthur Holly Compton (Nobel Prize, physics, 1927). Electricity was tangible, said he, because it could be seen, heard, felt, tasted.

Up rose wiry, tousle-haired Dr. Irving Langmuir (Nobel Prize, chemistry, 1932). Electricity was intangible, said he, because it could not be seen, heard, felt, tasted.

Circuit Judge Fisher watched, listened, pondered. Then he solemnly pronounced electricity a tangible, taxable commodity.

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"We have been orphaned today! Now who will fight for our

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14782



LEGAL ALERT

February 27, 2009

Illinois Supreme Court Ruling Raises Questions Regarding Sourcing Regulations and Sales Tax Rules

In *Exelon Corp. v. Dep't of Rev.*, Docket No. 105582, 2009 Ill. LEXIS 188 (Ill. Feb. 20, 2009), a divided Illinois Supreme Court held that electricity is tangible personal property for purposes of Sec. 201 of the Illinois Income Tax Act.¹ *Exelon* represents a change in the State's longstanding position regarding the treatment of electricity for state income tax purposes. Nationally, states are split regarding whether sales of electricity are sales of tangible personal property, sales of intangible property, or sales of a service. In some cases, states have conflicting positions depending on the type of tax at issue:

Background

Exelon Corporation challenged the Illinois Department of Revenue's denial of its claims for replacement tax credits for investments in "qualified property" under 35 ILCS 5/201(e). The Circuit Court and the Appellate Court agreed with the Department's denial of the credits. The dispute in this case centered around whether the taxpayer engaged in "retailing" under 35 ILCS 5/201(e). For a taxpayer to be engaged in retailing, it must sell tangible personal property. The Department took the position that the taxpayer was not engaged in retailing because the taxpayer sold electricity and electricity is not tangible personal property.

The Income Tax Act does not define "tangible personal property." The debate thus centered around whether, under existing case law, electricity was tangible. The lower courts agreed with the Department's contention that "the classification of electricity as intangible property" had already been conclusively determined in *Farrand Coal Co. v. Halpin*, 140 N.E.2d 698 (1957).² However, the Illinois Supreme Court held that *Farrand Coal* was not dispositive because the court's discussion in that case as to whether electricity was tangible personal property was simply an aside (obiter dicta) and not necessary to the holding in *Farrand Coal*.³ Thus, the Illinois Supreme Court undertook its own analysis as to whether electricity met the dictionary definition of "tangible."

Sutherland Observation: The court's detailed discussion of the scope and role of obiter dicta in judicial decision making illustrates that courts are not bound by stare decisis simply because an issue was discussed in a previous case. Before determining that an earlier discussion of an issue is binding authority, the Illinois Supreme Court's decision provides that a court must first determine if the discussion is an extension of an opinion on a point in the case which is deliberately passed on by the court as not necessary to the disposition of that case or an expression of the court which is "uttered as an aside."

Is Electricity Tangible Personal Property?

The Illinois Supreme Court ruled that, based on the dictionary definition of "tangible" and the modern scientific understanding of electricity, electricity is tangible. The court found expert testimony stating that electricity "can be sensed (felt, tasted, seen, and heard), measured, weighed, and stored..." to be

¹ *Exelon Corp. v. Dep't of Rev.*, 378 Ill. App. 3d 918 (2007).

² See *Exelon Corp. v. Dep't of Rev.*, 378 Ill. App. 3d 918, 922 - 923 (2007).

³ *Exelon Corp. v. Dep't of Rev.*, Docket No. 105582, 2009 Ill. LEXIS 188, 14 (Ill. Feb. 20, 2009).

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SCDOR00017086

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persuasive.⁴ Noting advances in the scientific community's understanding of electron theory of electricity, the court accepted the expert's position.

Sutherland Observation: The classification of electricity as tangible personal property for purposes of the Illinois income tax has ramifications not only for credit eligibility but also for nexus and Illinois apportionment calculations.

As of December 31, 2008, Illinois changed its sourcing rules for its corporate income tax apportionment formula. Receipts from the sale of most services are in the state if the services are received in the state. The legislation required the Department to adopt rules defining where utility services are received. Early this year, the Illinois Department of Revenue issued a proposed rule for the "Sale, Transmission and Delivery of Electricity." Because both the Department's authority and its regulations are premised on electricity not being tangible personal property, the *Exelon* decision may affect the applicability of the proposed regulations as currently drafted. This is particularly true for the wholesale sale of electricity. The statute mandates that sales of tangible personal property be sourced to the state in which the property is shipped or delivered. The proposed regulations, however, source receipts from the wholesale sale of electricity based on the location of the customer's office that entered the transaction, the customer's billing address, or based on an independent system operator load ratio. Other provisions of the proposed regulation, such as the sourcing of receipts from transmission services, should remain unaffected because the purchase of electricity is not directly involved.

The classification of electricity as tangible personal property also raises nexus and P.L. 86-272 questions. Illinois has generally noted that merely holding title to electricity in the state did not create nexus. Similarly, selling electricity in the state was not protected by P.L. 86-272. The *Exelon* opinion may reverse both of these positions because electricity is now tangible personal property.

Other Jurisdictions

The *Exelon* court notes that its decision is consistent with other state court decisions in California, Rhode Island, Florida and Alabama that have expressly held in varying contexts that electricity is tangible personal property.⁵ Other states that have (in the absence of legislative pronouncements) judicially determined electricity to be tangible for tax purposes include Tennessee and Arizona.⁶

Though the court aligns itself with other states treating electricity as tangible personal property, there are states that treat the sale of electricity as a sale other than a sale of tangible personal property (e.g., a service or intangible) for purposes of state income and/or sales taxes. For example, the Massachusetts Appellate Tax Board ruled electricity is not tangible personal property when sourcing receipts for the sales factor of the Massachusetts apportionment formula. *EUA Ocean State Corp., et al. v. Comm'r of Revenue*, Mass. App. Tax Bd., Nos. C258405-406, C258424-425; C258882-883; C259158-159; C259663; C262566-568 (April 24, 2006). For sales tax purposes, the Indiana Tax Court ruled that electricity was not tangible personal property for application of the sale for resale exemption. *Mynsberge v. Dept of State Revenue*, 716 N.E.2d 629 (Ind. Tax Ct. 1999).

⁴ *Id.* at 23.

⁵ See *Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization*, 160 Cal. App. 4th 514, 521, 72 Cal. Rptr. 3d 857, 862(2008) (sales tax); *Narragansett Elec. Co. v. Carbone*, 898 A.2d 87, 97-98 (R.I. 2006)(conversion); *Davis v. Gulf Power Corp.*, 798 So. 2d 298, 300 (Fla. Dist. Ct. App. 2001)(ad valorem tax exemption); *Curry v. Alabama Power Co.*, 243 Ala. 53, 59-60, 8 So. 2d 521, 526 (1942).

⁶ *Texas Eastern Transmission Corporation v. Benson*, 480 S.W.2d 905, 908 (Tenn. 1972); *Tucson Electric Power Co. v. Arizona Department of Revenue*, 822 P.2d 498 (Ariz. Ct. App. 1991).

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Sutherland Observation: In General Information Letters, the Illinois Department of Revenue has consistently taken the position that electricity is not tangible personal property for purposes of Illinois Retailers' Occupation (Sales) Tax. It is not clear whether *Exelon* will affect the Department's treatment of electricity for purposes of the Retailers' Occupation Tax. If the Department follows *Exelon* for the Retailers' Occupation Tax, this creates opportunities for claiming the machinery and equipment exemption to the Illinois sales tax available under 35 ILCS 120/2-5. The exemption applies to the gross receipts of "[m]achinery and equipment that will be used by the purchaser... primarily in the process of manufacturing or assembling tangible personal property..." 35 ILCS 120/2-5(14) (emphasis added). Taxpayers should consider filing sales tax refund claims for tax paid on purchases of machinery and equipment used to manufacture electricity. Note, however, that at least one state—California—has decisions that treat electricity as tangible personal property for one type of tax but not for the other. Interestingly, these California decisions treat electricity as not tangible personal property for purposes of its franchise/income tax but are tangible personal property for purposes of its sales tax.

If you have any questions regarding this Legal Alert, or the services we provide, please feel free to contact the attorneys listed below or the Sutherland attorney with whom you regularly work.

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Ohio.gov

Ohio Department of Taxation Information Release

ST 2003-06 - Definition of Tangible Personal Property including Prewritten Computer Software - July 2, 2003

Am. Sub. H.B. 95 contains a number of changes intended to bring Ohio statutes into compliance with the terms of the Streamlined Sales and Use Tax Agreement. Information on the Streamlined Agreement can be found at www.streamlinedsalestax.org. Effective July 1, 2003, one change that was made in H.B. 95 was the addition of a new definition of "tangible personal property." This definition is to be used for sales and use tax purposes only; it does not apply to other taxes, such as personal property tax.

The Ohio sales tax applies to sales of tangible personal property made in this state. The use tax applies to the storage, use, or consumption of tangible personal property in Ohio. Prior to H.B. 95, the Ohio sales tax statutes did not contain a definition of "tangible personal property." Effective July 1, 2003, a new R.C. 5739.01(YY) was added to the sales tax chapter. That section provides:

"Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. For purposes of this chapter and Chapter 5741, of the Revised Code, "tangible personal property" includes motor vehicles, electricity, water, gas, steam, and prewritten computer software.

That section expressly includes in the definition of tangible personal property, "**** electricity, *** and prewritten computer software." Below is a discussion of these items.

Electricity

Under R.C. 5701.03, Ohio does not consider electricity to be personal property. As such, sales of electricity were not subject to Ohio sales or use tax. Ohio has a special Kilowatt-hour tax that applies to electricity.

For purposes of conforming to the Streamlined Agreement, R.C. 5739.01(YY) specifies that for sales and use tax purposes, tangible personal property includes electricity. To avoid imposing sales and use tax on sales of electricity, H.B. 95 enacted new language in R.C. 5739.02(B)(7) that provides a sales tax exemption [and, by operation of R.C. 5741.02(C)(2), a use tax exemption] for "sales of electricity delivered through wires." This new exemption is effective July 1, 2003.

Prewritten Computer Software

The term "prewritten computer software" is defined in the Streamlined Sales and Use Tax Agreement. H.B. 95 adopts the Streamlined Agreement's definitions of "computer," "computer software," and "prewritten computer software" as follows in R.C. 5739.01(AAA), (BBB), and (DDD):

(AAA) "Computer" means an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

(BBB) "Computer software" means a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

14982
- political balancing

3693

SCDOR00017089

(DDD) "Prewritten computer software" means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more prewritten computer software programs or prewritten portions thereof does not cause the combination to be other than prewritten computer software. "Prewritten computer software" includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser. If a person modifies or enhances computer software of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person's modifications or enhancements. Prewritten computer software or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement, the modification or enhancement shall not constitute prewritten computer software.

Essentially, the term "prewritten computer software" has the same meaning as the term "canned software" found in Ohio Adm. Code (O.A.C.) 5703-9-46(A)(7). Under that rule, a sale of canned software was considered to be a sale of tangible personal property, as is a sale of prewritten computer software as defined in new R.C. 5739.01(DDD).

R.C. 5739.01(DDD) and O.A.C. 5703-9-46(A)(7) do differ somewhat on the treatment of "customized" software. Under the rule, where canned software that has been modified or customized for a specific consumer is sold in a single transaction, the sale is a sale of tangible personal property if the charge for the modifications is not more than half the price of the sale. It would not matter whether the modification charges were or were not separately stated unless they exceeded half the price of the transaction. Under new R.C. 5739.01(DDD), a reasonable separately stated charge for modifications to prewritten computer software is not part of the prewritten computer software and would be excluded from the tax base. Effective July 1, 2003, until O.A.C. 5703-9-46 is amended, the broader basis for exempting part of the price of a transaction under the new provisions of the statute will control.

The new definition provides that where prewritten computer software is modified for a specific consumer, and there is no separation of charges for the modification, the product remains prewritten computer software. Thus, in any case where the charge for modifications to prewritten computer software is not separately stated, even though the modifications may be extensive, the entire transaction would remain a sale of tangible personal property and be subject to sales or use tax.

If you have questions regarding any matter covered in this release, please call 1-888-405-4039 (Ohio Relay Service for the Speech or Hearing Impaired: 1-800-750-0750), or e-mail us through our web site at <http://tax.ohio.gov/>.

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14782

inter-net tech.

Hx of elect gen

AK 12/31/829 1st public demo elect lamp

3-5-11 First commercial sale of electric lighting on board

SS. Columbia launched 2/1880

1st on land Hinds, kitchen printer

1/1/1881

1/1882 temporary street lighting

9/4/82 opened Pearl St gas st

CAMPAD

SCDOR0001709

ENGINEERING DESIGN & TESTING Corp.
ENGINEERS / CONSULTANTS / LABORATORIES

August 31, 2011
E-MAIL TRANSMITTAL

INVOICE NUMBER: 811441

INVOICE TO:
South Carolina Department of Revenue
Counsel for Litigation
Post Office Box 12265
Columbia, South Carolina 29211
ATTN: Mr. Harry Hancock, Esq.

hancock@sclax.org

COLUMBIA DISTRICT OFFICE:
Post Office Box 8027
Columbia, South Carolina 29202

(803) 781-8800
Facsimile Transmission:
(803) 781-0427

REFERENCE: SC Department of Revenue v. Duke Energy
Insured: South Carolina Department of Revenue
D.o.I.: Not Applicable to File
L.o.I.: Columbia, South Carolina
Claim Number: Not Applicable to File
ED&T File Number: COL14782-76140
Engineer-in-Charge: Glenn J. Robinson, M.S., P.E.

INVOICE FOR SERVICES RENDERED THROUGH: August 31, 2011

FEDERAL EMPLOYERS IDENTIFICATION NUMBER: 57-0693571

PROFESSIONAL SERVICES:

Engineer (12.40 hour(s) @ \$200 /hour)..... \$ 2,480.00

TRAVEL EXPENSES:

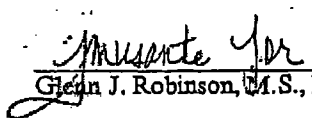
Mileage (4 mile(s) @ \$0.510 /mile)..... \$ 2.04

Mileage (4 mile(s) @ \$0.555 /mile)..... \$ 2.22

SUPPLIES \$ 2.50

LONG DISTANCE / TELEPHONE CALLS \$ 6.60

AMOUNT DUE \$ 2,493.36


Glenn J. Robinson, M.S., P.E.

CORPORATE OFFICES: ENGINEERING DESIGN & TESTING Corp.
Post Office Box 8027/Columbia, South Carolina 29202/(803) 788-6975
DISTRICT OFFICES: Columbia, SC / Charlotte, NC / Houston, TX / Charleston, SC / Birmingham, AL
Kansas City, KS / Oakland, CA / Asheville, NC / Orlando, FL / Santa Rosa, CA
Hartford, CT / Cleveland, OH / Dallas-Fort Worth, TX / Charleston, WV / Cherry Hill, NJ
San Juan, PR

SCDOR00017092

PAGE 2

ED&T FILE NUMBER: COL14782-76140

INVOICE NUMBER: 811441

ENGINEER

PROFESSIONAL SERVICES RENDERED AT

\$200.00 PER HOUR:

DATE	TIME	DESCRIPTION
02/10/11	0.10 hour	Return telephone call to client (discuss upcoming deposition preparation)
02/14/11	1.70 hours	Review e-mail documents; file review (deposition preparation)
02/15/11	1.20 hours	Local travel to meet with client for preparation of upcoming deposition
02/17/11	0.10 hour	Multiple telephone calls to and from client regarding next steps
02/23/11	1.00 hour	Receive telephone call from client regarding status; begin analysis of tangible personal property
02/25/11	1.50 hours	Review client provided materials; print draft on tangible personal property
03/02/11	1.95 hours	Local travel to meet with client for preparation of upcoming deposition; conduct Internet research
03/08/11	0.40 hour	Receive telephone call from client regarding questions; research answers, e-mail link to client
06/02/11	0.00 hour	Telephone call to client regarding status (leave message)
06/16/11	0.15 hour	Telephone call to client regarding status (briefing at client's office June 23, 2011)
06/23/11	2.00 hours	Local travel to meet with client for briefing; receive documents for review; send e-mail to client for document forwarding; return travel; create document list
07/11/11	1.30 hours	Review Carter transcript and portion of Jamil transcript
07/12/11	1.00 hour	Telephone call from client regarding transcript review; finish Jamil transcript

12.40 Hours

SCDOR00017093

Jan Musante

From: Harry Hancock [Hancoch@sctax.org]
To: Undisclosed recipients:
Sent: Friday, September 02, 2011 11:15 AM
Subject: Read: Emailing: Invoice for SC Department of Revenue v. Duke Energy; ED&T File #COL14782; Glenn J. Robinson, M.S., P.E.

Your message

To: Hancoch@sctax.org
Subject:

was read on 9/2/2011 11:15 AM.

13632

1124 Mon

Carter 2009-226E Rate increase

Pres. BS Accounting

- Agenda
- 1 briefing ops performance
 - 2 summary of request.
 - 3 justification for requested relief
 - 4 econ development activities impact of importance of
 5. support req for 5 yr extensions of BPM profit sharing via Advance SC

1. 2nd largest in SC

Gville Sp by Anderson

3 nuc 8 coal 30 hydro "several" gas

19 GW some purch power

T&D 13,000 mi T Ref Jamil efficiency

1,600 sub

~ 100,000 mi D

interconnected w/ 8 other util Ref Turner reliability

reliable rate efficient reasonable

balance perf - cost -

enviro

low cost balanced cost / reliable / cost eff.

- call centers

- Aclera tool customer begin

- big acct mgmt; some centers, "My Duke En."

⇒ hi cust sat is factious

sends to big acct thru Advance SC

SCDOR00017095

p. 10 1991 last prev rate hike 18^{yr}
(merged Cmergy ~~2006~~)
requested increase keeps rates
below average national & region

② request 133 mm 9.3%
less demand credit
104 mm 7.2% avg
increase less than inflation
growth & transition to Carbon Constrained
"general inflationary pressure"
cash flow & access to credit

Challenges

- pop growth + 8.8 GW by 2028
- energy efficiency as a "fifth fuel"
- inflation "rate based additions" ?

reached the bottom of the
efficiency bucket

15 Q4

ROR retail	6.47%
resid.	5.41%
indust	7.71%
gas	7.91%

17Q #1 Duke needs growth as vital

loss of mfg jobs 13% less demand
textiles dying fast

18Q 10

19Q 6

BPM sales → spot trades when
capacity exceeds demand

50% of SC allocation of BPM
profits goes to Advance X
^{via Cineroy}

Expires (ed?) 12/31/00
wants 5 yr extension

pub assistance and econ dev

↑
first priority, but how much allocated
ref Carter Ex 1

22Q 8

various customer assistance programs
- efficiency

24 line 14

1.2 mm 2008/2009 combined

25 line 16

fund growth of cap inv't

1,3632

Mon. 7/11

Jamul 2009-2016-E

Chief Gen. officer

Safe Reliable Efficient opes

1 over view of assets

2 brief Catawba purch & other nuel

3 report 2008 performance test

4 key cost drivers

P3

14,000 MW

Coal fired part has grown w/ load

Catawba price based on gas turbo analysis

" offset coal in meeting growth

9.09

Nuc. plans

- NRC mandatory costs, taxes, etc.

- potential uprating

- maintain option to build Lee plant

10 Q19

+ 2,687 C.T.s

11 Q5

Rate base additions

enviro.

reliability imp.

hydro relicensing

13 Q19

1.1 fossil & hydro 2009-2011

14 Q2

safety reliability costs

line 15

add regulatory compliance to above

15 line 16

HDP E

nuc. performance good

availability not stated

capacity 91.5

SCDQR00017098

13632

7/12 Tue cc 8/m cell 1; cell 11 & 1

continue Jamil p 15

16 line 24 performance of coal-fired plants

84.2 availability

55.8 capacity

peaking coal had good availability
but low capacity 36.2 summer

CTs 95.9 starting availability

(Duke Expert GA Tech)

Willoughby & Hafer for SCDOR

18 Q11

Nuc costs lowest in the nation

\$19.26 /MWh

26% fuel (ref: Calp)

Calproba will add 17 mm/a

Fatigue rule will add 7 mm/a

Elder repl. pipeline 1 mm/a steals

NRC fees will add 5 mm/a

19 Q1

Efficiency improvement efforts

- continuous improvement
- common integral policies & practices
- adopt best practices from competition

Management of refueling outage schedules off peak
More local labor for outages

13632

22Q1 challenges

↑ labor cost

↑ m & supplies for mtrc

• climate change legislation
→ more mtrc

23Q2

○ O & M costs for ^{Fossil} hydro fleet

Fossil 85% fuel offset by sale
of by-products (?)

Ref: Doebl

expect non fuel cost ↑

24Q3

Mitigation

• continuous improvement

• leaner org.

• more cost effective oper. structure (?)

24 June 24

• larger fleet (~~to be~~?) compared to?
• sourcing teams

separate
Fossil & hydro

25 Q 20

Fossil - Hydro challenges

• in corp. env controls ~~into~~ O & M into
overall mgt

begin work in areas improvement

26 June 7

"Focus on generation excellence,
process improvement and cost control"

26 June 16 at reg.

"safely provide 100% env. reg'ts."

Manufacture: From middle French about 1560, literally "made by hand". Thus, Make and Manufacture are closely related terms and ideas. Manufacture has changed in meaning. Hand-made now implies craft shop (or sweat shop?) technology and organization. Manufacture now implies mechanically-powered technology and division of labor. Merriam-Webster lists four definitions, two of which center on material goods, and two of which are more general and inclusive. Taken as a whole, manufacture relates to the process model of input - process - output, with the process being mechanized or at least organized. This model is only sensible if the product is well defined and the input is consumed to suit production.

The commercial-economic characterization of product as "goods and services" does not correlate with the legal formula quoted in Duke's 2002 letter "manufacturing of goods and materials". In the former, the goods are physical material and the services are immaterial (only incidentally involve physical transfer of material). In the latter, goods is either redundant or must include products other than physical material, such as electrical energy. This is in line with two more general dictionary definitions of goods:

That which is produced, then traded, bought or sold, then finally consumed.

Something that has economic utility or satisfies an economic want.

I would conclude that the language "manufacturing of goods and materials" is deliberately broad so as to avoid inadvertent exemptions. "Goods and Materials" here would fall under the "Goods" part of "Goods and Services" in economic terms.

1. Services

2. Goods

a. Goods other than materials

b. Materials & energy

right to a thing
intangible
tangible

I believe you stated that production of electricity is specifically defined as manufacture in SC law.

That would be consistent with my conclusion.

Another way to analyze this is to look at the distinction between service (service) activities and manufacturing activities. The former has the flavor of (slavishly) following orders that are peculiar to the instant. Today I order one sort of action, tomorrow another. The difference may be quantitative; but more generally is not. For example, an oil change today and a brake job tomorrow (but not two oil changes). The service may not even be "product-ized" (well defined and priced). For example, "What it will cost me to fix that funny noise in my engine?" Compare that with the time-invariant concept of a product or commodity. A pig tomorrow is a pig today, but I may buy two pigs or none. I would conclude that if a product (other than hours of service) can be metered, it is the result of manufacturing, not service. Taken to its logical conclusion, if delivering electricity ~~was~~ a service then I would pay a flat monthly fee, regardless of consumption (like my garbage service).

were

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Finally, the language, even though mutable, has pre-Einsteinian roots. Traditional language did not even recognize the concept of energy. The only physical interpretation that will serve the future must be consistent with the idea that energy and mass are interchangeable. Transfer of any form of energy as a commodity should be treated on the same legal basis as transfer of mass. This is consistent with existing cases where geothermal energy is piped and metered, and cases where natural gas is sold in terms of heat value, not mass. The transfer of electricity is no more ethereal than the transfer of heat.

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Manufacturing Draft

Definition of MANUFACTURE Merriam-Webster

- 1: something made from raw materials by hand or by machinery
- 2
- a : the process of making wares by hand or by machinery especially when carried on systematically with division of labor
- b : a productive industry using mechanical power and machinery
- 3: the act or process of producing something

Examples of MANUFACTURE

1. materials used in the *manufacture* of cars
2. We're developing new methods of *mass manufacture*.

Origin of MANUFACTURE

Middle French, from Medieval Latin *manufactura*, from *latīn manu factus*, literally, made by hand
First Known Use: 1567

Wiktionary Verb Produce

to produce (third-person singular simple present *produces*, present participle *producing*, simple past and past participle *produced*)

1. *(transitive)* To *make* or *manufacture*.

The factory will produce 10,000 lawn chairs.
2. *(transitive)* To make (a thing) available to a person, an authority, etc.

By 2008, travelers must produce their passport when crossing from Canada to the USA.
3. *(transitive) (media)* To sponsor and present (a motion picture, etc) to an audience or to the public.

Spielberg produced that movie.

Wikipedia Verb Make

to make (third-person singular simple present *makes*, present participle *making*, simple past and past participle *made*)

1. *(obsolete, except in Idioms)* To *hasten*, to act.

To make like a deer caught in the headlights.
2. To *create*, *synthesize* or *produce*.

We made a bird feeder for our yard.

They hope to make a bigger profit.

We'll make a man out of him yet.
3. To *synthesize*.

They make a cute couple.

This makes the third intrusion.
4. *(constructed with of, typically interrogative)* To *inquire*.

I don't know what to make of it.
5. *(usually stressed)* To bring into *existence*.

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This company is what made you.

She married into wealth. She has it made.

6. (second object is an adjective, participle or noun) To cause to be.

The citizens made their objections clear.

This might make you a bit woozy.

Did I make myself heard?

Scotch will make you a man.

7. (second object is a verb) To cause to do.

You're making her cry.

I was made to feel like a criminal.

8. (second object is a verb, can be stressed for emphasis or clarity) To urge to do.

The teacher made the student study.

Don't let them make you suffer.

9. (of a fact) To imply or suggest to be.

His past mistakes don't make him a bad person.

10. (object is a bed, referred to by the word bed) To cover exactly with bedclothes.

11. (known) (of a person being caught) To recognize (without being recognized in return). (unknown)

12. (colours) To arrive at a destination, usually at or by a certain time.

We should reach Christmast by 7 o'clock.

13. (quickly, upwards) To move or be able to move at a particular speed.

The ship could make 20 knots an hour in calm seas.

14. (joined) To belong into the family or a similar organization (as a made man). (unknown)

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**ARTICLE 9.
SALES TAX**

SECTION 12-36-910. Five percent tax on tangible personal property; laundry services, electricity, communication services, and manufacturer-consumed goods.

(A) A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.

(B) The sales tax imposed by this article also applies to the:

(1) gross proceeds accruing or proceeding from the business of providing or furnishing any laundering, dry cleaning, dyeing, or pressing service, but does not apply to the gross proceeds derived from coin-operated laundromats and dry cleaning machines;

(2) gross proceeds accruing or proceeding from the sale of electricity;

(3)(a) gross proceeds accruing or proceeding from the charges for the ways or means for the transmission of the voice or messages, including the charges for use of equipment furnished by the seller or supplier of the ways or means for the transmission of the voice or messages. Gross proceeds from the sale of prepaid wireless calling arrangements subject to tax at retail pursuant to Item (5) of this subsection are not subject to tax pursuant to this Item. Effective for bills rendered after August 1, 2002, charges for mobile telecommunications services subject to the tax under this Item must be sourced in accordance with the Mobile Telecommunications Sourcing Act as provided in Title 4 of the United States Code. The term "charges for mobile telecommunications services" is defined for purposes of this section the same as it is defined in the Mobile Telecommunications Sourcing Act. All other definitions and provisions of the Mobile Telecommunications Sourcing Act as provided in Title 4 of the United States Code are adopted. Telecommunications services are sourced in accordance with Section 12-36-1920;

(b)(i) for purposes of this Item, a "bundled transaction" means a transaction consisting of distinct and identifiable properties or services, which are sold for one nonitemized price but which are treated differently for tax purposes;

(ii) for bills rendered on or after January 1, 2004, that include telecommunications services in a bundled transaction, if the nonitemized price is attributable to properties or services that are taxable and nontaxable, the portion of the price attributable to any nontaxable property or service is subject to tax unless the provider can reasonably identify that portion from its books and records kept in the regular course of business for purposes other than sales taxes.

(4) fair market value of tangible personal property manufactured within this State, and used or consumed within this State by the manufacturer.

(5) gross proceeds accruing or proceeding from the sale or recharge at retail for prepaid wireless calling arrangements.

(a) "Prepaid wireless calling arrangements" means communication services that:

(i) are used exclusively to purchase wireless telecommunications;

(ii) are purchased in advance;

(iii) allow the purchaser to originate telephone calls by using an access number, authorization code, or other means entered manually or electronically; and

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(iv) are sold in units or dollars which decline with use in a known amount.

(b) All charges for prepaid wireless calling arrangements must be sourced to the:

(i) location in this State where the over-the-counter sale took place;

(ii) shipping address if the sale did not take place at the seller's location and an item is shipped; or

(iii) either the billing address or location associated with the mobile telephone number if the sale did not take place at the seller's location and no item is shipped.

(6) gross proceeds accruing or proceeding from the sale or renewal of warranty, maintenance, or similar service contracts for tangible property, whether or not such contracts are purchased in conjunction with the sale of tangible personal property.

(7) gross proceeds accruing or proceeding from the sale or renewal of warranty, maintenance, or similar service contracts for tangible personal property, whether or not the contracts are purchased in conjunction with the sale of tangible personal property.

(C) Notwithstanding other provisions in this article or Article 13, Chapter 36, of this title, the sales or use tax imposed by those articles does not apply to the gross proceeds accruing or proceeding from charges for or use of data processing. As used in this subsection, "data processing" means the manipulation of information furnished by a customer through all or part of a series of operations involving an interaction of procedures, processes, methods, personnel, and computers. It also means the electronic transfer of or access to that information. Examples of the processing include, without limitation, summarizing, computing, extracting, storing, retrieving, sorting, sequencing, and the use of computers.

SECTION 12-36-60. "Tangible personal property".

"Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under this chapter and does not include stocks, notes, bonds, mortgages, or other evidences of debt. Tangible personal property does not include the transmission of computer database information by a cooperative service when the database information has been assembled by and for the exclusive use of the members of the cooperative service.

SECTION 12-6-2250. Conducting business in State; apportionment of income.

< This section is repealed for tax years after 2010. >

(A) A taxpayer whose principal business in this State is (i) manufacturing or a form of collecting, buying, assembling, or processing goods and materials within this State, or (ii) selling, distributing, or dealing in tangible personal property within this State, shall make returns and pay annually an income

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tax that includes its income apportioned to this State. Its income apportioned to this State is determined by multiplying the net income remaining after allocation pursuant to Sections 12-6-2220 and 12-6-2230 by a fraction, the numerator of which is the property ratio, plus the payroll ratio, plus twice the sales ratio, and the denominator of which is four. However, where the sales ratio does not exist, the denominator of the fraction is the number of existing ratios, and where the sales ratio exists but the payroll ratio or the property ratio does not exist, the denominator of the fraction is the number of existing ratios plus one. The property, payroll, and sales ratios must be determined in accordance with Sections 12-6-2260, 12-6-2270, and 12-6-2280, respectively.

(B) For taxable years beginning in 2007 through 2010 only, a taxpayer in subsection (A) shall apportion income by using the method provided in Section 12-6-2250(A) and, if applicable, the method provided in Section 12-6-2252. If the calculation permitted in Section 12-6-2252 results in a reduction in income allocated to this State, the reduction is allowed as follows:

Taxable year beginning in Percentage of reduction allowed:

2007 20

2008 40

2009 60

2010 80

(C) For purposes of calculation of the license fee pursuant to Section 12-20-60, the percentage reduction is applied in the same manner as in subsection (B).

SCDOR00017107

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 2009-226-E

In the Matter of:

Application of Duke Energy Carolinas,
LLC for Authority to Adjust and Increase
Its Electric Rates and Charges

)
)
) DIRECT TESTIMONY OF
) BRETT C. CARTER FOR
) DUKE ENERGY CAROLINAS, LLC
)
)

DE00006708
SEP 09 10 10

I. INTRODUCTION AND PURPOSE

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Brett C. Carter, and my business address is 526 South Church Street, Charlotte, North Carolina.

Q. WHAT IS YOUR POSITION WITH DUKE ENERGY CAROLINAS, LLC?

A. I am President of Duke Energy Carolinas, LLC ("Duke Energy Carolinas" or "the Company"). Duke Energy Carolinas is a subsidiary of Duke Energy Corporation ("Duke Energy").

Q. BRIEFLY SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND PROFESSIONAL AFFILIATIONS.

A. I am a graduate of Clarion University in Pennsylvania with a Bachelor of Science degree in Accounting. I also have a Master of Business Administration degree, with a concentration in Marketing, from the University of Pittsburgh and have completed the Harvard Business School's Advanced Management Program. I am a member of the board of directors and serve as chair of the Business Development Committee for the Crisis Assistance Ministry of Charlotte. I serve on the North Carolina State Ports Authority Board. I am also a member of Leadership Charlotte.

Q. PLEASE DESCRIBE YOUR BUSINESS BACKGROUND AND EXPERIENCE.

A. I joined Duke Energy in 2005 as Vice President of Residential and Small Business Customers for the Duke Power division (now known as Duke Energy Carolinas) and also was responsible for marketing strategy and operations of the Customer Service Center. I then served as Vice President of Call Center

1 Operations for Duke Energy's U.S. Franchised Electric and Gas organization.
2 Before becoming president of Duke Energy Carolinas, I most recently served as
3 Senior Vice President of Customer Service and Business Development for Duke
4 Energy, supporting all of the company's utility operating companies, including
5 Duke Energy Carolinas. Prior to joining the Company, I served as Vice President
6 of the Central Services Division for Aquila Energy Corp. in Kansas City,
7 Missouri.

8 Q. WHAT ARE YOUR RESPONSIBILITIES IN YOUR CURRENT
9 POSITION?

10 A. I lead Duke Energy Carolinas, Duke Energy's regulated electric utility business
11 operating in South Carolina and North Carolina.

12 Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

13 A. The purpose of my testimony is: (1) to provide a brief description of Duke
14 Energy Carolinas' operations and operating performance; (2) to summarize what
15 the Company is requesting in this proceeding; (3) to explain why the relief we
16 request is important to our ability to continue to (i) provide safe, reliable, and
17 economically priced electric service to our customers, and (ii) access capital at
18 reasonable rates to build the electric infrastructure we need to comply with current
19 and anticipated environmental and other regulatory requirements; (4) to discuss
20 the impact of the Company's economic development activities and explain why
21 they are vital to our customers, the State of South Carolina, and the Company; and
22 (5) to support the Company's request for a five-year extension of its bulk power
23 marketing ("BPM") profit sharing program through AdvanceSC, LLC
24 ("AdvanceSC").

who pays for? BPM

1 II. DUKE ENERGY CAROLINAS' ELECTRIC UTILITY
2 SYSTEM AND OPERATIONS

3 Q. PLEASE GIVE AN OVERVIEW OF DUKE ENERGY CAROLINAS'
4 ELECTRIC UTILITY SYSTEM AND OPERATIONS.

5 A. Duke Energy Carolinas is South Carolina's second largest investor-owned electric
6 utility in terms of the number of retail customers served, the size of our service
7 territory, the size of our power production system, and the size of our
8 transmission and distribution system. In 2008, we provided retail electric service
9 to approximately 2.4 million retail customers throughout a 24,000 square mile
10 service territory in Western South Carolina and the Central and Western portions
11 of North Carolina. Approximately 600,000 of our retail customers are in South
12 Carolina. Our retail customers include residential, commercial, institutional,
13 governmental, and industrial customers. Manufacturing continues to be an
14 important contributor to the economy in our region, with the rubber and plastic
15 products, chemicals, paper products, and automotive industries also being of
16 major significance to our service territory's economy. Textile manufacturing,
17 while continuing to decline, still plays a significant role in our region, as do the
18 real estate and education services sectors. The major South Carolina cities in our
19 territory include Greenville, Spartanburg, and Anderson.

20 To generate the power to serve these customers, Duke Energy Carolinas
21 owns and operates three nuclear generating stations (two owned outright and one,
22 as indicated below, owned partially), eight coal-fired generating stations, thirty
23 hydroelectric stations, and several gas-fired combustion turbine generating
24 stations. On September 30, 2008, Duke Energy Carolinas completed the purchase

1 of a portion of Saluda River Electric Cooperative, Inc.'s ownership interest in
2 Catawba Nuclear Station. Following the closing of this transaction, Duke Energy
3 Carolinas owns approximately 19% of the Catawba Nuclear Station. Altogether,
4 these generating facilities are capable of producing approximately 19,000
5 megawatts ("MWs") of electricity. The Company also makes long-term and spot
6 market purchases of electricity to ensure economical and reliable service to our
7 customers. The testimony of Witness Jamil provides further detail on our power
8 supply resources.

9 To transmit and distribute this power, Duke Energy Carolinas owns and/or
10 operates approximately 13,000 circuit miles of transmission lines, over 1,600
11 substations, over 100,000 miles of distribution lines, and is interconnected with
12 eight other electric utilities. Witness Turner's testimony provides additional
13 detail on our power delivery operations.

14 Duke Energy Carolinas' headquarters is located in Charlotte, North
15 Carolina. In addition, the Company has 41 operations centers throughout our
16 South Carolina and North Carolina service territory from which we provide
17 service to our customers, and approximately 130 payment locations at which
18 customers can pay their bills.

1 **III. DUKE ENERGY CAROLINAS' OPERATIONAL PERFORMANCE**
2 **AND CUSTOMER SATISFACTION**

3 **Q. WHAT ARE DUKE ENERGY CAROLINAS' GOALS WITH RESPECT**
4 **TO OPERATIONAL PERFORMANCE AND CUSTOMER**
5 **SATISFACTION?**

6 **A. Our goal is to deliver reliable, safe, and efficient electric utility service at**
7 **reasonable prices. Our continuing challenge is to be a national leader in electric**
8 **utility operational performance, measured in terms of the safety and reliability of**
9 **our service and customer satisfaction, while also keeping our cost of operation**
10 **low in the face of new capital investment needs and increasingly costly**
11 **environmental and other regulatory requirements.**

12 **Q. PLEASE DESCRIBE DUKE ENERGY CAROLINAS' PERFORMANCE**
13 **IN TERMS OF THE RELIABILITY, EFFICIENCY, AND SAFETY OF ITS**
14 **ELECTRIC OPERATIONS.**

15 **A. Duke Energy Carolinas continues to perform extremely well in numerous key**
16 **areas. Witness Jamil describes the efficiency of our generating fleet, and Witness**
17 **Turner discusses the reliability of our transmission and distribution system. In**
18 **addition to our low cost production, transmission, and distribution of power and**
19 **our reliable power plant and transmission and distribution system performance,**
20 **we consistently deliver high quality customer service, as I discuss in greater detail**
21 **below.**

1 Q. PLEASE DESCRIBE DUKE ENERGY CAROLINAS' PERFORMANCE
2 IN TERMS OF PROVIDING HIGH QUALITY CUSTOMER SERVICE.

3 A. Customer satisfaction is very important to us. We respond to our customers'
4 inquiries and needs from two call centers employing approximately 300 customer
5 service representatives, along with utilization of third party vendors. We handle
6 more than 10 million calls annually through automated and live voice channels,
7 ranging from service orders, to requests for billing and payment information, to
8 electric trouble calls. In 2008, our Southeast call center handled 76% of its calls
9 within 30 seconds or less, and was able to resolve the vast majority of calls
10 correctly the first time, with no follow-up calls required by the customer. The
11 performance of our customer service representatives is monitored on an ongoing
12 basis by call center supervisors.

13 To further enhance customer service, the Aclara Agent Desktop & Online
14 Services Tool was implemented in 2008. This energy analysis tool provides a
15 standardized, customer-friendly method for customers to resolve energy usage
16 and cost inquiries and to address billing concerns. The tool improves customers'
17 experience by providing individualized information, alternatives, and specific
18 energy efficiency options to help customers improve their understanding of
19 energy usage and how to reduce future bill amounts. Access of the tool by South
20 Carolina customers since its launch in August 2008, has averaged over 65,000
21 log-ins per month.

22 We serve our large customers in a variety of ways including using
23 business relationship managers that have assigned customers to serve, a business
24 service center that is designed to handle routine requests, and a dedicated website

1 for large business customers called "My Duke Energy." National benchmark
2 studies conducted by third parties provide important measures of customer
3 satisfaction with our performance. For 2008, Duke Energy as a whole ranked
4 fourth in the nation in TQS Research, Inc.'s Key Accounts National Benchmark
5 study. Duke Energy Carolinas contributed to this excellent ranking with an
6 overall customer satisfaction score of 91.7% compared to the nationally top
7 ranked utility, which had an overall customer satisfaction score of 91.3%. This
8 study gauges the satisfaction of our largest customers - manufacturers with at least
9 3 MW in annual demand, large hospitals, and large universities - in several areas,
10 including overall satisfaction, reliability, price, power quality, and account
11 management. The Company has placed in the Top 10 of this study for 10
12 consecutive years.

13 Another important measure of our success in this area is the annual
14 electric utility customer satisfaction studies conducted by J.D. Power and
15 Associates ("J.D. Power"), a firm well known for setting the standard of
16 consumer opinion and customer satisfaction studies in many key industries. J.D.
17 Power performs annual studies of electric utilities' residential and midsize
18 business customer satisfaction. Duke Energy Carolinas participates in both of
19 these annual studies, and the results indicate that we are doing an outstanding job
20 of consistently providing high quality customer service.

21 The J.D. Power residential customer study, established in 1999, calculates
22 overall customer satisfaction based on six performance areas: (1) corporate
23 citizenship; (2) price; (3) power quality and reliability; (4) billing and payment;
24 (5) customer service; and (6) communications. In the 11 years that the J.D. Power

1 residential study has been conducted, Duke Energy Carolinas' scores in overall
2 satisfaction have consistently outperformed the scores of the industry average and
3 the South region average. For 2009, Duke Energy Carolinas ranked second in the
4 South region of the United States for overall residential customer satisfaction.
5 J.D. Power also conducts an annual survey of midsize business customers using
6 the same six performance areas that are used in the residential study, and Duke
7 Energy Carolinas consistently has exceeded the scores of the industry average and
8 the South region average in overall satisfaction. In the 2009 study, Duke Energy
9 Carolinas ranked fifth (out of twenty two) in the South region.

10 **Q. TO WHAT DO YOU ATTRIBUTE DUKE ENERGY CAROLINAS' HIGH**
11 **CUSTOMER SATISFACTION?**

12 **A.** Since being named President of Duke Energy Carolinas, I have met with
13 numerous key customers, customer groups, and other stakeholders. As I have
14 travelled the state and met with our customers, again and again I have heard from
15 customers that they are satisfied with our highly competitive rates, our reliability,
16 our responsiveness, and with our partnering with them to improve the energy
17 efficiency of their operations. We have been able to offer creative solutions to
18 customers' operating issues. As I discuss further below, this ingenuity combined
19 with the availability of funds through AdvanceSC provides us with the
20 opportunity to assist in improving the competitive position of our large business
21 customers. For our smaller customers we provide various access points to our
22 representatives. Our goal is to provide customer access that is easy to use and
23 lower cost for both the customers and the Company.

1 IV. DUKE ENERGY CAROLINAS' CURRENT AND PROPOSED
2 RETAIL ELECTRIC RATES

3 Q. PLEASE DISCUSS DUKE ENERGY CAROLINAS' CURRENT RETAIL
4 ELECTRIC RATES.

5 A. Our current retail electric rates were established by the Public Service
6 Commission of South Carolina (the "Commission") in 1991, in Docket No. 91-
7 216-B, Order No. 91-1022. Duke Energy Carolinas has not had a general rate
8 increase since 1991.

9 For the last 18 years, additional revenues from customer growth, coupled
10 with operating efficiencies, improved capacity factors, and a fuel adjustment
11 clause, have allowed the Company and its customers to enjoy stable and highly
12 competitive rates. Since 1991, our retail rates have been adjusted periodically to
13 reflect changes in fuel costs, as well as to implement other rate reductions. For
14 example, in 2005, we reduced rates for all customers by approximately \$38.7
15 million by offsetting fuel expense with certain accumulated deferred income tax
16 liabilities. And in 2006 we implemented an across-the-board one-year reduction
17 to South Carolina retail rates of \$40 million to reflect a share of our projected
18 five-year savings from the anticipated efficiencies from the Duke Energy merger
19 with Cinergy Corporation in 2006.

20 Significantly, our South Carolina retail rates today are lower than our rates
21 were 18 years ago in real terms, i.e., when inflation is factored in. Also
22 importantly, as Witness Turner has mentioned, Duke Energy Carolinas' current
23 average retail electric rates compare very favorably to both national and regional
24 average retail electric rates. According to information compiled by Edison

1 Electric Institute ("EEI"), as of December 31, 2008, our South Carolina retail
2 rates were 37% lower than the national average retail electric rate (as measured by
3 average revenue per kWh), and 31% lower than the South Atlantic regional
4 average retail rate on a per kWh basis. Even after giving effect to the proposed
5 increase, our average rates will still be significantly lower than both the national
6 average rates and the regional average rates.

7 Q. PLEASE GIVE A BRIEF OVERVIEW OF THE RATE INCREASE DUKE
8 ENERGY CAROLINAS PROPOSES IN THIS CASE AND WHY IT IS
9 NEEDED.

10 A. Duke Energy Carolinas is seeking to increase its retail revenues by approximately
11 \$133 million, which represents an overall 9.3% increase in rates. However, as
12 discussed by Witnesses Turner, Stillman and Bailey, the Company is also
13 proposing a decrement rider designed to return a demand-side management
14 ("DSM") deferral balance to customers. After this DSM decrement is applied, the
15 requested increase in annual revenues is \$104 million, or a 7.2% average increase
16 in rates. As Witness Turner explains, this rate increase is necessary to allow Duke
17 Energy Carolinas to continue to provide safe, reliable, and economically priced
18 electricity to its customers and to continue to build the infrastructure necessary for
19 South Carolina to continue to grow and transition to a carbon-constrained world.
20 Over the 18 year period since our last general rate increase, we have been able to
21 manage our costs in such a way that despite new capital additions and increased
22 operations and maintenance ("O&M") costs, we have been able to hold our prices
23 relatively steady, and below the rate of inflation. This is at a time when almost
24 everything else our customers purchase has increased in price. As a result of

1 significant capital investments in our system we now must increase our electricity
2 prices in order to continue to meet our obligations to our customers and to our
3 shareholders. It is important to keep in mind that even after our rates are
4 increased, our prices will be lower than they were 18 years ago on an inflation
5 adjusted basis.

6 There are certain major factors that make our proposed rate increase
7 necessary: (1) our financial position will erode further if we continue to serve
8 additional customers at today's costs while collecting revenues at rate levels that,
9 on an inflation adjusted basis, are below our 1991 rates; (2) we need to reflect in
10 our rates the significant capital investments we have made, for example, the
11 addition of new generating plant and environmental control equipment and
12 upgrades to our transmission and distribution systems, environmental, reliability,
13 safety, and regulatory compliance; (3) we must reflect in our prices the impact of
14 general inflationary pressures on our cost of doing business; and (4) we need to
15 maintain sufficient cash flow and credit quality to finance necessary capital
16 expenditures on reasonable terms, which is especially important during this period
17 of economic volatility.

18 Q. PLEASE DESCRIBE THE SIGNIFICANT CHALLENGES DUKE
19 ENERGY CAROLINAS FACES.

20 A. Our service territory covers an area of continuing population growth. Although
21 we project a short-term reduction in load growth under the current economic
22 conditions, the Company continues to experience residential customer growth and
23 expects long-term growth in electric demand. Even with the major investments
24 we already have made in our generating system, we face the need to add a

1 substantial amount of new capacity (approximately 8,800 MWs by 2028). To
2 address this challenge, we are pursuing energy efficiency as a "fifth" fuel in
3 meeting customer demand, along with advanced nuclear, clean coal, natural gas,
4 and renewable energy. As Witnesses Turner and Jamil discuss, construction of an
5 advanced clean coal unit at our Cliffside Steam Station is ongoing, as is
6 development of a longer-term investment in a new nuclear generating station. We
7 also are preparing to start construction of new gas fueled combined cycle units to
8 meet the growing need for power in our service territory.

9 With the imminent prospect of climate change regulation and the need to
10 replace aging plants, we need to modernize our generating system. Additionally,
11 there is a need to continue to expand, upgrade, and modernize our transmission
12 and distribution systems to serve new customers and to enhance the reliability and
13 functionality of our system, which will require significant capital investment.

14 Q. HOW HAS ONGOING INFLATION AFFECTED THE COMPANY'S
15 COST OF SERVICE?

16 A. This proposed rate increase is driven more by rate base additions than by general
17 inflationary pressures. Nevertheless, in addition to its effect on our construction
18 costs and cost of fuel, inflation since our last general rate increase in 1991 has
19 affected our wages and the costs of materials and supplies. This becomes obvious
20 when you consider that in 1991 the consumer price index was at 136, while in
21 2008 it was at 215 - a 58% increase. Although the current recessionary period has
22 dampened the extreme cost increases seen in the period 2006 through 2008, the
23 many efficiencies we have achieved in our operations along with cost control
24 measures and new revenues from adding new customers is no longer sufficient to

1 offset the costs of significant rate base additions combined with these inflationary
2 pressures. As other witnesses discuss, Duke Energy continues to look for
3 opportunities to implement sustainable cost reduction measures; however, there is
4 a limit to how much costs can be cut without affecting reliability and service
5 quality, when capital expenditures and other cost increases are outpacing
6 increased revenues from load growth.

7 Q. HOW DOES DUKE ENERGY CAROLINAS' COST OF SERVICE, AS
8 PRESENTED IN THIS CASE, COMPARE TO THE COST OF SERVICE
9 APPROVED BY THE COMMISSION IN 1991 IN THE COMPANY'S
10 LAST GENERAL RATE PROCEEDING?

11 A. Although Duke Energy Carolinas' capital investments in property, plant and
12 equipment have increased substantially since our last general rate increase in
13 1991, the increase in current annual operating costs compares favorably to the
14 inflation rate during that time period. The Company's modest operating cost
15 increases over the last 18 years are the result of intense and consistent
16 management focus on costs. The table below summarizes how certain of Duke
17 Energy Carolinas' major costs (and cost drivers) have changed over the last
18 approximately 18 years. As the table shows, although the Company's investment
19 in property, plant, and equipment has increased substantially, our non-fuel O&M
20 costs (other than depreciation and taxes) have increased only modestly over that
21 period. In fact, on an inflation-adjusted per kWh basis, our non-fuel O&M costs
22 (other than depreciation and taxes) actually have declined from the 1990 level
23 (which is 2.39 cents per kWh when adjusted for inflation), to 1.89 cents per kWh

1 in 2008. The numbers shown below are constant nominal dollars - i.e., not
2 adjusted for the effects of inflation:

Type of Cost (or Cost Driver)	1990	2008
Generating Capacity*	17,359 MWs	19,378 MWs
Property, Plant & Equipment*	\$11.2 billion	\$23.5 billion
KWH Sales (millions)	66,981	85,476
Peak Demand (MW)	14,046	16,888
Cost of Equity	12.25% (authorized)	12.25% (currently authorized) 12.3% (supported in this case)
Base Fuel Costs	1.1000 cents per kWh	2.3682 cents per kWh
Non-Fuel O&M Costs (excluding taxes and depreciation)	1.45 cents per kWh	1.89 cents per kWh
Average Number of retail Customers (SC and NC)	Approx. 1.6 million	Approx. 2.4 million

3 *Reflects the commercial operation of Bad Creek Pumped Storage facility.

4 Q. PLEASE EXPLAIN WHY IT IS IMPORTANT TO ADDRESS THE
5 DISPARITY IN THE RATES OF RETURN EARNED FROM THE
6 INDUSTRIAL, GENERAL SERVICE, AND RESIDENTIAL CUSTOMER
7 CLASSES.

8 A. A touchstone of ratemaking is the concept that each customer and customer class
9 should pay as close as is reasonably practicable the costs incurred by the utility in
10 meeting their energy needs. As Witness Bailey testifies, our 2008 test year
11 overall rate of return for the retail jurisdiction is 6.47%. In comparison, as shown
12 on Bailey Exhibit 4, the rate of return for the residential class is 5.41%. The rates
13 of return for the industrial and general service (commercial and institutional)
14 classes are significantly higher, at 7.51% and 7.91% respectively. Rate OPT, our
15 time-of-use schedule serving both industrial and general customers, has a rate of

1 return of 7.05%. In other words, the industrial, general service and Rate OPT
2 customers are 16.1%, 22.4% and 9% higher than the overall rate of return whereas
3 the residential class is 16.3% lower than the overall rate of return. This means
4 that the industrial, general service, and Rate OPT classes are bearing a
5 disproportionate share of the cost of service. As Witness Bailey demonstrates,
6 residential customers have been subsidized by the other classes for a significant
7 period of time. This disparity is not only unfair; it also puts our industrial and
8 commercial customers at a competitive disadvantage. We recognize that this
9 disparity must be addressed. We need rates that encourage rather than discourage
10 industrial development and job growth.

11 In order to take significant steps in this rate case to address rate parity, we
12 propose to allocate a greater portion of the rate increase to the residential class to
13 move each customer class' rate of return toward a narrower margin above or
14 below the average system rate of return. We believe that in addition to being fair,
15 our proposal will help our commercial and industrial customers maintain lower
16 bills and thus continue to fuel the economy in our region. Migrating toward a
17 greater degree of rate parity among customer classes is a much-needed action that
18 can have a beneficial impact on South Carolina's ability to attract and retain
19 industry and jobs. As I discuss in greater detail below, we also propose to extend
20 our BPM sharing program for an additional five years, which provides funding to
21 AdvanceSC for, among other things, manufacturing competitiveness and
22 economic development projects for customers in our South Carolina service
23 territory.

1 V. ECONOMIC DEVELOPMENT ACTIVITIES

2 Q. WHY DOES DUKE ENERGY CAROLINAS VIEW ECONOMIC
3 DEVELOPMENT AS A VITAL PART OF ITS BUSINESS?

4 A. Duke Energy Carolinas has a long history of supporting the economic
5 development of South Carolina. Our first generating plants and transmission and
6 distribution grid were built over a hundred years ago to fuel industrial
7 development in the Carolinas. Our sales and profits are inextricably tied to the
8 economic success of our service area. Recent history demonstrates this. The
9 changing composition of the economies of South Carolina and North Carolina has
10 resulted in significant losses of manufacturing jobs and business in the
11 Company's service area. These losses, in turn, have negatively affected the
12 Company's sales of electricity in the region. For example, the Company's sales
13 to industrial customers across our system declined nearly 13% from 1990 to 2008.
14 Further, the Company's sales to textile industries in both states have declined over
15 10% *per year* since 2000. In response, Duke Energy Carolinas has initiated
16 various programs to stimulate new industrial development in its service area,
17 including its Economic Development and Economic Redevelopment Riders,
18 which offer credits for customers locating new load on the Duke Energy Carolinas
19 system. Most of that effort has been aimed at encouraging new industrial
20 investments. Through the BPM sharing program, the Company also has provided
21 significant assistance to economic development initiatives, and economic
22 development-related educational initiatives to assist existing and new customers.

23 We believe strongly that a healthy industrial base is good for all of our
24 customers. A healthy and broad industrial customer base enables us to spread

1 our fixed costs over a broader group of customers, thereby ensuring that prices are
2 lower, on average, for all customers. Also, as new manufacturing businesses are
3 established and existing manufacturing businesses expand, they typically create a
4 significant multiplier effect that directly and indirectly produces additional jobs
5 and investments. In light of the current economic downturn, our focus on
6 economic development – targeted towards potential new and existing customers –
7 is more important than ever to maintain the competitiveness of our region. We
8 are confident that our sustained economic development efforts will continue to
9 provide positive results here in South Carolina.

10 **Q. PLEASE DISCUSS SOME OF THE RESULTS IN SOUTH CAROLINA OF**
11 **DUKE ENERGY CAROLINAS' ECONOMIC DEVELOPMENT**
12 **ACTIVITIES.**

13 **A.** Our support for state and local economic development efforts, combined with our
14 competitive electric rates, has produced a number of South Carolina economic
15 development successes in which Duke Energy Carolinas has played a part. In
16 2008 alone, we estimate that our cooperative efforts with state and local economic
17 development officials have contributed to the creation of more than 2,000 South
18 Carolina jobs and over \$1.19 billion of capital investment in South Carolina.
19 Also in 2008, Duke Energy Carolinas was named one of the "Top 10 Best" utility
20 economic development programs by *Site Selection* magazine, a recognition we
21 earn regularly.

22 South Carolina's competitive advantages – a quality workforce, strong
23 educational institutions, superior transportation infrastructure, and competitive
24 energy rates – have been key factors in the state's ability to attract significant new

1 businesses in the financial, electronics manufacturing, plastics,
2 biopharmaceuticals, medical equipment, and automotive parts industries. These
3 economic development successes continue to help offset the loss of jobs (and
4 customers of Duke Energy Carolinas) in the textile industry.

5 **VI. BPM SHARING PROGRAM**

6 **Q. WHAT IS THE BPM SHARING PROGRAM?**

7 A. Duke Energy Carolinas provides funding for AdvanceSC with 50% of the South
8 Carolina allocation of its profits from BPM sales of electricity. BPM sales are
9 non-firm, short-term, wholesale sales made from the Company's generation
10 resources when they are not needed to serve its firm, native load customers. The
11 Commission's *Order Approving Stipulations and Merger in the Application of*
12 *Duke Energy Corporation for Authorization to Enter into a Business Combination*
13 *Transaction with Cinergy Corporation* in Docket No. 2005-210-E provided that
14 the Company would extend its sharing of non-firm BPM profits until the
15 Company's next rate case, or through December 31, 2010, whichever occurred
16 first. The three year period included profits realized through December 31, 2010,
17 Duke Energy Carolinas proposes to increase the period of time over which it will
18 make contributions to AdvanceSC for an additional five years following the
19 effective date of the order in this case.

20 **Q. WHAT IS ADVANCESC?**

21 A. AdvanceSC was established by Duke Energy in 2004, but is operated under the
22 direction of an independent board. AdvanceSC was created to support
23 communities in the Company's South Carolina service territory through grants for
24 public assistance and economic development programs. In general, AdvanceSC

1 focuses on advancing education to support industry, assisting other economic
2 development organizations to attract and retain industries in our South Carolina
3 service territory, and enhancing the competitive position of manufacturers in our
4 South Carolina service territory.

5 **Q. HOW DOES ADVANCESC USE THE FUNDS RECEIVED FROM DUKE**
6 **ENERGY CAROLINAS' BPM SHARING PROGRAM?**

7 A. AdvanceSC utilizes the shared BPM funds from Duke Energy Carolinas to fund
8 (1) public assistance programs, (2) a manufacturing competitiveness fund, (3)
9 economic development initiatives, and (4) education for the benefit of the
10 Company's customers in South Carolina.

11 More specifically, funding is first allocated to help fund Duke Energy's
12 "Share the Warmth," "Cooling Assistance," and "Fan Heat Relief" programs.
13 Once these public assistance program funding requirements are met, the
14 remaining funds are divided among the manufacturing competitiveness (50%),
15 economic development (25%), and education (25%) programs.

16 The funds provided to the manufacturing competitiveness fund are
17 designed to strengthen the competitive position of existing manufacturers located
18 in Duke Energy Carolinas' South Carolina service territory, through investments
19 in productivity, efficiency, reliability, and reductions in environmental impacts.

20 The funds allocated to the South Carolina economic development
21 initiatives are targeted at creating sustainable manufacturing and manufacturing-
22 related jobs within the Company's South Carolina service territory. These
23 economic development funds are provided to regional economic development

1 partnerships and alliances, chambers of commerce, and county economic
2 development organizations.

3 The funds provided for educational purposes are designed to help South
4 Carolina with the ongoing transition from an agricultural and textile-based state to
5 a manufacturing state, with funding for programs that offer new solutions,
6 develop new skills, and create an educational foundation to prepare South
7 Carolinas' citizens for this emerging economy. Programs eligible for support
8 include: technical college training programs that prepare the workforce to support
9 new and existing manufacturing and related industry; college or university
10 research and higher education programs that provide innovative solutions and
11 competitive advantages for manufacturing and related industry; and high school
12 education programs that support workforce preparedness for manufacturing and
13 related industry and increase graduation rates.

14 Carter Exhibit 1 is a copy of AdvanceSC's 2008 performance report,
15 which provides greater detail about AdvanceSC's activities and achievements.

16 **Q. WHY IS THE COMPANY PROPOSING TO EXTEND ITS BPM**
17 **SHARING PROGRAM?**

18 **A.** In our view, the BPM sharing program has provided significant benefits for
19 customers through the activities of AdvanceSC, while at the same time providing
20 an incentive for the Company to maximize short-term opportunistic (and
21 inherently unpredictable) wholesale sales. For example, since the sharing
22 arrangement was implemented, contributions to AdvanceSC have ranged from
23 \$24 million for the year 2005 to a low of \$8 million for the year 2006. We
24 believe that it makes sense to share these BPM profits with AdvanceSC, as the

1 Company has done successfully for several years now, in order to stimulate
2 economic development and economic development-related education in our
3 region while at the same time assisting those most in need. In sum, the BPM
4 sharing program has a proven track record of aligning Company and customer
5 interests, and we believe the Commission should authorize the Company to
6 continue the profit sharing arrangement for an additional 5 year period.

7 VII. CUSTOMER ASSISTANCE PROGRAMS

8 Q. WHAT IS DUKE ENERGY CAROLINAS DOING TO ASSIST
9 INDIVIDUAL CUSTOMERS, ESPECIALLY LOWER-INCOME
10 CUSTOMERS, DURING THIS DIFFICULT PERIOD OF TIME?

11 A. First and foremost, we work hard to keep our costs under control and our rates
12 competitive. Also, we recognize that one of the best ways we can help our
13 customers who are struggling financially is to help them better manage their
14 electric usage. Our new Low Income Energy Efficiency and Weatherization
15 Assistance Program specifically targets low-income customers. In addition, the
16 new Residential Energy Assessments, Residential Smart Saver®, and Power
17 Manager programs recently approved by the Commission in Docket No. 2009-
18 166-E provide opportunities for residential customers of all income levels to
19 reduce their monthly electric bills. For example, we estimate that by participating
20 in certain energy efficiency programs, the average South Carolina residential
21 customer (using 1,000 kWh a month) can save about \$5 per month.

22 In addition to these newly approved energy efficiency programs, we also
23 are exploring the potential for several new programs that target one of the most
24 difficult to serve segments of our customer base, low income renters. These are

1 typically some of the most difficult customers to reach via energy efficiency
2 programs because they do not own their homes, and they may not even be the
3 customers who pay the energy bill directly. Yet many renters are also the
4 customers who most need financial assistance right now. One such program is a
5 multi-family energy efficiency solution research project under which Duke
6 Energy Carolinas is evaluating opportunities to create value for both tenants and
7 owners to overcome longstanding barriers to energy efficiency improvements in
8 the non-subsidized rental market. The goal of this program is to lower tenant
9 energy usage and cost while reducing the total cost of ownership for owners by
10 evaluating different ownership options for equipment and appliances. Duke
11 Energy Carolinas is exploring opportunities to use American Reinvestment and
12 Recovery Act of 2009 competitive funds for this project.

13 We also are partnering with over 100 community assistance and other
14 agencies across our service territory that receive public funds and private
15 donations to provide emergency bill payment assistance to our customers. We
16 have developed a special assistance agency website through which the Company
17 interacts with these agencies and provides information they need to provide
18 services to their clients. Through this website, partnering agencies will offer to
19 complete a short energy survey with each customer. Duke Energy Carolinas will
20 mail 12 compact fluorescent lamps to customers who participate in the energy
21 survey. Moreover, the information collected in the energy survey will be used to
22 better target additional efficiency services to these households.

23 The Company also is evaluating the potential to partner with local
24 community and faith-based organizations to better reach low-income and elderly

1 customers. The goal of this effort is to overcome awareness, trust, and
2 comprehension challenges prevalent in these segments by utilizing a face-to-face
3 engagement approach to promote our efficiency services.

4 Duke Energy also has been pursuing partnership opportunities with state
5 and local entities to fully leverage the combined impact of American
6 Reinvestment and Recovery Act of 2009 weatherization program funds and our
7 low-income weatherization program. To the extent we are successful in this
8 effort, stimulus funds will provide greater funding for and access to this program
9 to increase the opportunities for eligible customers to participate and thereby
10 lower their electric bills.

11 In addition to these initiatives, we currently offer a number of other
12 programs designed to help customers lower or pay their electric bills. For
13 example, Duke Energy's Foundation makes significant contributions to the Share
14 the Warmth, Cooling Assistance, and Fan Relief programs - a total of \$1.2
15 million in 2008 and 2009 to date.

16 Finally, as discussed above, we are proposing to continue sharing BPM
17 profits through AdvanceSC, which provides funding to public assistance
18 programs.

19 **VIII. CONCLUSION**

20 **Q. MR. CARTER, WHY IS IT IMPORTANT THAT DUKE ENERGY**
21 **CAROLINAS BE GRANTED THIS RATE INCREASE?**

22 **A. A safe, reliable, and economically priced source of energy benefits existing**
23 **customers. It also attracts new growth, which benefits existing customers in terms**
24 **of new jobs, new tax revenues, and new opportunities. If we are to continue to**

1 carry out our obligation to provide safe, reliable, and economically priced
2 electricity to our customers and to build the infrastructure to provide the energy
3 for South Carolina's future growth, our revenues must cover all of our costs,
4 including a return on investment that will enable us to raise on reasonable terms
5 the large amounts of capital required by the Company's capital project plans. As
6 Witnesses Turner, DeMay, and Fetter testify, Duke Energy Carolinas must
7 maintain a strong financial position as we enter this next era of large capital
8 project requirements. A strong financial position is particularly important during
9 the current period of financial recession and credit crisis. The requested rate
10 increase is needed because our current rates are not sufficient to preserve the
11 Company's current level of financial strength. Today, the Company's retail
12 prices are well below the national average and they will remain so even with the
13 requested rate increase. We have successfully managed our costs, capitalized on
14 customer growth, and achieved outstanding operational efficiencies since 1991 to
15 avoid the need for a general rate increase. However, our costs, particularly those
16 tied to capital investments, continue to increase beyond the incremental revenues
17 from customer growth. We now must increase our electricity prices to meet our
18 obligations to our customers and to our shareholders.

19 Q. WAS CARTER EXHIBIT 1 PREPARED BY YOU OR UNDER YOUR
20 SUPERVISION AND DIRECTION?

21 A. Yes.

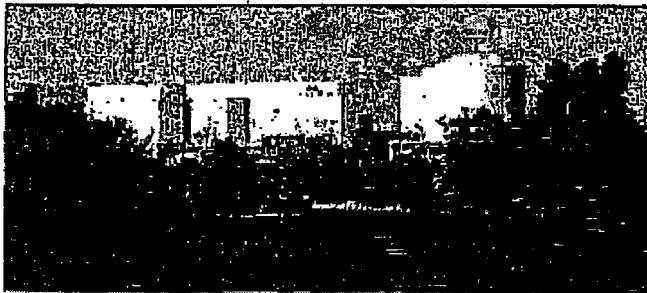
22 Q. DOES THIS CONCLUDE YOUR PRE-FILED DIRECT TESTIMONY?

23 A. Yes, it does.



Catawba Nuclear Station

- Capacity: 2,258 megawatts
- Location: York County, South Carolina
- Commercial Date: 1985



Catawba Nuclear Station is located on Lake Wylie in York County, South Carolina. The lake was created in 1904 and is the oldest lake on the Catawba River. The lake provides cooling water for both Catawba and Allen Steam Station.

Unlike its sister stations—McGuire in Mecklenburg County, North Carolina, and Oconee in Oconee County, South Carolina—Catawba is jointly owned by North Carolina Municipal Power Agency Number One, North Carolina Electric Membership Corporation, Piedmont Municipal Power Agency, and Duke Energy.

Catawba is one of three nuclear stations designed, built and operated by Duke Energy. Today, the nuclear fleet provides electricity to approximately half of Duke Energy's customers in the Carolinas.

SCDOR00017134

Safety and security are top priority at all Duke Energy-operated nuclear power plants. Production costs for the nuclear fleet are among the lowest in the nation.

[Generating Electricity with Nuclear Power \(/about-energy/generating-electricity/nuclear.asp\)](/about-energy/generating-electricity/nuclear.asp)

[Energy Education Web Resources \(/pdfs/07-6339_Energy_Education.pdf\)](/pdfs/07-6339_Energy_Education.pdf) (pdf, 46 KB)

[Lake Wylie \(/lakes/facts-and-maps/lake-wylie.asp\)](/lakes/facts-and-maps/lake-wylie.asp)

[Nuclear Emergency Preparedness \(/safety/nuclear-emergency-preparedness.asp\)](/safety/nuclear-emergency-preparedness.asp)

[Nuclear Security \(/nuclear-emergency-preparedness/general/security.asp\)](/nuclear-emergency-preparedness/general/security.asp)

[NuStart Energy Consortium \(http://www.nustartenergy.com/\)](http://www.nustartenergy.com/)

[Printable Fact Sheet \(/pdfs/CNS-Fact-Sheet.pdf\)](/pdfs/CNS-Fact-Sheet.pdf) (pdf, 198 KB)

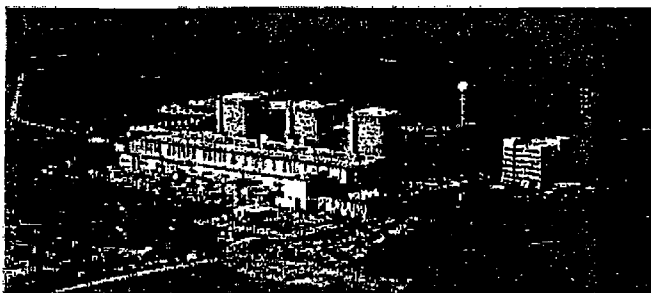
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SCDOR00017136



Oconee Nuclear Station

- Capacity: 2,538 megawatts
- Location: Oconee County, South Carolina
- Commercial Date: 1973



Oconee Nuclear Station was the first of three nuclear stations designed, built and operated by Duke Energy. Located on Lake Keowee in Oconee County, South Carolina, the facility is eight miles north of Clemson. Oconee has safely and reliably generated more than 500 million megawatt-hours of electricity—the first nuclear station in the United States to achieve this milestone.

Oconee earned the further distinction of being the second nuclear station in the country to have its licenses renewed by the Nuclear Regulatory Commission (NRC) for an additional 20 years. All U.S. reactors are initially licensed by the NRC for 40 years.

Today, Duke Energy's nuclear fleet provides electricity to approximately half of its customers in the Carolinas.

SCDOR00017138

Safety and security are top priority at all Duke Energy nuclear power plants.
Production costs for the nuclear fleet are among the lowest in the nation.

[Generating Electricity with Nuclear Power \(/about-energy/generating-electricity/nuclear.asp\)](/about-energy/generating-electricity/nuclear.asp)

[Lake Keowee \(/lakes/facts-and-maps/lake-keowee.asp\)](/lakes/facts-and-maps/lake-keowee.asp)

[Nuclear Emergency Preparedness \(/safety/nuclear-emergency-preparedness.asp\)](/safety/nuclear-emergency-preparedness.asp)

[Nuclear Security \(/nuclear-emergency-preparedness/general/security.asp\)](/nuclear-emergency-preparedness/general/security.asp)

[NuStart Energy Consortium \(http://www.nustartenergy.com/\)](http://www.nustartenergy.com/)

[Printable Fact Sheet \(/pdfs/07-7853 ONS Fact Sheet 12-07.pdf\)](/pdfs/07-7853_ONS_Fact_Sheet_12-07.pdf) (pdf, 148 KB)

[World of Energy \(/visitor-centers/world-of-energy.asp\)](/visitor-centers/world-of-energy.asp)

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Lake Wylie Hydro Station

- Capacity: 60 megawatts
- Location: York County, South Carolina and Mecklenburg County, North Carolina
- Commercial Date: 1925



Lake Wylie Hydro Station has four generating units. It was named for Dr. Gil Wylie, first president of Southern Power Company, a predecessor company of Duke Energy.

[Catawba-Wateree Relicensing \(/lakes/catawba-wateree-relicensing.asp\)](/lakes/catawba-wateree-relicensing.asp)

[Generating Electricity with Conventional Hydro \(/about-energy/generating-electricity/hydro.asp\)](/about-energy/generating-electricity/hydro.asp)

[Lake Wylie \(/lakes/facts-and-maps/lake-wylie.asp\)](/lakes/facts-and-maps/lake-wylie.asp)

SCDOR00017142

Water Recreation Safety (/safety/electric/water-recreation-safety.asp)

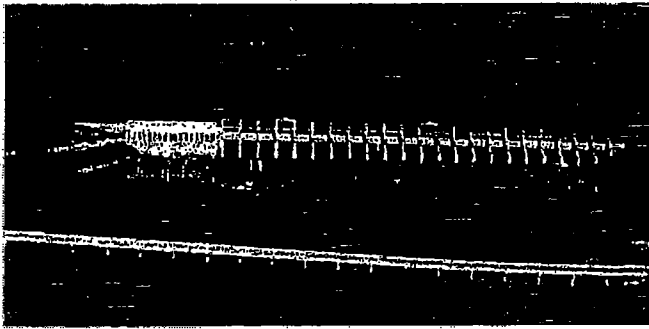
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SCDOR00017144



Fishing Creek Hydro Station

- Capacity: 37 megawatts
- Location: Chester County, South Carolina
- Commercial Date: 1916



Fishing Creek Hydro Station is a five-unit generating facility located on the Catawba River in Chester County, South Carolina. The station was built by Southern Power Company, a forerunner of Duke Energy.

[Catawba-Wateree Relicensing \(/lakes/catawba-wateree-relicensing.asp\)](/lakes/catawba-wateree-relicensing.asp)

[Download Fishing Creek Project Fact Sheet \(/pdfs/fishingcreek_project.pdf\)](/pdfs/fishingcreek_project.pdf) (pdf, 132 KB)

[Fishing Creek Lake \(/lakes/facts-and-maps/fishing-creek.asp\)](/lakes/facts-and-maps/fishing-creek.asp)

[Generating Electricity with Conventional Hydro \(/about-energy/generating-electricity/hydro.asp\)](/about-energy/generating-electricity/hydro.asp)

SCDOR00017146

Water Recreation Safety (/safety/electric/water-recreation-safety.asp)

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SCDOR00017148



Great Falls and Dearborn Hydro Stations

- Capacity: Great Falls: 24 megawatts; Dearborn: 46 megawatts
- Location: Chester County, South Carolina
- Commercial Date: Great Falls: 1907; Dearborn: 1923



Great Falls Hydro Station has eight generating units.

Dearborn Hydro Station has three generating units. The station was named for Mt. Dearborn, an island now covered by the reservoir.

[Catawba-Wateree Relicensing \(/lakes/catawba-wateree-relicensing.asp\)](/lakes/catawba-wateree-relicensing.asp)

[Generating Electricity with Conventional Hydro \(/about-energy/generating-electricity/hydro.asp\)](/about-energy/generating-electricity/hydro.asp)

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Great Falls and Rocky Creek (/lakes/facts-and-maps/great-falls-rocky-creek.asp)

Water Recreation Safety (/safety/electric/water-recreation-safety.asp)

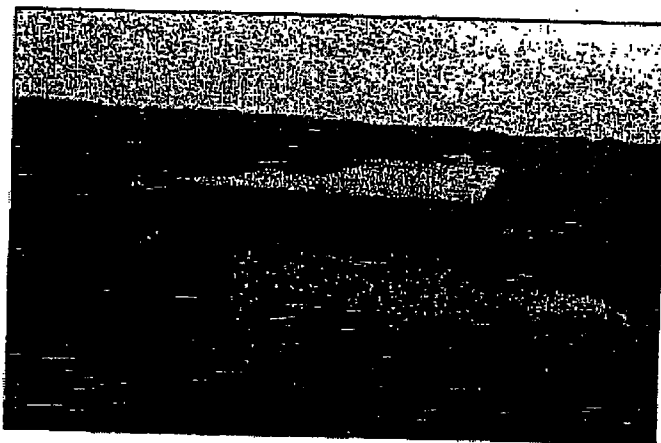
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SCDOR00017152



Rocky Creek and Cedar Creek Hydro Stations

- Capacity: Rocky Creek: 28 megawatts; Cedar Creek: 45 megawatts
- Location: Fairfield and Lancaster counties, South Carolina
- Commercial Date: Rocky Creek: 1909; Cedar Creek: 1926



Rocky Creek Hydro Station is an eight-unit generating facility located on the Catawba River in Fairfield County, S.C. It was the second construction project of Southern Power Company, a predecessor company of Duke Energy.

Cedar Creek Hydro Station is a three-unit generating facility located on the Catawba River in Lancaster County, S.C.

[Catawba-Wateree Relicensing \(/lakes/catawba-wateree-relicensing.asp\)](#)

SCDOR00017154

Generating Electricity with Conventional Hydro (/about-energy/generating-electricity/hydro.asp)

Great Falls and Rocky Creek (/lakes/facts-and-maps/great-falls-rocky-creek.asp)

Water Recreation Safety (/safety/electric/water-recreation-safety.asp)

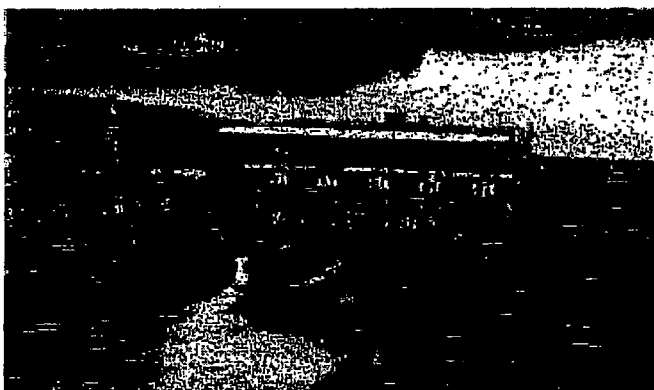
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Wateree Hydro Station

- Capacity: 56 megawatts
- Location: Fairfield and Kershaw counties, South Carolina
- Commercial Date: 1919



Wateree Hydro Station has five generating units. The Catawba River becomes the Wateree River at the upper end of the lake.

[Catawba-Wateree Relicensing \(/lakes/catawba-wateree-relicensing.asp\)](#)

[Generating Electricity with Conventional Hydro \(/about-energy/generating-electricity/hydro.asp\)](#)

[Lake Wateree \(/lakes/facts-and-maps/lake-wateree.asp\)](#)

[Water Recreation Safety \(/safety/electric/water-recreation-safety.asp\)](#)

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SCDOR00017160



Keowee Hydro Station

- Capacity: 158 megawatts
- Location: Pickens County, South Carolina
- Commercial Date: 1971



Keowee Hydro Station is a two-unit facility located in Pickens County, S.C. Lake Keowee was the first lake developed as part of Duke Energy's Keowee-Toxaway Complex. The complex includes the Oconee Nuclear Station and the Keowee, Jocassee and Bad Creek hydroelectric stations.

[Catawba-Wateree Relicensing \(/lakes/catawba-wateree-relicensing.asp\)](/lakes/catawba-wateree-relicensing.asp)

[Generating Electricity with Conventional Hydro \(/about-energy/generating-electricity/hydro.asp\)](/about-energy/generating-electricity/hydro.asp)

[Lake Keowee \(/lakes/facts-and-maps/lake-keowee.asp\)](/lakes/facts-and-maps/lake-keowee.asp)

[Water Recreation Safety \(/safety/electric/water-recreation-safety.asp\)](/safety/electric/water-recreation-safety.asp)

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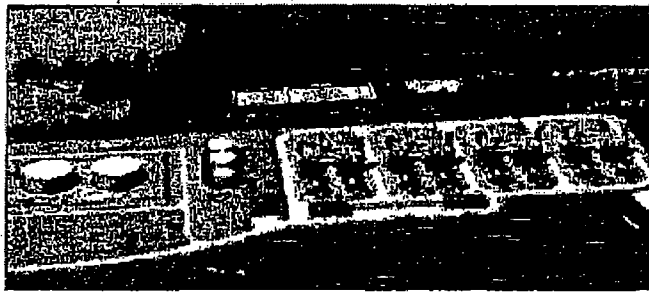
2008 Licensed Hydropower Recreation Reports (FERC Form 80)
(/lakes/form80.asp)

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Mill Creek Combustion Turbine Station

- Capacity: 640 megawatts
- Location: Cherokee County, South Carolina
- Commercial Date: 2003



Mill Creek Combustion Turbine Station is a 640-megawatt, natural gas-fired generating facility located in Cherokee County, South Carolina.

Mill Creek operates as a peaking facility, generating electricity quickly during periods when customers' electricity usage is greatest—usually hot summer afternoons and cold winter mornings.

The Mill Creek facility consists of eight natural gas-fired combustion turbines. Natural gas is the primary fuel for the plant, with fuel oil as a secondary fuel source. The energy generated from Mill Creek is enough to serve approximately 500,000 homes in the Carolinas.

Duke/Fluor Daniel designed and constructed the eight-unit plant.

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Download Coal, Oil and Gas Fact Sheet

(/pdfs/coal oil gas fact sheet.pdf) (pdf, 113 KB)

Generating Electricity with Oil or Gas (/about-energy/generating-electricity/oil gas fired.asp)

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Buzzard Roost Station

- Capacity: 196 megawatts
 - Location: Chappells, South Carolina
 - Commercial Date: 1971
-

[Download Coal, Oil and Gas Fact Sheet \(/pdfs/coal_oil_gas_fact_sheet.pdf \(pdf, 113 KB\)](#)

[Generating Electricity with Oil or Gas \(/about-energy/generating-electricity/oil_gas_fired.asp\)](#)

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Bad Creek

- Capacity: 1,065 megawatts
- Location: Oconee County, South Carolina
- Commercial Date: 1991



The Bad Creek Hydroelectric Station is a 1,065-megawatt pumped-storage facility located in Oconee County, eight miles north of Salem, South Carolina. The four-unit station began generating electricity in 1991, and is the largest hydroelectric station on the Duke Energy system. It is named for the two streams, Bad Creek and West Bad Creek, which were dammed to create the Bad Creek reservoir.

The Bad Creek facility uses two reservoirs (or lakes) to generate electricity: an upper reservoir and a lower reservoir. Water stored in an upper lake is released into underground power tunnels. The water rushes down the tunnels, driving huge turbines, which are underground at the base of a dam. The spinning turbines are connected to large generators, which produce the electricity. The water then flows through draft tubes into a lower lake.

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A pumped-storage hydroelectric station uses the same water over and over again, making more efficient use of water resources. When demand for electricity is low, operators can refill the lake, as if they were "recharging" a battery. Using power from other generating stations, the generators act as electric motors spinning the huge turbines backward. This pumps water back up the power tunnels into the upper lake. Water is generally pumped back to the upper reservoir at night and on weekends.

[Water Recreation Safety \(/safety/electric/water-recreation-safety.asp\)](#)

[2008 Licensed Hydropower Recreation Reports \(FERC Form 80\) \(/lakes/form80.asp\)](#)

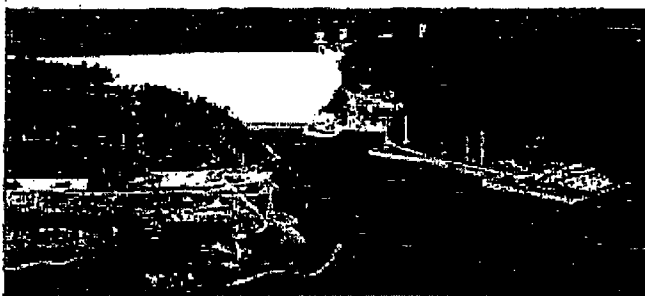
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Jocassee

- Capacity: 610 megawatts
- Location: Pickens County, South Carolina
- Commercial Date: 1973



The four-unit Jocassee Hydroelectric Station is a 610-megawatt pumped-storage generating facility located in Pickens County, South Carolina. The facility works much like a conventional hydroelectric station, except that it can reverse turbines and pump back previously used water from a lower lake to store potential energy for later.

The Jocassee facility typically generates power during times of peak electric demand. In the Carolinas, peaks are usually on hot summer afternoons and cold winter mornings during the work week. Water power uses no fuel in the generation of electricity and so has very low operating costs.

[Lake Jocassee \(/lakes/facts-and-maps/lake-jocassee.asp\)](/lakes/facts-and-maps/lake-jocassee.asp)

[Water Recreation Safety \(/safety/electric/water-recreation-safety.asp\)](/safety/electric/water-recreation-safety.asp)

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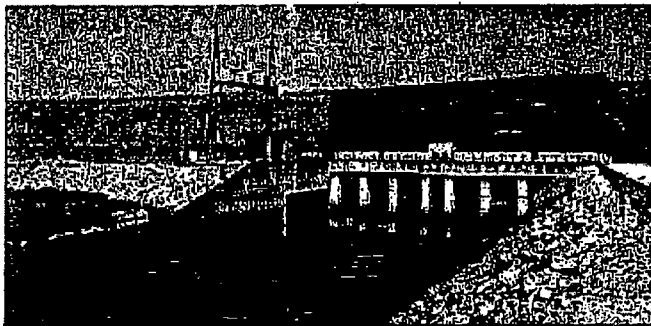
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Introduction Conventional Hydro



Hydroelectric plants harness the power of water to generate electricity. Water falling from an elevated reservoir drives turbines beneath a dam to create the power.

Because water is the source of power, hydroelectricity is inexpensive and environmentally friendly. However, the amount of power that can be created by hydroelectricity is limited by the volume of water held by the dam.

In the Carolinas, we use hydroelectric plants to meet peak demands, at times when electricity usage is greatest, like hot summer days or cold winter nights.

[Catawba-Wateree Relicensing \(/lakes/catawba-wateree-relicensing.asp\)](#)

[Hydro Station Siren Tests \(/power-plants/hydro/hydro-station-siren-tests.asp\)](#)

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Conventional Hydro (/power-plants/hydro.asp)

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Background Conventional Hydro

Steam-electric stations produce more than 95 percent of the electricity used in the Piedmont Carolinas today. But that wasn't always true.

Duke Energy began its operations in the Carolinas as a hydroelectric company. As time passed, however, it became evident that the Piedmont was growing rapidly, and water power alone could not supply all the electricity needed.

First of all, the area's relatively small rivers do not contain enough water to generate the large amounts of energy required for an industrial society.

For example, it takes about two tons of water falling through the turbines at each of the thirteen dams on the Catawba River just to produce one kilowatt-hour, or kwh, of electricity. A kilowatt-hour is the amount of electricity needed to burn ten 100-watt light bulbs for one hour.

Although hydroelectric production normally provides a small percentage of the electricity used by Duke Energy's customers, it's still an important energy resource. Hydroelectric plants are now used mainly to supply peaking power—the extra electricity needed during the fairly short periods when customers' use of power is the highest.

[Catawba-Wataree Relicensing \(/lakes/catawba-wataree-relicensing.asp\)](http://www.duke-energy.com/about-energy/generating-electricity/hydro-background.asp)

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[Hydro Station Siren Tests \(/power-plants/hydro/hydro-station-siren-tests.asp\)](/power-plants/hydro/hydro-station-siren-tests.asp)

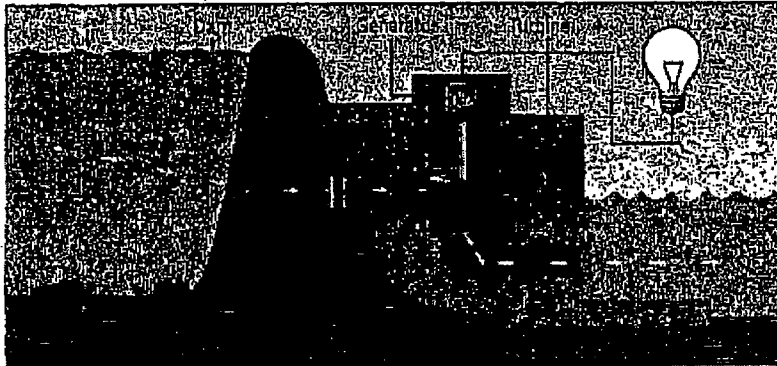
[Conventional Hydro \(/power-plants/hydro.asp\)](/power-plants/hydro.asp)

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How Do Conventional Hydro Plants Work?



1. Reservoir

The water is held in a reservoir, or lake, behind the dam.

2. Penstock

Penstocks lead the water into a chamber housing the turbine. The water is held at a higher elevation than the turbine, so that it can fall with enough force to strike the turbine's blades and cause it to spin.

3. Turbine

The turbine wheel is attached by a shaft to a system of magnets and wires called a generator. As the turbine rotates, these magnets and wires also spin—producing electricity.

4. Draft Tube and Tailrace

The water returns to the river by passing through a draft tube under the turbine and into the tailrace.

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Introduction Pumped-Storage Hydro



In addition to our 29 traditional hydroelectric plants, Duke Energy has two pumped-storage plants in the Carolinas—Jocassee and Bad Creek. A pumped-storage hydroelectric plant works much like a conventional hydroelectric station, except that the same water can be used over and over again to produce electricity.

When demand for electricity is low, Duke Energy operators can refill the lake, as if they were recharging a battery. Using power from other Duke Energy stations, the huge turbines spin backward and pump water back up the power tunnels into the upper lake. Water is generally pumped back to the upper reservoir at night and on weekends.

Pumped-storage plants typically generate power during times of peak electric demand. In southeastern part of the country, peaks are usually on hot summer afternoons and cold winter mornings during the work week. Water power uses no fuel in the generation of electricity and so has very low operating costs.

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The pumped-storage process actually consumes more electricity than it generates. What makes it useful is the fact that pumped-storage can be used to capture unused electricity during times of low use. Pumped storage allows us to keep our coal-fired and nuclear plants running longer and more efficiently.

When used in a well-planned generating scheme, pumped-storage plays an important role and can be one of the most economical forms of electric power generation available today.

[Pumped-Storage Hydro \(/power-plants/pumped-storage-hydro.asp\)](/power-plants/pumped-storage-hydro.asp)

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How Do Pumped-Storage Hydro Plants Work?



1. Upper Reservoir

When power from the plant is needed, water stored in an upper reservoir is released into an underground tunnel.

2. Intake Tunnel

The water rushes down the intake tunnel.

3. Turbines

The force of the water drives huge turbines, which are underground at the base of a dam. The spinning turbines are connected to large generators, which produce the electricity.

4. Discharge Tunnel

The water then flows through a discharge tunnel into a lower reservoir.

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5. Recharging

When demand for electricity is low, the turbines spin backward and pump the water back up into the upper reservoir to make it available to generate electricity when it's needed.

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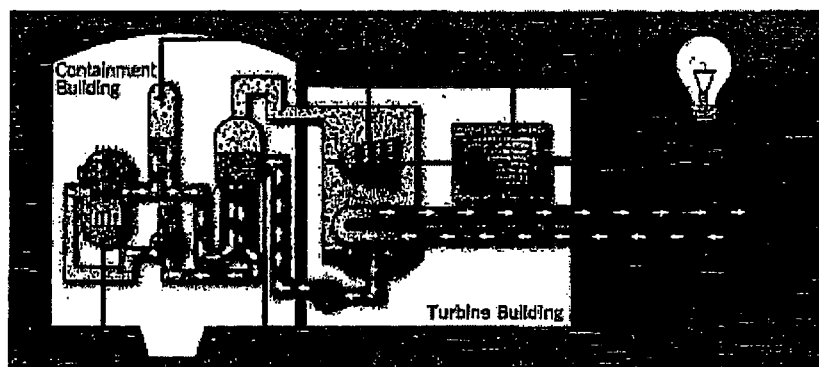
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How Do Nuclear Plants Work?

Generation of electricity in a nuclear station is similar to a coal-fired steam station. The difference is the source of heat. Fissioning, or splitting, of uranium atoms replaces the burning of coal as the source of heat. The heat turns water to steam in steam generators. The steam is then used to drive turbine generators.



1. The Fuel

The fuel used in nuclear generation is uranium 235. It is manufactured as small round pellets. A single pellet is less than an inch long, but produces the energy equivalent to a ton of coal. The pellets are placed end to end into fuel rods 12 feet long. Over 200 of these rods are grouped into what is known as a fuel assembly.

2. Reactor

The process of producing electricity begins when uranium atoms are split (i.e.,

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Background Nuclear Power

About 20 percent of America's electricity is generated from nuclear power. Some states, such as South Carolina, generate more than 50 percent of their electricity from nuclear power. The three nuclear power plants operated by Duke Energy—McGuire, Oconee, and Catawba nuclear stations—produced approximately 50 percent of the electricity generated by the company's electric operations in the Carolinas.

As our population grows, we will need more and more energy to produce food, to power factories and to drive our productivity. We will have to generate much more electricity than we do today, and this will require vast amounts of fuel.

Alternative energy sources—solar power, geothermal energy, wind power, biomass - still have a long way to go before they can produce consistent and significant amounts of energy. Our oil resources will be earmarked for transportation purposes and other end-uses, for which we have few or no substitutes.

Nuclear energy will continue to be an important energy source for the world in years to come. We have the ability to produce electricity safely and economically using nuclear energy, as well as the ability to safely isolate the wastes produced by the process.

[Nuclear Emergency Preparedness \(/safety/nuclear-emergency-preparedness.asp\)](#)

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[Nuclear \(/power-plants/nuclear.asp\)](#)

[NuStart Energy Consortium \(http://www.nustartenergy.com/\)](http://www.nustartenergy.com/)

[Power Plant Visitor Centers \(/about-energy/power plant visitor centers.asp\)](#)

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Introduction Nuclear Power



Duke Energy operates seven nuclear units in the Carolinas—three at Oconee Nuclear Station in Oconee County, S.C., two at Catawba Nuclear Station in York County, S.C. and two at McGuire Nuclear Station in Mecklenburg County, N.C. Nuclear power provides about half of the electricity used by our customers in the Carolinas.

The cost of generating electricity with nuclear power is stable and economical. That means as the prices for other power generation fuels escalate, Duke Energy rates remain basically the same.

In late 1967, Duke Energy began construction of Oconee Nuclear Station, its first commercial nuclear-fueled, steam-electric station. Oconee began operation in 1973. At full capacity, Oconee's three units produce over 2,500 megawatts:

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Duke Energy also operates the McGuire Nuclear Station and Catawba Nuclear Station. Each station has two nuclear units with a total generating capacity of over 2,200 megawatts.

Duke Energy has operated nuclear plants for more than thirty-five years. Our plants set industry benchmarks for safety and efficiency. The McGuire and Oconee nuclear stations also feature a visitor center, which provide a hands-on learning experience.

Nuclear Emergency Preparedness (</safety/nuclear-emergency-preparedness.asp>)

Nuclear (</power-plants/nuclear.asp>)

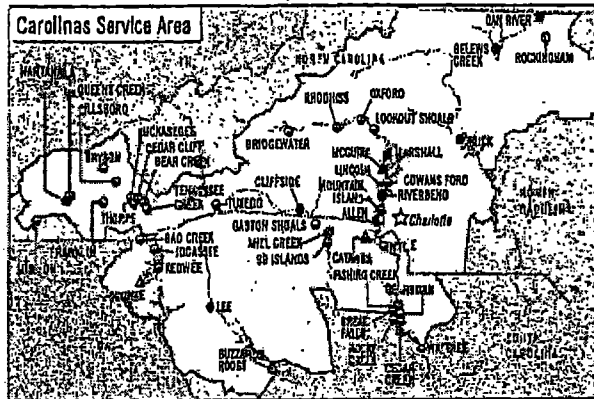
NuStart Energy Consortium (<http://www.nustartenergy.com/>)

Power Plant Visitor Centers (</about-energy/power-plant-visitor-centers.asp>)

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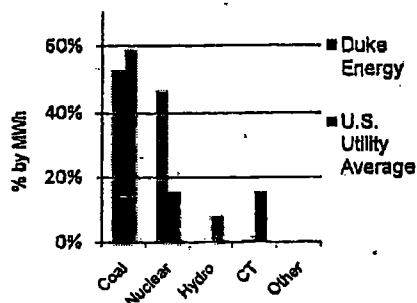
Duke Energy Carolinas Generation Profile



Generation Facilities	Number of Facilities
NUCLEAR	3
FOSSIL	8
COMBUSTION TURBINE	4
HYDRO	30
Franchised Electric and Gas Service Area	



2008 Generation Profile by Source



Generation Source	Fossil	Nuclear	Hydro	Combustion Turbine	Other
Duke Energy Carolinas	53.00%	46.56%	0.10%*	.34%	-
MWh	45,496,467	39,970,607	1,048,428	298,847	-
U.S. National Average	59.36%	15.91%	8.44%	15.76%	.53%

* Hydro % is net pumped storage.

Source: FERC Form 1, 2008 EB, 2008 data

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