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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 XVIII

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J. Abraham Gutting
South Carolina Department of Revenue
PO Box 12265
Columbia, SC 29211
(803) 898-5131

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

June 15, 1998

Duke Power Corporation
422 Church Street
Charlotte, NC 28242-0001
Attn: Mr. Rick McCarver

Dear Rick,

I'm faxing the waiver to you and sending the original by mail.
Please fax back a copy of executed waiver to my attention at (803) 898-5685, and return the original to me at SC Department of Revenue, PO Box 125, Columbia, SC 29214.

I'm sorry again for the delay, but I was in charge of my Mother's 6 month battle with lung cancer which ended June 9, 1998, and everything got put on the back burner. I'm back on the job again and will get with my supervisor next week to get his thoughts on the methods we were using to see if he has any different ideas.

I'll give you a call next week and let you know where we stand.
Give me a call if we need to talk.

Yours Very Truly,

Randy Wilson

Randy Wilson, Auditor
(803) 898-5615

DES00000388

COPY



State of South Carolina
DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev 1/95
2024

File No. 20090024-9

Duke Energy Corp. (Formerly Duke Power Co.) & Combined Affiliates SSN/FBI 56-0285520
Name of Taxpayer

422 S. Church St., Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

(1) The amount of any STATE Income/License Fee tax due on any return(s)
made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 - December 31, 1999 (Income)
December 31, 1984 - December 31, 2000 (License Fee)
may be assessed at anytime on or before December 31, 2002
(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: [Signature]
(Taxpayer, Partner, Officer of Corp., etc.)

Senior Vice President Corporate Tax
(Title)

6-21-02

(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE
By: Robert Anderson/ By:

Robert Anderson
(Administrator, Field Services Division)

6/21/02

(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000389



State of South Carolina
DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

COPY

FS-43
Rev 1/99
2004

File No. 20090024-9

Duke Energy Corp. (Formerly Duke Power Co.) & Combined Affiliates SSN/FRI 56-0205520

Name of Taxpayer

422 E. Church St., Charlotte, NC 28242-0001

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

(1) The amount of any STATE Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 - December 31, 1999 (Income) December 31, 1984 - December 31, 2000 (License Fee)

may be assessed at anytime on or before December 31, 2002 (Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation

(Name of Taxpayer)

By:

(Taxpayer, Partner, Officer of Corp., etc.)

Senior Vice President Corporate Tax

(Title)

6-21-02

(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE

By: Robert Anderson/By:

Robert Anderson by Land Wilk
(Administrator, Field Services Division)

6/21/02
(Date)

If this waiver is accepted on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000390

COPY



State of South Carolina
DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev 1/99
2024

File No. 20090024-9

Duke Energy Corp. (Formerly: Duke Power Co.) & Combined Affiliates SSN/FEI 56-0205520
Name of Taxpayer

422 S. Church St., Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

(1) The amount of any STATE Income/License Fee tax due on any return(s)
made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 - December 31, 1999 (Income)
December 31, 1984 - December 31, 2000 (License Fee)
may be assessed at anytime on or before December 31, 2002
(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: [Signature]
(Taxpayer, Partner, Officer of Corp., etc.)
Senior Vice President Corporate Tax
(Title)

6-21-02

(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE
By: Robert Anderson/ By:

[Signature]
(Administrator, Field Services Division)

6/21/02

(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000391



State of South Carolina
DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

COPY

FS-43
Rev 1/89
2024

File No. 20090024-3

Duke Energy Corp. (Formerly Duke Power Co.) & Combined Affiliates SSN/FBI 56-0205520

Name of Taxpayer

422 S. Church St., Charlotte, NC 28242-0001

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

(1) The amount of any STATE Income/License Fee tax due on any return(s)

made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 - December 31, 1999 (Income)

December 31, 1984 - December 31, 2000 (License Fee)

may be assessed at anytime on or before

December 31, 2002
(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation

(Name of Taxpayer)

By:

(Taxpayer, Partner, Officer of Corp., etc.)

Senior Vice President Corporate Tax

(Title)

6-21-02

(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE

By: Robert Anderson/ By:

Robert Anderson by Sarah White
(Administrator, Field Services Division)

6/21/02

(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000392

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

December 19, 1997

Duke Energy Corporation
422 South Church St.
Charlotte, NC 28242-0001

Attn: Mr. Rick McCarver

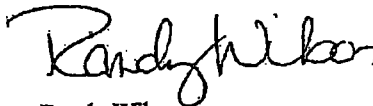
Dear Rick,

Please have the enclosed waiver signed before December 31, 1997 and return to me at your earliest convenience. I am completing the report this week to be reviewed possibly by year-end and mailed to you early January.

I hope you and your family have a happy holiday season.

Yours very truly,

SC DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION



Randy Wilson
Auditor
(803)898-5615

/tb

DES00000393



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/83)
2024

File No. 20090024-9

Duke Power Co. (Now renamed Duke Energy Corp.)

SSN FEI# 56-0205520

Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended Dec. 31, 1978 through Dec. 31, 1994 (Income)
Dec. 31, 1984 through Dec. 31, 1995 (License)

may be assessed at any time on or before June 30, 1998

(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.

DUKE POWER CO. (Now renamed Duke Energy Corp.)

(Name of Taxpayer)

By:

E. G. Ruff
(Taxpayer, Partner, Officer of Corp., etc.,)

Ellen T. Ruff

Vice President and General Counsel, Electric Operations

12/22/97

(Title)

(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By:

Maurin N. L. Lantz/tb
(Director, Field Services Division)

12/19/97
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000394



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Co. (Now renamed Duke Energy Corp.)

SSN FEI# 56-0205520

Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

- (1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended Dec. 31, 1978 through Dec. 31, 1994 (Income)
Dec. 31, 1984 through Dec. 31, 1995 (License)

may be assessed at any time on or before June 30, 1998

(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.

DUKE POWER CO. (Now renamed Duke Energy Corp.)

(Name of Taxpayer)

By: E. G. Ruff

(Taxpayer, Partner, Officer of Corp., etc.)

Ellen T. Ruff
Vice President and General Counsel, Electric Operations

12/22/97

(Title)

(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Maurin N. Lavant/tb

(Director, Field Services Division)

12/19/97

(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000395

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Co.

SSN FEI #56-0205520

Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 through December 31, 1992 (Income)
December 31, 1984 through December 31, 1993 (License)

may be assessed at any time on or before June 30, 1997
(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.

DUKE POWER COMPANY

(Name of Taxpayer)

By:

Robert A. Lohman
(Taxpayer, Partner, Officer of Corp., etc..)

V.P.

(Title)

6-3-96

(Date)

SOUTH CAROLINA TAX COMMISSION

By:

Martin A. Darnold
(Director, Field Services Division)

5/30/96

(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DES00000396

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Co.

SSN FEI #56-0205520

Name of Taxpayer(s)

422 South Church St.

Charlotte, NC 28242-0001

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 through December 31, 1992 (Income)
December 31, 1984 through December 31, 1993 (License)

may be assessed at any time on or before June 30, 1997

(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.

DUKE POWER COMPANY

(Name of Taxpayer)

By:

Robert A. Fisher

(Taxpayer, Partner, Officer of Corp., etc.)

V.P.

(Title)

6-3-96

(Date)

SOUTH CAROLINA TAX COMMISSION

By:

Martin A. Darnall

(Director, Field Services Division)

5/30/96

(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DES00000397



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Co.

SEN FILE# 56-0205520

Name of Taxpayer(s)

422 South Church Street Charlotte, NC 28242-0001

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983 through December 31, 1991 (Income)
December 31, 1984 through December 31, 1992 (License)
may be assessed at any time on or before June 30, 1996
(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.

Duke Power Company

(Name of Taxpayer)

By:

Robert A. Lohm

(Taxpayer, Partner, Officer of Corp., etc.)

V.P. & Tax Counsel

(Title)

8-27-95

(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By:

Mauri A. Davant by RW

(Director, Field Services Division)

8/9/95

(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation. In addition, to which the seal, if any, of the corporation must be affixed.

DES00000398



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/83)
2024

File No. 20090024-9

Duke Power Company

SSN FEI #56-0205520

Name of Taxpayer(s)

422 South Church St.

Charlotte, NC 28242-0001

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

- (1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983 through December 31, 1990 (Income)
December 31, 1984 through December 31, 1991 (License)

may be assessed at any time on or before November 30, 1995

(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-60 of the 1976 South Carolina Code of Laws, as amended.

DUKE POWER COMPANY

(Name of Taxpayer)

By:

Robert A. Lilius

(Taxpayer, Partner, Officer of Corp., etc..)

V.P. & TAX COUNSEL

(Title)

5-7-95

(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By:

Joseph P. Southard for Marvin Devant

(Director, Field Services Division)

2 May 1995

(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000399



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20096024-9

Duke Power Company

SSN

Name of Taxpayer(s)

422 South Church St.

Charlotte, NC 28242-0001

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86, December 31, 1986/87, December 31, 1987/88, December 31, 1988/89, December 31, 1989/90 and December 31, 1990/91

may be assessed at any time on or before May 30, 1995.

(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.

Duke Power Company

(Name of Taxpayer)

By:

Robert A. Linder, Vice Pres.

(Taxpayer, Partner, Officer of Corp., etc.,)

Vice President

(Title)

8-29-94

(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By:

Marvin N. Davenport

(Director, Field Services Division)

8/24/94

(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000400



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Company
Name of Taxpayer(s)

SSN

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86, December 31, 1986/87, December 31, 1987/88, December 31, 1988/89, December 31, 1989/90 and December 31, 1990/91

may be assessed at any time on or before May 30, 1995
(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.

Duke Power Company
(Name of Taxpayer)
By: Robert L. Linton, Vice Pres.
(Taxpayer, Partner, Officer of Corp., etc.)
Vice President
(Title)

8.29.94
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Maurice N. Davis Jr.
(Director, Field Services Division)

8/24/94
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000401

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

October 19, 1993

Duke Power Company
422 South Church St.
Charlotte, NC 28242-0001

Attn: Mr. Wilson R Taylor

Dear Remi:

Please have the enclosed waiver signed and returned to me at your earliest convenience. Also, when you complete your spreadsheet or have any additional information regarding the audit, give me a call so I can make plans to complete my examination.

Your cooperation is appreciated.

Yours very truly,

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION

Randy Wilson
Randy Wilson
Auditor
(803) 737-4408

/dd
Enclosure

DES00000402

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company

SSN

Name of Taxpayer(s)

422 South Church Street Charlotte, NC 28242-0001

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86, December 31, 1986/87, December 31, 1987/88, December 31, 1988/89 and December 31, 1989/90 may be assessed at any time on or before December 31, 1994 (Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.

Duke Power Company
(Name of Taxpayer)

By: Robert J. Linton, VP & Tax Counsel
(Taxpayer, Partner, Officer of Corp., etc.)

VP & Tax Counsel
(Title)

11-16-93
(Date)

SOUTH CAROLINA TAX COMMISSION

By: Maurice H. Dawant by Rand Linton
(Director, Field Services Division)

10/19/93
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DES00000403

TO: Duke Power Company
P.O. Box 33189
Charlotte, NC 28242
Attn: Mr. Wilson R. Taylor

FROM: S. C. TAX COMMISSION
P.O. BOX 125
Columbia, South Carolina 29214
Phone: (803) 737-4408

SUBJECT	PLEASE RETURN WITHIN	DATE
Warren 83-89	10 DAYS	12/15/92
MESSAGE		
Please have the enclosed leave signed & return to me		
Thanks,		
[Signature]		

PLEASE REPLY BELOW	
[Signature]	
[Circular Stamp]	
[Circular Stamp]	
DATE 12/27/92	SIGNED [Signature]

RETURN PINK COPY WITH REQUESTED INFORMATION, KEEP WHITE COPY

C-197 (10/84)

DES00000404



STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (7/90)
2024

File No. 20090024-9

Duke Power Company
Name of Taxpayer(s)

SSN

P O Box 33189 Charlotte, NC 28242 Attn: Mr. Wilson R. Taylor
Address (Number, Street, City or Town, State, Zip Code).

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86, December 31, 1986/87, December 31, 1987/88, December 31, 1988/89 and December 31, 1989/90 may be assessed at any time on or before December 31, 1993 (Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.

By: *John D. Kulp* (Name of Taxpayer)
(Taxpayer, Partner, Officer of Corp., etc.,)
VP Taxes
(Title)

12/23/92
(Date)

SOUTH CAROLINA TAX COMMISSION

By: *Marvin N. Davenport by Randy Wilson*
(Director, Field Services Division)

12/14/92
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000405

NO AND REPLY

TO Duke Power Company
P.O. Box 33189
Charlotte, N.C. 28242
Attn: Wilson R. Taylor

FROM



S. C. TAX COMMISSION

P. O. BOX 125

Columbia, South Carolina 29214

Phone (803) 737-4408

1010 V	SUBJECT	Waiver for 1983 + 1984 tax years; 84 + 85 ^{Waiver} _{For}	PLEASE RETURN WITHIN 10 DAYS	DATE 12/20/88
	MESSAGE			
Roni, Please have the enclosed waiver signed & returned to me as soon as possible so that we can complete this audit during the first part of next year. I'll need to have this in hand prior to 12/31/88 so the quicker you can put it back in the mail the better. SIGNED Randy Wilson				

PLEASE REPLY BELOW	
DATE	SIGNED

RETURN PINK COPY WITH REQUESTED INFORMATION, KEEP WHITE COPY

C-107 (10/84)

DES00000424

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company
Name of Taxpayer(s)

SSN

P.O. Box 33189 Charlotte, NC 28242
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84 and December 31, 1984/85 may be assessed at any time on or before March 31, 1989 (Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.

(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Officer of Corp., etc.)

(Title)

(Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin N. Davant
(Director, Field Services Division) RW

12/20/88
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DES00000425

TO Duke Power Comp
P.O. Box 33189
Charlotte, N.C. 28242
Attn: Wilson R. Taylor

FROM



SOUTH CAROLINA TAX COMMISSION

P.O. BOX 125

Columbia, South Carolina 29214

Phone (803) 737-4408

SUBJECT Waiver For 1983 & 1984 tax years PLEASE RETURN WITHIN 10 DAYS DATE 8/9/88

Remi

Please have the enclosed waiver signed and return to me so that I can conduct the audit after September 15. The week of October 10 or October 31 are still open on my calendar. If one of these weeks looks OK to you, please let me know when you return the waiver or give me a call. Thanks SIGNED Randy Wilson

Randy -

Attached is the executed consent to extend the time to answer Taper 83 & 84 income and 84 & 85 returns -

Call me around 1st of September so we can set a date -

DATE 8-16-88

SIGNED

Remi Taylor

RETURN PINK COPY WITH REQUESTED INFORMATION, KEEP WHITE COPY

C-107 (10/84)

DES00000427

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company

SSN

Name of Taxpayer(s)

PO Box 33189 Charlotte NC 28242

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84 and

December 31, 1984/85

may be assessed at any time on or before

December 31, 1988

(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.

Duke Power Company

(Name of Taxpayer)

By:

John P. O. Rife

(Taxpayer, Partner, Officer of Corp., etc.,)

V.P. Taxes

(Title)

8/16/88

(Date)

SOUTH CAROLINA TAX COMMISSION

By:

Marvin N. Davant pw

(Director, Field Services Division)

August 9, 1988

(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DES00000428

10/1/870
7. December
1983)

Department of the Treasury
Internal Revenue Service
Waiver of Restrictions on Assessment
and Collection of Deficiency in Tax
and Acceptance of Overassessment

Date received by
Internal Revenue
Service

Names and Address of taxpayers
Duke Power Company
P.O. Box 33189
422 South Church Street
Charlotte, N. C. 28242-0001

Social security or employer
identification number
56-0205520

Increase (Decrease) in Tax and Penalties

Tax year ended	Amount of Tax	Penalty	Penalty
12/31/79	\$ (557,034)	\$ N/A	\$ N/A
12/31/80	\$ (1,381,339)	\$ N/A	\$ N/A
12/31/81	\$ (628,783)	\$ N/A	\$ N/A
12/31/82	\$ (235,305)	\$ N/A	\$ N/A
12/31/83	\$ None	\$ N/A	\$ N/A
	\$	\$	\$

Other Information:

Restricted Interest:

Since \$135,954 of the decrease in tax for the year 1980 results from the carryback of Research Credit from 1983, interest is due on that amount from the due date of the 1983 income tax return (March 15, 1984) under the provisions of Section 6611(f)(2) of the Internal Revenue Code. For the remaining decrease in tax for 1980, interest begins March 15, 1981, the due date of the return.

INTERNAL REVENUE SERVICE
RECEIVED

SEP 24 1992

District Director-Greensboro District
CHARLOTTE, N. C.
100423

Consent to Assessment and Collection

I consent to the immediate assessment and collection of any deficiencies (increase in tax and penalties) and accept any overassessment (decrease in tax and penalties) shown above, plus any interest provided by law. I understand that by signing this waiver, I will not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years.

DUKE POWER COMPANY

Signatures: _____

By *John P. O'Keefe* *VP Taxes*

Date 9/23/92

NUCLEAR FUEL DEPRECIATION
1978 - 1987 ADJUSTMENT

	VINTAGE 1978	VINTAGE 1979	VINTAGE 1980	VINTAGE 1981	VINTAGE 1982	VINTAGE 1983	TOTAL
INCREASE (DECREASE)							
DEPRECIABLE BASE	5,117,968	12,000,282	20,302,606	(197,690)	(1,525,103)	31,467	35,729,530
INCREASE (DECREASE)							
DEPRECIATION EXPENSE							
1978	1,023,594						1,023,594
1979	1,637,750	2,400,056					4,037,806
1980	1,074,773	3,840,090	4,060,521				8,975,384
1981	767,756	2,520,060	6,496,834	(29,654)			9,754,996
1982	460,571	1,800,186	4,263,547	(43,492)	(228,765)		6,252,047
1983	153,524	1,079,918	3,045,635	(41,515)	(335,523)	4,720	3,906,759
1984		359,972	1,827,052	(41,515)	(320,272)	6,923	1,832,160
1985			609,017	(41,514)	(320,272)	6,608	253,839
1986					(320,271)	6,608	(313,663)
1987						6,608	6,608
TOTAL	5,117,968	12,000,282	20,302,606	(197,690)	(1,525,103)	31,467	35,729,530

INCREASE (DECREASE)							
ITC GENERATED	392,337	920,022	1,556,533	(19,769)	(152,510)	2,517	2,699,130

NOTES: SYSTEM LIFE METHOD

1978-1980	ADR	5	COB-2 YEARS	
			SYD-3RD YEAR	.4375
			4TH YEAR	.5556
			5TH YEAR	.7500
			6TH YEAR	BALANCE

1981-1983	ACRS	5	TABLE 1ST YEAR	.15
			2ND YEAR	.22
			3RD YEAR	.21
			4TH YEAR	.21
			5TH YEAR	.21

Form **2297**
(Rev. March 1982)

Department of the Treasury Internal Revenue Service

WAIVER OF STATUTORY NOTIFICATION
OF CLAIM DISALLOWANCE

I, Duke Power Company (56-0205520) of P.O. Box 33189, 422 South Church Street
(Name, SSN or EIN) (Number, Street, City or Town, State, Zip Code)
Charlotte, North Carolina 28242-0001

waive the requirement under the Internal Revenue Code section 6532(a)(1) that a notice of claim disallowance be sent to me by certified or registered mail for the claims for credit or refund shown in column (d), below.

I understand that the filing of this waiver is irrevocable and it will begin the 2-year period for filing suit for refund of the claims disallowed as if the notice of disallowance had been sent by certified or registered mail.

CLAIMS			
(a) TAXABLE PERIOD ENDED:	(b) KIND OF TAX	(c) AMOUNT OF CLAIM	(d) AMOUNT OF CLAIM DISALLOWED
December 31, 1979	Income	\$ 557,034.00	\$ None
December 31, 1980	Income	1,245,385.00	None
December 31, 1981	Income	777,581.00	148,798.00
December 31, 1982	Income	290,505.00	55,200.00
December 31, 1983	Income	None	None
INTERNAL REVENUE SERVICE RECEIVED			
SEP 24 1992			

If you file this waiver for a joint return, both you & your spouse must sign the original & duplicate of this form. Sign your name exactly as it appears on the return. If you are acting under power of attorney for your spouse, you may sign as agent for him or her.

For an agent or attorney acting under a power of attorney, a power of attorney must be sent with this form if not previously filed.

For a partnership with excise or employment tax liability, all partners must sign. However, one partner may sign with appropriate evidence of authorization to act for the partnership.

For a person acting in a fiduciary capacity (executor, administrator, trustee) file Form 56, Notice Concerning Fiduciary Relationship, with this form if not previously filed.

For a corporation, enter the name of the corporation followed by the signature and title of the officer(s) authorized to sign.

District Director - Greensboro District
CHARLOTTE, N.C.
100423
(Date Signed)

YOUR SIGNATURE →
Spouse's Signature If A Joint Return Was Filed →
Taxpayer's Representative Sign Here →
Partnership/Corporate Name: DUKE POWER COMPANY
Partners/Officers →
Sign Here →
Title →
Date Signed →
9/23/92

NOTE — Filing this waiver within 6 months from the date the claim was filed will not permit filing a suit for refund before the 6-month period has elapsed unless a decision is made by the Service within that time disallowing the claims.

Form **2297**

Form 3363
(Rev. November 1983)

Department of the Treasury — Internal Revenue Service

ACCEPTANCE OF PROPOSED DISALLOWANCE OF CLAIM
FOR REFUND OR CREDIT

Name(s), SSN or EIN, and address of taxpayer(s) (Number, Street, City or Town, State, ZIP Code)

DUKE POWER COMPANY
P. O. BOX 33189
422 SOUTH CHURCH STREET
CHARLOTTE, NC 28242-0001

56-0205520

INTERNAL REVENUE SERVICE
RECEIVED

SEP 24 1992

District Director—Greensboro District
Charlotte, N.C.

Year or Period	Date Claim Filed	Kind of Tax	Amount of Claim	Amount of Claim Disallowed	Amount of Claim Allowed
12/31/79	12/30/91	Income	\$ 557,034.	\$ —	\$ 557,034.
12/31/80	12/30/91	Income	1,245,385.	—	1,245,385.
12/31/81	12/30/91	Income	777,581.	148,798.	628,783.
12/31/82	12/30/91	Income	290,505.	55,200.	235,305.
12/31/83	12/30/91	Income	N/A	N/A	N/A

I accept the proposal of the Internal Revenue Service to disallow the claim(s) to the extent described above. This means only that I do not want the Service to consider the claim(s). It does not waive my right to file suit on the disallowance.

If you file this acceptance for a joint :
return, both you & your spouse must sign :YOUR SIGNATURE—> _____ (Date Signed) _____
the original & duplicate of this form. Sign:
your name exactly as it appears on the :
return. If you are acting under power of :Spouse's Signature If
attorney for your spouse, you may sign as :A Joint Return Was
agent for him or her. :Filed—> _____ (Date Signed) _____
For an agent or attorney acting under a :
power of attorney, a power of attorney must :
be sent with this form if not previously :Taxpayer's Representative
filed. :Sign Here—> _____ (Date Signed) _____
For a partnership with excise or
employment tax liability, all partners must :
sign. However, one partner may sign with :Partners/
appropriate evidence of authorization to :Corporate Name: DUKE POWER COMPANY
act for the partnership. :
For a person acting in a fiduciary :Partners/ —> _____
capacity (executor, administrator, trustee):Corporate
file Form 56, Notice Concerning Fiduciary :Officers
Relationship, with this form if not :Sign
previously filed. :Here —> Lester P. O. Kelly (Date Signed) _____
For a corporation, enter the name of the :
corporation followed by the signature and :CVP Taxes (Date Signed) 9/23/92
title of the officer(s) authorized to sign. : (Title)

Form 3363 (Rev. 11-83)

Form 870-AD
(rev. 04/1992)

Department of the Treasury-Internal Revenue Service

Offer to Waive Restrictions on Assessment and Collection
of Tax Deficiency and to Accept Overassessment

Symbols: AP LMSB GBO TM	Name of Taxpayer: Duke Energy Corporation and Affiliates: Formerly, Duke Power Company and Affiliates	SSN or EIN: 56-0205520

Under the provisions of section 6213(d) of the Internal Revenue code of 1986 (the Code), or corresponding provisions of prior internal revenue laws, the undersigned offers to waive the restrictions provided in section 6213(a) of the Code or corresponding provisions of prior internal revenue laws, and to consent to the assessment and collection of the following deficiencies and additions to tax, if any, with interest as provided by law. The undersigned offers also to accept the following overassessments, if any, as correct. Any waiver or acceptance of an overassessment is subject to any terms and conditions stated below and on the reverse side of this form.

Deficiencies (Overassessments) and Additions to Tax					
Year Ended	Kind of Tax	Tax			
December 31, 1984	Income	\$12,335.00			
December 31, 1986	Income	(\$4,458,182.00)			
December 31, 1987	Income	\$11,276,912.00			

Accepted as of the date the Joint Committee on Taxation completes its review without objection or the date accepted for the Commissioner, whichever is later.

This offer must be accepted for the Commissioner of Internal Revenue and will take effect on the date it is accepted. Unless and until it is accepted, it will have no force or effect.

If this offer is accepted, the case will not be reopened by the Commissioner unless there was:

- fraud, malfeasance, concealment or misrepresentation of a material fact
- an important mistake in mathematical calculation
- a deficiency or overassessment resulting from adjustments made under Subchapters C and D of Chapter 63 concerning the tax treatment of partnership and subchapter S items determined at the partnership and corporate level
- an excessive tentative allowance of a carryback provided by law

No claim for refund or credit will be filed or prosecuted by the taxpayer for the years stated on this form, other than for amounts attributed to carrybacks provided by law. See exceptions on back.

The proper filing of this offer, when accepted, will expedite assessment and billing (or overassessment, credit or refund) by adjusting the tax liability. This offer, when executed and timely submitted, will be considered a claim for refund for the above overassessment(s), if any.

Signature of Taxpayer:	Date:
Signature of Taxpayer:	Date:
Signature of Taxpayer's Representative:	Date:
Corporate Name: Duke Energy Corporation and Affiliates: Formerly, Duke Power Company and Affiliates	Date:
By Corporate Officer:	Title: Vice President
For Internal Revenue Use Only	Date: 5/6/2001
Date Accepted for Commissioner: May 11, 2001	Signature: Thomas M. Cusston
Office: AP LMSB GBO TM	Title: Appeals Team Case Leader

(See second page for signature instructions)

Form 870-AD- (Rev. 4/1992)

This offer may be executed by the taxpayer's attorney, certified public accountant, or agent provided this is specifically authorized by a power of attorney which, if not previously filed, must accompany this form. If this offer is signed by a person acting in a fiduciary capacity (for example: an executor, administrator, or a trustee) Form 56, Notice Concerning Fiduciary Relationship, must accompany this form, unless previously filed.

If this offer is executed for a year for which a joint return was filed, it must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

If this offer is executed by a corporation, it must be signed with the corporate name followed by the signature and title of the officer(s) authorized to sign. If the offer is accepted, as a condition of acceptance, any signature by or for a corporate officer will be considered a representation by that person and the corporation, to induce reliance, that such signature is binding under law for the corporation to be assessed the deficiencies or receive credit or refund under this agreement. If the corporation later contests the signature as being unauthorized on its behalf, the person who signed may be subject to criminal penalties for representing that he or she had authority to sign this agreement on behalf of the corporation.

Notwithstanding any of the preceding terms and conditions to which this offer is subject, the taxpayer reserves the right to timely file and prosecute a claim or claims for refund or credit for the years stated in this form, based solely upon any or all of the grounds specified in the subparagraphs immediately following this paragraph. This offer is not to be construed as a claim for refund or credit, formal or informal, concerning the matters for which the right to file a claim or claims is reserved.

(a) The entitlement of Duke Power Company to claim additional 1986 and 1987 research and experimentation credits and related adjustments made to reflect changes in depreciation expense, as well as any adjustments to section 174 deductions related to these additional claims for research and experimentation credits (specifically including the taxpayer's Form 1120-X for 1986 and 1987 filed on or about September 23, 1999).

RECEIVED

MAY 1 6 2001

APPEALS OFFICE - GREENSBORO
SOUTHEAST REGION

Form 870-AD-c (Rev. 4/1992)

Form 870-AD (rev. 04/1992)	Department of the Treasury-Internal Revenue Service Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment		
Symbols: AP LMSB GBO TM	Name of Taxpayer: Duke Energy Corporation and Affiliates: Formerly, Duke Power Company and Affiliates	SSN or EIN: 56-0205520	
Under the provisions of section 6213(d) of the Internal Revenue code of 1986 (the Code), or corresponding provisions of prior internal revenue laws, the undersigned offers to waive the restrictions provided in section 6213(a) of the Code or corresponding provisions of prior internal revenue laws, and to consent to the assessment and collection of the following deficiencies and additions to tax, if any, with interest as provided by law. The undersigned offers also to accept the following overassessments, if any, as correct. Any waiver or acceptance of an overassessment is subject to any terms and conditions stated below and on the reverse side of this form.			
Deficiencies (Overassessments) and Additions to Tax			
Year Ended	Kind of Tax	Tax	
December 31, 1988	Income	(\$2,547,134.00)	
December 31, 1989	Income	\$14,865,852.00	
December 31, 1990	Income	(\$19,042,352.00)	
December 31, 1991	Income	(\$2,864,975.00)	
Accepted as of the date the Joint-Committee on Taxation completes its review without objection or the date accepted for the Commissioner, whichever is later.			
This offer must be accepted for the Commissioner of Internal Revenue and will take effect on the date it is accepted. Unless and until it is accepted, it will have no force or effect.			
If this offer is accepted, the case will not be reopened by the Commissioner unless there was:			
• fraud, malfeasance, concealment or misrepresentation of a material fact • an important mistake in mathematical calculation • a deficiency or overassessment resulting from adjustments made under Subchapters C and D of Chapter 63 concerning the tax treatment of partnership and subchapter S items determined at the partnership and corporate level • an excessive tentative allowance of a carryback provided by law			
No claim for refund or credit will be filed or prosecuted by the taxpayer for the years stated on this form, other than for amounts attributed to carrybacks provided by law. See exceptions on back.			
The proper filing of this offer, when accepted, will expedite assessment and billing (or overassessment, credit or refund) by adjusting the tax liability. This offer, when executed and timely submitted, will be considered a claim for refund for the above overassessments, if any.			
Signature of Taxpayer:			Date:
Signature of Taxpayer:			Date:
Signature of Taxpayer's Representative:			Date:
Corporate Name: Duke Energy Corporation and Affiliates: Formerly, Duke Power Company and Affiliates			Date:
By Corporate Officer: <i>[Signature]</i>		Title: Vice President	Date: 2/4/2001
For Integral Revenue Use Only	Date Accepted for Commissioner: May 11, 2001	Signature: <i>Thomas McQuiston</i>	
	Office: AP LMSB GBO TM	Title: Appeals Team Case Leader	

(See second page for signature instructions)

Form 870-AD-c (Rev. 4/1992)

This offer may be executed by the taxpayer's attorney, certified public accountant, or agent provided this is specifically authorized by a power of attorney which, if not previously filed, must accompany this form. If this offer is signed by a person acting in a fiduciary capacity (for example: an executor, administrator, or a trustee) Form 56, Notice Concerning Fiduciary Relationship, must accompany this form, unless previously filed.

If this offer is executed for a year for which a joint return was filed, it must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

If this offer is executed by a corporation, it must be signed with the corporate name followed by the signature and title of the officer(s) authorized to sign. If the offer is accepted, as a condition of acceptance, any signature by or for a corporate officer will be considered a representation by that person and the corporation, to induce reliance, that such signature is binding under law for the corporation to be assessed the deficiencies or receive credit or refund under this agreement. If the corporation later contests the signature as being unauthorized on its behalf, the person who signed may be subject to criminal penalties for representing that he or she had authority to sign this agreement on behalf of the corporation.

Notwithstanding any of the preceding terms and conditions to which this offer is subject, the taxpayer reserves the right to timely file and prosecute a claim or claims for refund or credit for the years stated in this form, based solely upon any or all of the grounds specified in the subparagraphs immediately following this paragraph. This offer is not to be construed as a claim for refund or credit, formal or informal, concerning the matters for which the right to file a claim or claims is reserved.

(a) The entitlement of Duke Power Company to claim additional 1988 through 1991 research and experimentation credits and related adjustments made to reflect changes in depreciation expense, as well as any adjustments to section 174 deductions related to these additional claims for research and experimentation credits (specifically including the taxpayer's Form 1120-X for 1988 through 1991 filed on or about September 23, 1999).

(b) The entitlement of Duke Power Company to claim diesel fuel tax credits under the mobile machinery exception as defined in Treasury Regulations 48.4061(a)-1(d)(2)(i) for 1988 through 1991.

Form 870-AD
(rev. 04/1992)

Department of the Treasury-Internal Revenue Service

Offer to Waive Restrictions on Assessment and Collection
of Tax Deficiency and to Accept Overassessment

Symbols:
AP LMSB GBO TM

Name of Taxpayer: Duke Energy Corporation and Affiliates:
Formerly, Duke Power Company and Affiliates

SSN or EIN :
56-0205520

Under the provisions of section 6213(d) of the Internal Revenue code of 1986 (the Code), or corresponding provisions of prior internal revenue laws, the undersigned offers to waive the restrictions provided in section 6213(a) of the Code or corresponding provisions of prior internal revenue laws, and to consent to the assessment and collection of the following deficiencies and additions to tax, if any, with interest as provided by law. The undersigned offers also to accept the following overassessments, if any, as correct. Any waiver or acceptance of an overassessment is subject to any terms and conditions stated below and on the reverse side of this form.

Deficiencies (Overassessments)
and Additions to Tax

Year Ended	Kind of Tax	Tax				
December 31, 1992	Income	(\$12,158,532.00)				
December 31, 1993	Income	\$3,624,671.00				
December 31, 1994	Income	\$2,677,953.00				

Accepted as of the date the Joint Committee on Taxation completes its review without objection or the date accepted for the Commissioner, whichever is later.

This offer must be accepted for the Commissioner of Internal Revenue and will take effect on the date it is accepted. Unless and until it is accepted, it will have no force or effect.

If this offer is accepted, the case will not be reopened by the Commissioner unless there was:

- fraud, misfeasance, concealment or misrepresentation of a material fact
- an important mistake in mathematical calculation
- a deficiency or overassessment resulting from adjustments made under Subchapters C and D of Chapter 63 concerning the tax treatment of partnership and subchapter S items determined at the partnership and corporate level
- an excessive tentative allowance of a carryback provided by law

No claim for refund or credit will be filed or prosecuted by the taxpayer for the years stated on this form, other than for amounts attributed to carrybacks provided by law. See exceptions on back.

The proper filing of this offer, when accepted, will expedite assessment and billing (or overassessment, credit or refund) by adjusting the tax liability. This offer, when executed and timely submitted, will be considered a claim for refund for the above overassessment(s), if any.

Signature of Taxpayer:

Date:

Signature of Taxpayer:

Date:

Signature of Taxpayer's Representative:

Date:

Corporate Name: Duke Energy Corporation and Affiliates: Formerly, Duke Power Company and Affiliates

Date:

By Corporate Officer:

Title

Date:

For
Internal
Revenue
Use Only

Date Accepted for Commissioner:

Signature:

July 17, 2001
Office: AP LMSB GBO TM

Thomas McQuiston

Title:

Appeals Team Case Leader

(See second page for signature instructions)

Form 870-AD-a (Rev. 4/1992)

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

Bumet R. Maybank
1/20/02

DIRECT DIAL
(803) 253-8228
(843) 720-1768
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.

NPCHART:--0-

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

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/mwi

cc: Mr. Harley Priesmeyer/Duke Energy

NPC:ART:181232.1-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

STEVEN PRUET JACOBS & POLLARD, P.C.

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.)

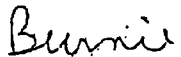
CONCLUSION

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 Friesmeyer/Duke Energy


John Swearingen
DOR

July 8, 2002

SCDOR00021668

----- 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: 713-501-0725
email: hhpriesmeyer@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@ripjp.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: hhpriesmeyer@duke-energy.com

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

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

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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

CC: <bmaybank@npjp.com>

SCDOR00021664

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

1/16/92
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: 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

SCDOR00622017

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

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	\$2,767,796		\$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

SC 2560317-00

FEB. 12. 2003 3:34PM SCDOR FSD 803 8985685
03/03/2002 FRI 15:16 FAX
Jul-02-2002 01:26am From-SC DEPT OF REV.

NO. 109 P.2
002/002
T-550 P.002/000 F-000



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 \$ 2,487,494 if paid by August 14, 2002 including interest.

This information was prepared by Jon Steensen, CRA 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

Commission Approval of Waiver by [Signature]

(See reverse side)

NEXSEN|PRUET

Burnet R. Maybank, III
Member
Admitted in SC

April 18, 2008

Mr. Tim Donovan
South Carolina Department of Revenue
301 Gervais Street
Columbia, South Carolina 29214

Re: Duke Energy

Dear Tim:

You will please find attached Duke's appeal to the Department of Revenue's proposed assessment. The proposed assessment was sent to an incorrect zip code and was not received by Duke until February 4 (see attached date stamp.) Accordingly, the appeal is within 90 days of receipt of the proposed assessment. The correct zip code is 28285.

The Form 2848 Power of Attorney authorizing our representation will be forthcoming.

Very truly yours,



Burnet R. Maybank, III

BRM/shp

Enclosures

cc: Mr. Thomas C. Monroe III
Mr. John Lechko
Mr. Rick Reames III, Esquire

1230 Main Street
Suite 700 (28201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.540.2048
F 803.727.1472
E BMaybank@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

NPCOL1:1346532.1-DOC-(RR) 011413-00041



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
APPLICATION FOR APPEAL
(Protest Pursuant to Revenue Procedures Act)

C-245
(Rev. 1/27/05)
6177

Section I: Taxpayer Identification

Taxpayer Name (s) Duke Energy Corporation (f/k/a Duke Power Company)
(Please type or print)
Address 400 S. Tryon Street, ST22M
City Charlotte State NC Zip Code 28285
Telephone 704/382-1669
Period (s) Covered Periods ending December 31, 1986 to December 31, 1998
Type (s) of Tax (es) Income Tax
Identification Number (Social Security Number, License Number, etc.) 56-0205520

Section II: Department of Revenue Document to be Attached

Please attach a copy of the Department of Revenue document or notice you received which led to the filing of this protest.

Section III: Reason for Protest

State all the reasons you disagree, including a statement of facts supporting your position and the law or other authority upon which you rely. (If the amount of proposed assessment is less than \$2,500 you need not provide your legal authority unless you are a partnership, "S" corporation, an exempt organization or an employee plan and the proposed tax is imposed by Chapters 6, 11, or 13 of Title 12.) Add additional sheets if necessary.

See attached.

(over)

ATTACHMENT TO APPLICATION FOR APPEAL – FORM C-245

Duke Energy Corporation – f/k/a Duke Power Company
File: 20090024-9
Corporate Income Tax
Taxable Periods Ending 12/31/1986 through 12/31/1998

Duke Energy Corporation (“Duke”), formerly known as Duke Power Company files this Application for Appeal in response to the Report of Field Audit (“Report”), dated January 9, 2008 by the South Carolina Department of Revenue (“Department”) for the taxable periods ending December 31, 1986 through December 31, 1998 (“Taxable Periods”) for corporate income tax. The Duke Tax Department did not receive the Report until February 4, 2008 as evidenced by its date stamp on the attached Report. The Department’s Report is attached as Exhibit A.

Facts

Duke is a multistate energy services corporation with operations in South Carolina. In December, 2002, Duke timely filed amended corporate income tax returns for the periods ending December 31, 1986 through December 31, 2001.

The refund claims result from: (a) the filing on a single-factor receipts formula pursuant to South Carolina Code Section 12-6-2290, and (b) the inclusion of gross receipts from the sale of short-term financial instruments in the denominator of its gross receipts factor.

In its original returns, Duke employed the three-factor apportionment formula provided for in Section 12-6-2250. However, the corporation is not among the types of specifically enumerated corporations required to employ the three-factor apportionment formula. Consequently, Duke’s amended returns properly employ the single-factor gross receipts formula provided for in Section 12-6-2290.

The amended returns include in the denominator of Duke’s single-factor gross receipts formula the corporations’ gross receipts from the sale of short-term financial instruments. Duke’s day-to-day operations generated excess cash which it desired to keep available as working capital for its business. Consequently, in order to keep the funds as liquid as possible and earn a return, Duke purchased and sold short-term financial instruments. Duke’s activities concerning these financial instruments occurred outside of South Carolina. Moreover, the dealer’s that assisted Duke with its purchases and sales of the financial instruments were domiciled outside of South Carolina.

In 2007, Duke timely filed amended returns to report changes to its federal taxable income, resulting from the settlement of audit issues with the Internal Revenue Service (“IRS”) in December 2006. The changes were reported against the last filed returns filed by Duke, which are currently under appeal with the Department. Those returns claiming refunds for changes to its apportionment factors, as described above, were denied by the

Department and subsequently appealed in March 2003. Such appeals are still pending. The Department ignored the income tax appeals currently pending and adjusted the amended returns filed in 2007 to reflect the apportionment factors on Duke's originally filed income tax returns, not those on its last filed returns.

Reasons for the Appeal

Duke objects to the following determinations of the Department.

1. The Department failed to accept the changes to taxable income resulting from the settlement of federal income tax audits.
2. The Department erred by changing the apportionment factors. Only issues related to the federal income tax changes were subject to change.
3. The Department should have used the apportionment factors from the last filed returns.
4. The denial of Duke's employment of the single-factor gross receipts apportionment formula even though Duke did not satisfy the requirements for using the three-factor apportionment formula under Sections 12-6-2250 or any apportionment formula under Section 12-6-2310.
5. The exclusion of Duke's gross receipts from the sales of the short-term financial instruments from the denominator of Duke's gross receipts factor, notwithstanding that such gross receipts are required to be so included.
6. All other adverse determinations that resulted in the denial of the refund claims.

1. Changes Due to Federal Income Tax Changes

Duke received notices of settlement of numerous changes to its federal taxable income in December 2006. This settlement of issues for the taxable periods was approved by the Joint Committee on Taxation ("Joint Committee") in December 2006. These changes to taxable income were the result of refund claims made while Duke was under audit by the IRS, not by the filing of amended returns with the IRS for which corresponding South Carolina returns were not filed. These changes were not final until approved by the Joint Committee.

2. Change in Apportionment Factors

Duke filed its amended returns for the taxable periods to report the changes to its federal taxable income. It made no changes to the apportionment factors as reported on its last filed returns. As such, the Department is only permitted to audit and make changes to those changes reported by the taxpayer.

3. Last Filed Returns

Duke is required to file amended income tax returns in South Carolina when its taxable income changes due to federal income tax audits. Such changes are required to be made to the last filed returns with the State. Duke filed its amended returns for the applicable tax periods in 2007 using its last filed returns as its starting point. The Department erred in not acknowledging that those returns were still subject to an ongoing appeal and should have postponed any further work on these amended returns until such appeals were exhausted.

4. Single-Factor Gross Receipts Formula

Duke is required to compute its South Carolina corporate income tax liability using a single-factor gross receipts formula to apportion its income. Pursuant to Sections 12-6-2290, if the taxpayer does not derive its principal profits in the manner described in Sections 12-6-2250 or 12-6-2310, the taxpayer must apportion its income utilizing the single-factor gross receipts formula. Duke's business is not among those enumerated in Section 12-6-2310, and it does not satisfy the requirements of Section 12-6-2250. Consequently, Duke is required to compute its South Carolina tax liability using a single-factor gross receipts apportionment formula.

Duke's principal business in South Carolina is not "(a) manufacturing or any form of collecting, buying, or assembling, or processing goods and materials within [South Carolina], or (b) selling, distributing, or dealing in tangible personal property within [South Carolina]." Section 12-6-2250. Duke's principal business in South Carolina was not manufacturing or any form of collecting, buying, assembling or processing goods and materials within South Carolina, as Duke is not a manufacturer, and electricity is neither a good or material. Moreover, Duke was not engaged in selling, distributing or dealing in tangible personal property within South Carolina because electricity is not tangible personal property. See Consolidated Hydro Southeast, Inc. v. South Carolina Dep't of Revenue & Taxation, No. 95-ALJ-17-0634-CC, 1996 WL 909155 (S.C. Admin. Law Judge Div. May 13, 1996) (the sale of electricity constitutes the sale of services and is therefore subject to the additional license fee of Section 12-19-110); Section 12-36-60 (while electricity is included in the sales tax statute discussing the application of the tax on sales of tangible personal property, the sale of electricity is specifically recognized and defined as a service); Section 12-36-910 (subsection A imposes the sales tax on sales of tangible personal property at retail and subsection B imposes the sales tax on sales of various services, including sales of electricity); In re PacifiCorp, 2002-SBE-005-A, 2002 Cal. Tax LEXIS 469 (Cal. S.B.O.E. Sept. 12, 2002), reh'g denied, 2002 Cal. Tax LEXIS 684 (Cal. S.B.O.E. Dec. 19, 2002) (sales of electricity are sales of services and not sales of tangible personal property).

In the letter denying Duke's refund claims, the Department states that its policy on applying the three-factor apportionment formula to power companies as manufacturers should be upheld because it has allegedly been applied for a long period of time. "Such administrative construction however affords no basis for the perpetuation of a patently

erroneous application of the statute.” Monroe v. Livingston, 251 S.C. 214,217,161 S.E.2d 243, 244 (1968).

In addition, Duke’s filing of amended returns utilizing the single-factor gross receipts apportionment formula does not constitute a change in accounting method that requires the consent of the Department. In the first place, an apportionment formula is not an accounting method. See Section 12-6-4420 (providing that [a] taxpayer’s method of accounting. . . must be the same as for federal income tax purposes” and apportionment formulas are not accounting methods for federal income tax purposes).

Moreover, Internal Revenue Service Code Section 446 addresses methods of accounting used in computing taxable income. Under the South Carolina Code, the apportionment methodology is applied after taxable income has been determined. Therefore, the utilization of a statutorily mandated apportionment method after taxable income has been computed is not a change in accounting method as provided in Internal Revenue Code Section 446.

5. Computation of the Gross Receipts Factor

Duke’s receipts from the sale of financial instruments are properly included in the denominator of the gross receipts factor for the taxable periods.

First, Duke’s receipts from the sale of the financial instruments are business receipts that must be apportioned and not allocated. South Carolina law allocates “[g]ains and losses from the sales of intangible personal property *not connected with the business of the taxpayer* and not held for sale to customers in the regular course of business, less all related expenses” to the corporation’s principal place of business. Section 12-6-2250(5) (emphasis added). All items remaining after allocation are apportioned. Section 12-6-2240.

Duke’s purchases and sales of financial instruments allow it to maintain its working capital and to increase cash flow for its business. Therefore, the gross receipts from their sale are apportionable. See Eastman Kodak Co. v. South Carolina Tax Comm’n, 308 S.C. 415,418 S.E.2d 542 (1992). The principal used to purchase the financial instruments was generated by Duke’s business income, the income produced from the sale of the financial instruments was used in Duke’s normal business operations and the instruments were continuously monitored. See M. Lowenstein Corp. v. South Carolina Tax Comm’n, 298 S.C.93, 378 S.E.2d 272 (1989).

Second, the gross receipts formula is calculated by dividing a corporation’s gross receipts from within South Carolina by the corporation’s gross receipts from everywhere. Section 12-6-2290. The source of the gross receipts is the location where the income-producing activity occurs. Lockwood Greene Eng’rs. v. South Carolina Tax Comm’n, 293 S.C. 447,361 S.E.2d 346 (1987). The income producing activity underlying the sale of Duke’s financial instruments occurred outside of South Carolina, as all of the corporation’s activities regarding the purchases and sales of the financial instruments occurred outside

of South Carolina and the investment dealers that assisted Duke engaged in the buying and selling of the financial instruments outside of South Carolina. Therefore, the gross receipts from the sale of the financial instruments should be included in the denominator, and not the numerator, of the gross receipts formula.

Finally, the denominator of the gross receipts factor includes all receipts from the sale of the financial instruments. The term "gross" is defined, in relevant part, as: "[b]efore or without diminution or deduction. Whole; entire; total; as the gross sum, amount, weight—opposed to net." Black's Law Dictionary 702 (6th ed. 1990) ('Black's'). The term "receipt" is defined, in relevant part as "[t]hat which comes in, in distinction from what is expended, paid out, sent away, and the like." Id at 1260. Given these clear definitions of the controlling language at issue, the amounts received from the sales of the financial instruments constitute gross receipts.

In the alternative, if it is ultimately determined that the three-factor apportionment formula should be used, the gross receipts from the sale of the financial instruments should be included in the denominator, and not the numerator, of Duke's sales factor. Section 12-6-2280(A) provides that the sales factor is comprised of "total sales." Such sales include "sales of intangible personal property and receipts" based on "the entire income-producing activity." Section 12-6-2280(C)(2). As discussed above, all of the income producing activity of Duke's purchases and sales of the financial instruments occurred outside of South Carolina. Therefore, the gross receipts from the sales must be included in the denominator, and not the numerator, of the sales factor.

The amount that should be included in the denominator of Duke's sales factor should be the gross receipts from the sale of the financial instruments. The sales factor includes "total sales." Section 12-6-2280(A). "Total" is defined as "[w]hole, not divided, lacking no part, entire, full, complete, the whole amount." Black's at 1490. Therefore, Duke's gross receipts from its sales of financial instruments should be included in the denominator of the sales factor.

6. General Objection

Duke objects to all other adverse determinations resulting in denial of the refund claims and reserves the right to raise more detailed objections at the conference on this matter.

In addition, Duke objects to the Department's determination on Constitutional grounds. The Department's change to Duke's apportionment factors violates the Due Process and Commerce Clauses of the United States Constitution, as it taxes activity that does not have a substantial nexus with South Carolina, is not fairly apportioned, discriminates against interstate commerce and is not fairly related to the services provided by South Carolina. Moreover, the Department's changes result in a tax due to South Carolina that is distortive, out of all appropriate proportion to Duke's activities in South Carolina and results in the taxation of income by South Carolina that is not properly attributable to South Carolina. E.g., Allied Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768

(1992); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279(1977); Hans Rees' Sons v. North Carolina ex. rel. Maxwell, 283 U.S. 123 (1931).

Conclusion

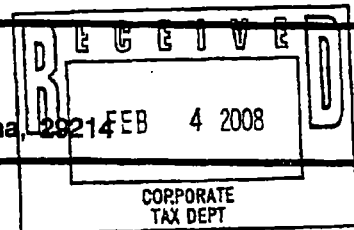
The Department erred by (1) not allowing the changes to taxable income resulting from the settlement of federal income tax audits; (2) changing the apportionment factors on the amended returns; (3) not allowing Duke to employ the single-factor gross receipts formula in computing its corporate income tax liability; (4) not allowing Duke to include the gross receipts from the sale of financial instruments in the denominator of the gross receipts factor; and (5) ignoring the appeals currently pending before the Department, for the same years and for these same issues. The Department has deprived Duke of its constitutional rights.

Duke reserves the right to present further information and raise further arguments concerning its appeal of the Department's audit findings.

Based on the foregoing, Duke respectfully requests a redetermination of the amended returns to reflect the proper federal taxable income, as determined by the Internal Revenue Service, and the proper apportionment factors based on Duke's last filed returns. In the alternative, Duke would request that this redetermination be held in abeyance pending the outcome of the pending appeals.

State of South Carolina
Department of Revenue

301 Gervais Street, P.O. Box 125, Columbia, South Carolina, 29214



January 9, 2008

Duke Power Co.
400 South Tryon St.
Charlotte, NC 28242

Attn: John Lechko
Tax Director

Tax Type :Corp. Income
Periods :12-31-86/98
File # :20090024-9
Response Date :April 9, 2008
Audit # :00/36/6361

Gentlemen:

The audit of the above referenced tax return(s) has been completed by the Field Services Division of the South Carolina Department of Revenue. Enclosed is a "Report of Field Audit" (AS-54) which explains our "Proposed Assessment".

If you agree with the changes detailed in the enclosed report, the balance shown to be due on Form AS-54 should be remitted to this office within thirty (30) days from the date of this letter, to avoid additional interest and penalties, if applicable. Please include a copy of the AS-54 with your check to insure proper processing.

If you agree with the Division's adjustments but are unable to make full payment at this time, please complete the enclosed Waiver of Restriction on Assessment (SC 870) and return it to this office within thirty (30) days from the date of this letter. Upon receipt of this document, a "Final Assessment" will be issued.

If you disagree with any of the adjustments of tax, interest, or penalties that have been proposed by the Division, a written protest must be submitted to this office by the response date stated above.

If you do not respond to this letter by the response date stated above, the Division will issue the "Final Assessment" and begin collection action.

Should you have any questions, please do not hesitate to call me at the number listed below.

Yours very truly,

S.C. DEPARTMENT OF REVENUE
LAW & COMPLIANCE

A handwritten signature in cursive script, appearing to read "Tim Donovan".

Tim Donovan - Supervisor Non Resident Auditors
(803)898-5619
(803)898-5825 (fax)

/ds
Enclosure

Form Letter AS-54-PA (Rev. 8/95)

AS-54

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

TAXPAYER: Duke Power Company
ADDRESS: 400 South Tryon Street
Charlotte, NC 28242

FEI #: 56-0205520
FILE #: 20090024-9
PERIOD: 12/86-12/98
DATE: 1/7/08
AUDITOR: SOUTHARD

INTEREST COMPUTED TO: FEBRUARY 15, 2008

INCOME TAX:				
PERIOD ENDED:	INCOME TAX	INTEREST	PENALTY	TOTALS
12/31/86	\$0		\$0	\$0
12/31/87	3,984	15,919	0	19,903
12/31/88	0		0	0
12/31/89	0		0	0
12/31/90	0		0	0
12/31/91	(4,915)	(6,722)	0	(11,637)
12/31/92	0		0	0
12/31/93	0		0	0
12/31/94	(5,647)	(5,663)	0	(11,310)
12/31/95	4,202	5,731	0	9,933
12/31/96	(189,637)	(140,556)	0	(330,193)
12/31/97	(34,780)	(21,685)	0	(56,465)
12/31/98	359,941	298,935	0	658,876
TOTALS	\$133,148	\$145,959	\$0	\$279,107

LICENSE FEE:				
PERIOD ENDED:	LICENSE FEE	INTEREST	PENALTY	TOTALS
				\$0
				0
				0
				0
				0
				0
TOTALS	\$0	\$0	\$0	\$0

SUMMARY:	TAX	INTEREST	PENALTY	TOTALS
INCOME TAX	\$133,148	\$145,959	\$0	\$279,107
LICENSE FEE	0	0	0	0
TOTALS	\$133,148	\$145,959	\$0	\$279,107

**SOUTH CAROLINA DEPARTMENT OF REVENUE
RECOMPUTATION OF NET INCOME & TAX**

TAXPAYER: Duke Power Company
ADDRESS: 400 South Tryon Street
Charlotte, NC 28242

FIRM: 06-0206520
FILE#: 20000024-9
PERIOD: 12/96-12/98
DATE: 1/7/00
AUDITOR: SOUTHDARD

PERIOD INDEX:	12/31/1996	12/31/1997	12/31/1998	12/31/1999	12/31/2000	12/31/2001	12/31/2002	12/31/2003	12/31/2004	12/31/2005	12/31/2006	12/31/2007	12/31/2008
APPORTIONABLE INCOME PER DUKE Settlement of 8/8/02	482,850,271	691,948,173	876,178,037	577,598,561	643,810,253	613,263,052	612,618,378	811,682,332	641,867,719	1,000,068,378	1,217,711,973	1,004,268,374	1,294,362,844
APPORTIONABLE INCOME PER ORIGINAL RETURN													
APPORTIONABLE INCOME PER AMENDED RET 8/4/98													
ADJUSTMENT 8/14/07	11,688,083	17,818,932	3,728,813	37,117,821	36,272,684	(6,978,828)	(47,038,988)	25,005,931	10,050,795	264,877	0	0	0
ADJUSTMENT 8/22/02	(11,688,083)	(17,818,932)	(3,728,813)	(37,117,821)	(36,272,684)	6,862,671	47,038,988	(25,005,931)	(10,050,795)	0	0	0	0
AMENDED RETURN FILED FOR R&D CREDIT & SEC 174	(1,244,936)	(1,983,903)	(7,884,878)	(7,084,860)	(6,962,810)	(5,177,904)	(1,133,887)	(7,218,448)	731,388	(47,933,614)			
AMENDED RETURN FILED FOR R&D CREDIT & SEC 174	1,244,936	1,983,903	7,884,878	7,084,860	6,962,810	5,177,904	1,133,887	7,218,448	(731,388)	47,933,614			
CORRECTED APPORTIONABLE INCOME	482,850,271	692,148,778	876,178,037	577,598,561	643,810,253	612,669,936	612,618,378	811,682,332	641,867,719	1,000,381,265	1,217,711,973	1,004,268,374	1,294,362,844
APPORTIONMENT RATIO-DUKE Settlement 8/8/02	32.9720%	33.2671%	33.4741%	33.4330%	33.1908%	33.6297%	34.0759%	33.4032%	32.684800%	31.7270%	0.000000%	0.000000%	0.000000%
APPORTIONMENT RATIO-ORIGINAL RETURN													
SO PROPORTION	162,468,987	230,287,826	192,868,408	193,104,512	180,403,888	171,897,280	208,754,824	271,131,313	208,212,882	338,417,843	348,876,436	283,917,568	412,876,747
OTHER-SC ALLOCABLE INCOME	18,348	28,188	0	28,403	0	84,827	10,861	10,978,721	(388,820)	(468,327)	12,292,211	(17,943,896)	32,186,877
OTHER-SC NOI	0	0	0	0	0	0	0	0	0	0	(859,029)	0	0
TAXABLE INCOME	162,512,345	230,288,091	192,868,408	193,130,915	180,403,888	172,082,107	208,734,685	282,008,984	208,822,967	338,448,318	360,688,117	266,973,633	444,868,124
TAX RATE	0%	0%	6.0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
TAX DUE	0,760,741	13,817,160	10,807,817	6,856,548	8,028,268	8,804,105	10,438,784	14,100,497	10,441,148	16,787,418	18,028,908	13,298,882	22,340,466
TAX CREDIT-Per Original Return	0	0	0	0	0	0	0	0	0	0	(26,000)	0	(693,810)
TAX PREVIOUSLY PAID-ORIGINAL RETURN	0	0	0	0	0	0	0	0	0	(18,783,214)	(18,063,877)	0	(21,287,209)
TAX PREVIOUSLY PAID-AMENDED RETURN 8/4/98	0	0	0	0	0	0	0	0	0	0	0	(13,308,514)	0
TAX PREVIOUSLY PAID-DUKE Settlement 8/8/02	(8,780,741)	(13,813,178)	(10,807,817)	(6,856,849)	(8,028,268)	(8,809,020)	(10,438,784)	(14,100,497)	(10,441,148)	0	0	0	0
UNDERPAYMENT (OVERPAYMENT)	0	3,984	0	0	0	(4,815)	0	0	0	4,202	(78,971)	(7,832)	368,841
TAX PREVIOUSLY PAID (E)	0	0	0	0	0	0	0	0	(5,847)	0	(110,988)	(28,848)	0
INTEREST TO	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTALS	0	3,984	0	0	0	(4,815)	0	0	(5,847)	4,202	(189,637)	(34,780)	368,841

EXPLANATION TO GIVE EFFECT TO RAR FURNISHED BY TAXPAYER.

As numbers reflect the RAR amounts for this entity as submitted by taxpayer at 8/14/07.
By these numbers reflect the RAR amounts for this entity as submitted by taxpayer from the billing of 8/8/02 that combined an income tax refund with a sales tax assessment.
Adjustments A and B are netted as the original RAR from the the 8/8/02 billing is already reflected in the apportionable income of 8/8/02. The tax years 1997 and 1998 result in slight differences in the RAR from 8/8/02 and the RAR from 8/14/07.
C) Taxpayer seems to be taking advantage of amended returns that have been filed with the IRS, but have not been filed with South Carolina and therefore the adjustment would be out of status.
D) Remove amended return adjustment due to being out of status.
E) Taxpayer is given credit for the three checks sent to and processed by DCR per enclosed copy of DUN74274833.
The apportionable income numbers above through the 12/94 tax year were determined by the 8/8/02 billing in which the income tax credit refund due was offset by a sales tax credit assessment.
The 12/94 apportionable income is calculated as follows: Original return 631,808,923 plus RAR adjustment on 8/8/02 billing 18,063,785 equals 641,867,719.
The 12/94 return tax paid is calculated as follows: Original return 10,277,246 plus tax amount paid on 8/8/02 billing 183,822 equals 10,441,148.
Taxpayer filed separately with South Carolina through 12/31/96 and combined thereafter.
Please reference Schedules A1,A2 and A3 for the 1996, 1997 and 1998 tax years respectively as these years were filed consolidated.

**SOUTH CAROLINA DEPARTMENT OF REVENUE
RECOMPUTATION OF NET INCOME & TAX**

Taxpayer: Duke Power Company
File#: 20080024-0
Period: 12/85-12/86

Schedule: A1
Auditor: SOUTHDARD
Date: 1/7/88

Period Ended: 12/86

	Duke Power Company	Crescent Resources	CLT Develop Corp	DEAS	GT&W Restonia	DukeNet	DEAS Resources	Intern	M-P Supply	Duke Water Systems	Duke Marsh	Crescent Comm	Combined
Apportionable Income Per T/P Worksheet:	1,160,104,681	46,181,379	18,328,888	13,605,432	-343,948	-25,827,886	1,272,367	5,676,128	314,778	0	0	0	
Adjustments:													
RAR 6/14/87	-6,123,827	0	0	0	0	0	0	-3,846,840	0	0	0	0	-8,869,867
ENDED RET FILED FOR R&D CREDIT & SEC 174	20,788,180												
ENDED RET FILED FOR R&D CREDIT & SEC 174	-20,788,180												

Apportionable Income As Adjusted:	1,164,980,854	46,181,379	18,328,888	13,605,432	-343,948	-25,827,886	1,272,367	1,829,288	314,778	0	0	0	1,208,742,396
Less: Allocable Income Per Original Return	-1,398,716	-19,472,487	-12,748,959	0	71,808	7,686,278	0	0	0	0	0	0	
Total Net Income Subject To Apportionment	1,163,581,119	-3,291,108	5,580,929	13,605,432	-272,041	-17,732,410	1,272,367	1,829,288	314,778	0	0	0	
SC Ratio-Per Original Return a)	80.8249%	45.7287%	4.2228%	7.3983%	26.8401%	35.7039%	4.2482%	0.0000%	0.0000%	0.0000%	0.0000%	0.0000%	
SC Proportion	366,690,226	-1,604,582	181,216	986,867	-86,762	-8,231,091	54,082	0	0	0	0	0	348,876,438
Allocable to SC-Per Original Return	-234,819	12,786,609	-301,848	0	-78,719	21,556	0	0	0	0	0	0	12,282,311
SC Net Income	366,355,607	11,280,827	-20,633	986,867	-145,471	-8,306,503	54,082	0	0	0	0	0	361,167,648
SC NOL	0	0	0	0	0	-288,948	0	0	-272,994	0	0	0	-569,028
SC Taxable Net Income													360,598,117
Tax Rate													0.05
Tax Due													18,029,908
Non-Refundable Credits-Per T/P Worksheet													-398,618
Disallow Non-Refundable Credits a)													398,618
Credits per Original Return													-20,000
Balance													18,004,608
Tax Previously Paid-Per Original Return													-18,083,877
Underpayment(Overpayment)													-78,571

EXPLANATIONS:

a) Taxpayer cannot adjust credits claimed on an original return that was out of status due to an RAR.

taxpayer cannot adjust any apportionment ratio on an original return that was out of status due to an RAR. This ratio adjustment refers to Duke Power Company. The ratio for Duke Power Company was adjusted back to the original return. All other ratios from the other entities are in agreement to the original return.

c) Taxpayer seems to be taking advantage of amended returns that have been filed with the IRS, but have not been filed with South Carolina and therefore the adjustment would be out of status.

d) Remove amended return adjustment due to being out of status.

**SOUTH CAROLINA DEPARTMENT OF REVENUE
RECOMPUTATION OF NET INCOME & TAX**

Taxpayer: Duke Power Company
Firm: 2300024-0
Period: 1200-1298

Schedule: A3
Auditor: SOUTHWARD
Date: 1/7/00

Period Ended: 1297

	Duke Power Company	Crescent Resources	CLT Develop Corp	DE&S	GT&W Gastonia	DukeNet	DE&S Resources	Inters	IS-P Supply	Duke Water Systems	Duke Merch	Crescent Center	Duke Solutions	Combined
Apportionable Income Per Amended Ret 6AUG:	918,949,040	68,963,978	3,244,564	20,693,063	806,588	-41,663,700	747,010	4,272,362	331,910	0	0	0	-5,031,213	981,883,310
Adjustments:														
RAR 6/14/07	31,862	0	0	-7,105,438	0	0	0	0	838,718	0	0	0	0	-5,136,028
b) AMENDED RET FILED FOR R&D CREDIT & SEC 174	3,748,058													
c) AMENDED RET FILED FOR R&D CREDIT & SEC 174	-3,748,058													

Apportionable Income As Adjusted:	918,980,732	68,963,978	3,244,564	13,587,625	806,588	-41,663,700	747,010	4,272,362	1,270,633	0	0	0	-5,031,213	980,548,260
Less: Apportionable Income Amended Ret 6AUG	2,939,828	0	0	0	-503,941	-41,663,700	0	0	0	0	0	0	0	42,586,068
Total Net Income Subject To Apportionment	916,040,904	68,963,978	3,244,564	13,587,625	2,748	-41,663,700	747,010	4,272,362	1,270,633	0	0	0	-5,031,213	980,132,348
SC Ratio-Per Original Return a)	20.0584%	18.3112%	0.0000%	2.3889%	18.3911%	25.0637%	2.8183%	0.1622%	0.0000%	0.0000%	0.0000%	0.0000%	14.0911%	
SC Proportion	274,482,236	10,282,842	0	321,551	500	-1,162	18,812	4,368	0	0	0	0	-1,131,588	263,917,886
Allocable to SC-Per Amended Ret 6AUG	-4,408,846	0	0	0	-83,818	-13,490,472	0	0	0	0	0	0	0	-17,943,836
SC Net Income	270,042,384	10,282,842	0	321,551	-83,118	-13,491,634	18,812	4,368	0	0	0	0	-1,131,588	266,973,833
SC NOL	0	0	0	0	0	0	0	0	0	0	0	0	0	0
SC Taxable Net Income														266,973,833
Tax Rate														0.00
Tax Due														13,298,682
Tax Previously Paid-Per Amended Ret 6AUG														-13,305,814
Underpayment(Overpayment)														-7,532

EXPLANATIONS:

a) Taxpayer cannot adjust any apportionment ratio on an original return that was out of status due to an RAR. This ratio adjustment refers to Duke Power Company. The ratio for Duke Power Company was adjusted back to the original return. All other ratios from the other entities are in agreement to the original return.

b) Taxpayer seems to be taking advantage of amended returns that have been filed with the IRS, but have not been filed with South Carolina and therefore the adjustment would be out of status.

c) Remove amended return adjustment due to being out of status.

SOUTH CAROLINA DEPARTMENT OF REVENUE
RECONSTRUCTION OF NET INCOME & TAX

Taxpayer: Duke Power Company
Period: 09/01/2014-0
Period: 12/31/2014

Schedule: AB
Auditor: SOUTHPOD
Date: 1/7/16

Period Ending: 12/31

Adjustments	Date Power Company	Overhead Reconstruction	GLT Reversal Over	2009 2010	2011 2012	2013 2014	2015 2016	2017 2018	2019 2020	2021 2022	2023 2024	2025 2026	2027 2028	2029 2030	2031 2032	2033 2034	2035 2036	2037 2038	2039 2040	2041 2042	2043 2044	2045 2046	2047 2048	2049 2050	2051 2052	2053 2054	2055 2056	2057 2058	2059 2060	2061 2062	2063 2064	2065 2066	2067 2068	2069 2070	2071 2072	2073 2074	2075 2076	2077 2078	2079 2080	2081 2082	2083 2084	2085 2086	2087 2088	2089 2090	2091 2092	2093 2094	2095 2096	2097 2098	2099 2100	2101 2102	2103 2104	2105 2106	2107 2108	2109 2110	2111 2112	2113 2114	2115 2116	2117 2118	2119 2120	2121 2122	2123 2124	2125 2126	2127 2128	2129 2130	2131 2132	2133 2134	2135 2136	2137 2138	2139 2140	2141 2142	2143 2144	2145 2146	2147 2148	2149 2150	2151 2152	2153 2154	2155 2156	2157 2158	2159 2160	2161 2162	2163 2164	2165 2166	2167 2168	2169 2170	2171 2172	2173 2174	2175 2176	2177 2178	2179 2180	2181 2182	2183 2184	2185 2186	2187 2188	2189 2190	2191 2192	2193 2194	2195 2196	2197 2198	2199 2200	2201 2202	2203 2204	2205 2206	2207 2208	2209 2210	2211 2212	2213 2214	2215 2216	2217 2218	2219 2220	2221 2222	2223 2224	2225 2226	2227 2228	2229 2230	2231 2232	2233 2234	2235 2236	2237 2238	2239 2240	2241 2242	2243 2244	2245 2246	2247 2248	2249 2250	2251 2252	2253 2254	2255 2256	2257 2258	2259 2260	2261 2262	2263 2264	2265 2266	2267 2268	2269 2270	2271 2272	2273 2274	2275 2276	2277 2278	2279 2280	2281 2282	2283 2284	2285 2286	2287 2288	2289 2290	2291 2292	2293 2294	2295 2296	2297 2298	2299 2300	2301 2302	2303 2304	2305 2306	2307 2308	2309 2310	2311 2312	2313 2314	2315 2316	2317 2318	2319 2320	2321 2322	2323 2324	2325 2326	2327 2328	2329 2330	2331 2332	2333 2334	2335 2336	2337 2338	2339 2340	2341 2342	2343 2344	2345 2346	2347 2348	2349 2350	2351 2352	2353 2354	2355 2356	2357 2358	2359 2360	2361 2362	2363 2364	2365 2366	2367 2368	2369 2370	2371 2372	2373 2374	2375 2376	2377 2378	2379 2380	2381 2382	2383 2384	2385 2386	2387 2388	2389 2390	2391 2392	2393 2394	2395 2396	2397 2398	2399 2400	2401 2402	2403 2404	2405 2406	2407 2408	2409 2410	2411 2412	2413 2414	2415 2416	2417 2418	2419 2420	2421 2422	2423 2424	2425 2426	2427 2428	2429 2430	2431 2432	2433 2434	2435 2436	2437 2438	2439 2440	2441 2442	2443 2444	2445 2446	2447 2448	2449 2450	2451 2452	2453 2454	2455 2456	2457 2458	2459 2460	2461 2462	2463 2464	2465 2466	2467 2468	2469 2470	2471 2472	2473 2474	2475 2476	2477 2478	2479 2480	2481 2482	2483 2484	2485 2486	2487 2488	2489 2490	2491 2492	2493 2494	2495 2496	2497 2498	2499 2500	2501 2502	2503 2504	2505 2506	2507 2508	2509 2510	2511 2512	2513 2514	2515 2516	2517 2518	2519 2520	2521 2522	2523 2524	2525 2526	2527 2528	2529 2530	2531 2532	2533 2534	2535 2536	2537 2538	2539 2540	2541 2542	2543 2544	2545 2546	2547 2548	2549 2550	2551 2552	2553 2554	2555 2556	2557 2558	2559 2560	2561 2562	2563 2564	2565 2566	2567 2568	2569 2570	2571 2572	2573 2574	2575 2576	2577 2578	2579 2580	2581 2582	2583 2584	2585 2586	2587 2588	2589 2590	2591 2592	2593 2594	2595 2596	2597 2598	2599 2600	2601 2602	2603 2604	2605 2606	2607 2608	2609 2610	2611 2612	2613 2614	2615 2616	2617 2618	2619 2620	2621 2622	2623 2624	2625 2626	2627 2628	2629 2630	2631 2632	2633 2634	2635 2636	2637 2638	2639 2640	2641 2642	2643 2644	2645 2646	2647 2648	2649 2650	2651 2652	2653 2654	2655 2656	2657 2658	2659 2660	2661 2662	2663 2664	2665 2666	2667 2668	2669 2670	2671 2672	2673 2674	2675 2676	2677 2678	2679 2680	2681 2682	2683 2684	2685 2686	2687 2688	2689 2690	2691 2692	2693 2694	2695 2696	2697 2698	2699 2700	2701 2702	2703 2704	2705 2706	2707 2708	2709 2710	2711 2712	2713 2714	2715 2716	2717 2718	2719 2720	2721 2722	2723 2724	2725 2726	2727 2728	2729 2730	2731 2732	2733 2734	2735 2736	2737 2738	2739 2740	2741 2742	2743 2744	2745 2746	2747 2748	2749 2750	2751 2752	2753 2754	2755 2756	2757 2758	2759 2760	2761 2762	2763 2764	2765 2766	2767 2768	2769 2770	2771 2772	2773 2774	2775 2776	2777 2778	2779 2780	2781 2782	2783 2784	2785 2786	2787 2788	2789 2790	2791 2792	2793 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CE-2

**South Carolina
Department of Revenue**

P.O. Box 125, Columbia, SC 29214

ST 22M

[Signature]

JOHN LECHKO
TAX DIRECTOR
DUKE POWER CO
400 SOUTH TRYON ST
CHARLOTTE NC 28242



UNITED STATES POSTAGE
FIRST CLASS
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8193

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,	)	Docket No. 10-ALJ-17-0270-CC
	)	
Petitioner,	)	DUKE ENERGY CORPORATION
	)	PREHEARING STATEMENT
vs.	)	
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent.	)	

Petitioner, Duke Energy Corporation (f/k/a Duke Power Company) ("Petitioner") respectfully submits the following Prehearing Statement:

1. The nature of this proceeding:

This proceeding arises out of the denial by the South Carolina Department of Revenue ("Respondent") of certain income tax and license fee refunds owed to Duke Energy for the tax years 1978-2001. The specific facts preceding this matter are outlined under paragraph 5 below.

2. Statutory provision(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations:

- A. Jurisdiction: S.C. Code Ann. §12-60-10 (Supp. 2009), *et. seq.* which establishes the appeal process for tax protests; S.C. Code §§1-23-310 – 600 (Supp. 2009) which confers subject matter jurisdiction to the Administrative Law Court.
- B. Three factor apportionment for manufacturers: S.C. Code §§ 12-6-2220 – 90 (Post 1996); Sections 12-7-1140 – 90 (Pre 1996).
- C. Single Factor Apportionment: S.C. Code § 12-6-2290 (Post 1996); S.C. Code §12-7-1190 (Pre 1997).
- D. Definition of "gross receipts": S. C. Code § 12-7-2295.
- E. Statute of Limitations: S.C. Code § 12-54-85.
- F. 1995 SC Acts 60
1995 SC Acts 76

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SC ADMIN. LAW COURT

G. Allocation of Interest and expenses relating to Crescent Resources Corporation: S.C. Code § 12-6-2220; S.C. Code of Regulations 117-700.

3. The issues presented for determination:

A. Is Petitioner required to include the gross receipts from the sale of securities in its South Carolina gross receipts apportionment formula?

B. Is Petitioner required to use the single factor gross receipts apportionment formula in the calculation of its South Carolina corporate income tax?

C. Are Petitioner's claims for refund timely filed?

D. Did the Petitioner properly allocate interest and expenses related to Crescent Resources Corporation?

4. The action requested of the Court, if any;

Petitioner respectfully requests that the Court find that Petitioner is required to include the gross receipts from the sale of securities in its gross receipts apportionment formula, that Petitioner is required to use the single factor gross receipts apportionment formula, and that Petitioner's refund claims are timely filed. With reference to Crescent, petitioner requests that the Court find that the Petitioner correctly allocated interest and expenses related to Crescent Resources Corp. Petitioner respectfully requests that, as a result of the above findings, the Court order Respondent to issue Petitioner a tax refund in the amount of \$126,240,645, plus applicable interest.

5. A brief summary of the facts to be presented at the hearing;

A. Duke Energy Corporation

Petitioner is, and was during all relevant tax periods, a multi-state energy services enterprise with operations in South Carolina. Petitioner's primary operations in South Carolina consisted of its franchise electric service business, real estate business, and fiber optics and telecommunications business. As part of its business, Petitioner purchased and sold securities including municipal bonds and commercial paper. Petitioner invested its capital in the ordinary course of its business and often earned income on its investments. Petitioner included income from these investments in its South Carolina corporate income tax base. All of Petitioner's investment accounts were maintained in New York or Georgia

Petitioner timely filed its South Carolina corporate income tax returns (including license fee returns) for the tax years 1978-2001 ("1978-2001 tax periods"). On its original South Carolina corporate income tax returns for the 1978-2001 tax periods, Petitioner erroneously computed its South Carolina income tax liability

by incorrectly apportioning business income to South Carolina using a three-factor apportionment formula and not including gross receipts from the sale of securities in its gross receipts factor denominator. Petitioner also improperly allocated expenses related to an affiliated entity, Crescent Resources Corporation ("Crescent").

On December 30, 1991, Petitioner timely filed South Carolina amended corporate income tax returns for the tax periods 1978 through 1983 reflecting federal audit adjustments for the tax years 1978-1983 as required under South Carolina law.

On December 12, 2002, Petitioner timely filed South Carolina amended corporate income tax returns for the 1978-2001 tax periods correcting its original tax returns for those periods and seeking a refund of corporate income taxes and license fees plus applicable interest. The amended corporate income tax returns reflected the use of a single gross receipts factor apportionment formula and the adjustment of Petitioner's gross receipts factor denominator to include the gross receipts from its sales of securities as is required by law. The refund claims also included the proper allocation of income and expenses for Crescent for tax years 1998 and 1999.

On February 12, 2003, Respondent denied Petitioner's adjustments (refund claims) for the 1978-2001 tax periods claiming that Duke Energy was a "manufacturer" and was required to use a three-factor apportionment formula. Respondent further asserted that Petitioner may not include the gross proceeds from the sale of securities in its apportionment formula because inclusion of the gross receipts from Petitioner's sale of securities constitutes an unauthorized change in its method of apportioning income. On March 13, 2003, Petitioner timely appealed from the denial of its refund claims for the 1978-2001 tax periods.

On June 15, 2007, Petitioner filed additional amended South Carolina corporate income tax returns reflecting federal audit adjustments for the tax years 1986-1998 ("1986-1998 tax periods") and, consistent with its previously filed amended returns for the 1978-2001 tax periods, Petitioner apportioned its income using a single factor gross receipts apportionment formula. Petitioner's amended corporate income tax returns for the 1986-1998 tax periods sought a refund of corporate income taxes plus applicable interest.

On February 4, 2008, Petitioner received Respondent's denial of Petitioner's adjustments (refund claims) for the 1986-1998 tax periods rejecting Petitioner's use of the single factor gross receipts apportionment method and inclusion of the gross receipts from its sales of securities in sales factor.

On April 18, 2008, Petitioner timely appealed the Respondent's denial of its refund claims for the 1986-1998 tax periods. Respondent has not acted on

Petitioner's appeal for the amended returns for 1986-1998 tax period and those returns are not before the Court in this proceeding.

On February 4, 2010, Respondent issued a Determination denying Petitioner's refund claims for the 1978-2001 tax periods on the grounds that Petitioner was not entitled to use a single factor gross receipts apportionment formula; that Petitioner was not permitted to include the gross receipts from the sale of securities in its sales factor apportionment; and that Petitioner's claims for refund were untimely for some of the 1978-2001 tax periods in question.

For each of the 1978-2001 tax periods, Petitioner and Respondent executed several Consent to Extend the Time to Assess Tax ("Waivers") thereby extending the original statute of limitations for each tax period. These waivers were largely requested by the Respondent and agreed to by the Petitioner as an accommodation to the Respondent. The final Waiver, which covered the South Carolina corporate income tax period 1978-1999 and South Carolina license fee period 1984-2000, expired on December 31, 2002. Petitioner's amended South Carolina corporate income tax returns for the 1978-2001 tax periods were filed prior to December 31, 2002. In addition to being open as a result of the Waivers, the statutes of limitations had not expired for several of the years within the 1978-2001 tax periods as a result of Federal Revenue Agent Reports and the requisite South Carolina reports reflecting those changes to federal taxable income.

B. Crescent Resources Corporation

Under South Carolina law, expenses incurred in earning income allocable outside of South Carolina are not deductible against South Carolina taxable income. S.C. Code Ann. § 12-6-2220; S.C. Code Regs. 117-700. In preparing Crescent's 1998-1999 South Carolina income tax returns, Petitioner first determined Crescent's net gains allocable to South Carolina and outside of the state. Petitioner then allocated related interest and expenses attributable to Crescent's income allocated outside of South Carolina. Petitioner's methodology for allocating expenses and interest associated with its income allocated outside of South Carolina as reflected on Petitioner's amended South Carolina corporate income tax returns was proper and accurately reflected its operations in South Carolina.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion:

The Petitioner and the Department anticipate submitting a scheduling order to the Court which will provide that the parties have a designated time period to enter into a Stipulation of facts and legal issues.

7. A list of proposed witnesses and exhibits:

Petitioner and Respondent are working on stipulations of facts. Petitioner's list of witnesses and exhibits is dependent on the degree to which Petitioner and Respondent can agree on stipulations.

Petitioner will supplement this Prehearing Statement with additional witnesses and exhibits based on the sufficiency of the parties' stipulation of facts and discovery.

8. A statement regarding the necessity for discovery, if any:

Petitioner and Respondent are working on stipulations of facts. The amount of discovery will be dependent on the degree to which Petitioner and Respondent can agree on stipulations.

If stipulations acceptable to the parties cannot be reached, Petitioner anticipates serving interrogatories, requests for production of documents, and may serve requests for admission. Petitioner anticipates deposing witnesses during discovery.

9. The estimated length of the hearing:

The time required for the hearing will depend in large part on the above referenced stipulations and how the issues and parties are aligned for purposes of trial. Petitioner anticipates 3-5 days of trial time.

10. Any dates in the next one hundred twenty (120) days when you will not be available for a hearing:

Petitioner is not aware of any such dates at this time. A motion for protection will be filed well in advance of any date conflicts.

11. An e-mail address where you can be reached:

Email addresses for counsel of record are indicated below:

Burnet R. Maybank III: bmaybank@nexsenpruet.com

James Frederick Reames III: jreames@nexsenpruet.com

RESPECTFULLY SUBMITTED,


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Attorneys for Petitioner
Duke Energy Corporation

April 1, 2010
Columbia, South Carolina

Duke Energy Corporation,
Petitioner,
vs.
South Carolina Department of Revenue,
Respondent.

CERTIFICATE OF SERVICE

8200

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation,	)	Docket No. 10-ALJ-17-0270-CC
	)	
Petitioner,	)	
	)	
vs.	)	RESPONDENT'S RESPONSES TO
	)	PETITIONER'S REQUESTS FOR
	)	PRODUCTION OF DOCUMENTS
South Carolina Department	)	
of Revenue,	)	
	)	
Respondent.	)	

TO: J. FREDERICK REAMES, III, ESQUIRE, AND BURNET R. MAYBANK, III,
ESQUIRE, ATTORNEYS FOR PETITIONER

COMES NOW, the Respondent, South Carolina Department of Revenue,
(SCDOR) and hereby submits the following answers to request to produce pursuant to
and in accordance with ALC Rule 21, and Rule 33, SCRCP. Respondent reserves the
right to supplement its responses hereto as appropriate and necessary.

**RESPONDENT'S RESPONSES TO PETITIONER'S FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS**

1. Any and all documents identified, requested, referenced, reviewed, or
relied upon in any manner in answering the Petitioner's First Set of Interrogatories to
Respondent, designating to which Interrogatory each document is responsive.

ANSWER:

Petitioner's Application for Appeal dated March 12, 2003
Final Agency Determination, dated February 4, 2010
Petitioner's Request for a Contested Case Hearing, dated March 3, 2010
SCDOR Audit Report

2. Any and all documents that evidence, indicate, constitute, support, refute or otherwise refer or relate in any way to Petitioner's Refund Claims.

ANSWER:

The Department objects to this request to the extent it seeks information protected by the attorney client and/or attorney work product privilege. Additionally, the Department objects to this request as being unduly broad and overly burdensome, as set forth in Rule 26(a), SCRPC. Subject to and without waiving said objection, to the extent documents responsive to this request exist, such are included within the documents produced in response to Request No. 1¹

3. Any and all documents reflecting any consideration, discussion, assessment, or communication concerning Petitioner's Refund Claims.

ANSWER:

The Department objects to this request to the extent it seeks information protected by the attorney client and/or attorney work product privileges. The Department objects to producing any remaining documents within the request because the request does not describe the items or categories of items with reasonable particularity. Additionally, the information sought is more easily obtainable from some more convenient and easily obtainable source. Subject to and without waiving said objection, to the extent documents responsive to this request exist, such are included within the documents produced in response to Request No. 1.

4. Any and all books, manuals, policies, procedures, articles, documents, or other materials, whether or not prepared by you, referenced, reviewed, consulted, or referred to in denying Petitioner's Refund Claims.

ANSWER:

The Department has already provided this information in the Department Determination. Subject to and without waiving said objection, to the extent documents responsive to this request exist, such are included within the documents produced in response to Request No. 1. This request will be supplemented by an amended prehearing statement.

¹Oncology and Hematology Associates of SC, LLC. V. South Carolina Dept. of Health and Environmental Control, 387 S.C. 380 (2010).

5. Any and all notes from any meetings, telephone calls, or other conversations between or among any persons relating to Respondent's consideration, review and/or denial of Petitioner's Refund Claims.

ANSWER:

The Department has already provided this information in the Department Determination. Subject to and without waiving said objection, to the extent documents responsive to this request exist, such are included within the documents produced in response to Request No. 1.² This request will be supplemented by an amended prehearing statement.

6. All correspondence or other documents or other tangible things exchanged between you and any other person relating to Petitioner's Refund Claims, including but not limited to all correspondence, letters, or e-mails.

ANSWER:

None exist at this time.

7. Any and all documents and communications related in any way to the Audit, including the audit plans, audit workpapers, auditor notes, audit run sheets, internal or external memoranda and letters, communications between you and Petitioner related to the Audit or to issues in the Audit (including documents you provided to or received from Petitioner), lists of employees assigned to the Audit (including documents providing employee responsibilities in regard to the audit), documents relating to your determination to deny the Petitioner's Refund Claims, and all other documents or correspondence in your audit file, in whatever form, electronic or otherwise, related to the Audit.

²Id.

ANSWER:

To the extent documents responsive to this request exist and have not yet been provided, such are included within the documents produced in response to Request No. 1.

8. Any and all documents (redacted as necessary for confidentiality reasons or otherwise) from audits related to the imposition of or the allowance of Gross Receipts Apportionment on any of the following:

- (A) Electricity Producers;
- (B) Utilities;
- (C) Telephone Companies; and
- (D) Telecommunications Companies.

ANSWER:

The Department objects to Petitioner's requests for production of these documents pursuant to S.C. Code Ann. § 12-54-240 (2000). Disclosure of taxpayer information is prohibited according to this provision. Furthermore, it is unlawful for the Department or an employee of the Department to provide this information to third parties as specified in the statute. Subject to and without waiving said objection, to the extent documents responsive to this request exist which are not confidential, such are included within the documents produced in response to Request No. 1. Further, such request is not reasonably tailored to include only relevant matters.³

9. Any and all documents which evidence, reflect, or relate to your contracts or agreements with testifying or non-testifying experts with regard to the Lawsuit.

ANSWER:

The Department objects to this request to the extent it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, as described in Rule 26(b)(1), SCRCP.

³Id.

10. A copy of the curriculum vitae for each and every expert retained by you who is expected to testify at the hearing in this Lawsuit.

ANSWER

Vitae for Glenn Robinson has been previously provided.

11. For any witness you intend to call as an expert in this Lawsuit, please produce all documents provided to, reviewed by, prepared by, or prepared for the expert in anticipation of the expert's testimony, including any and all reports, notes, tables, charts, documents, spreadsheets, or other documents related to the expert opinions you intend to rely on at the hearing, and any and all communications between you and your expert.

ANSWER:

The Department objects to this request to the extent it seeks information protected by the attorney client and/or attorney work product privileges. Subject to and without waiving said objection, to the extent documents responsive to this request exist, such are included within the documents produced in response to Request No. 1.

12. Any and all correspondence, memoranda, or other writings relating to Petitioner's Refund Claims and/or the Lawsuit and sent by any expert identified by you in this case to any other expert identified by you in this case.

ANSWER:

None at this time.

13. All documents or tangible things which have been reviewed by, prepared by or provided or made available to any testifying or non-testifying experts with regard to the Lawsuit.

ANSWER:

The Department has provided its named expert with some of the documents provided under Request No. 1, specifically, the Department Determination and relevant South Carolina Code Sections. No other documents have been provided to date.

14. All written or recorded statements provided by any person to you concerning or relating to the Lawsuit.

ANSWER:

To the extent documents responsive to this request exist and have not yet been provided, such are included within the documents produced in response to Request No. 1.

15. Any and all documents which evidence, record, refer or relate to any oral statements provided by any person to you concerning or relating to the Lawsuit.

ANSWER:

To the extent documents responsive to this request exist and have not yet been provided, such are included within the documents produced in response to Request No. 1. Objection based upon the attorney-client and work product privileges, and this request is not reasonably tailored to seek non-privileged and relevant documentation.

16. Any and all documents you intend to use as an exhibit at hearing in this Lawsuit in your assertion of any claims, counterclaims, or defenses.

ANSWER:

The Department has not determined the exhibits it intends to utilize at trial. Exhibits will be provided to the Petitioner once a determination of such is made.

17. Any and all documents you intend to use as evidence or as an exhibit during discovery.

ANSWER:

The Department has not determined the exhibits it intends to utilize in discovery. Exhibits will be provided to the Petitioner once a determination of such is made.

18. Any and all briefs and other documents and communications related to the former South Carolina Tax Commission's and your determinations in S-D-176 (Aug. 22, 1986), I-D-384 (May 17, 1985), and I-D-352 (Feb. 13, 1984).

ANSWER:

The Department objects to the extent the request seeks materials protected as attorney work-product and communications protected by the attorney-client privilege. Both protections extend beyond the litigation for which the materials and communications were made to all subsequent litigation. The Department also objects to the request for briefs or other court filings because they do not constitute relevant evidence admissible at trial, and the request for the documents is not reasonably calculated to lead to the discovery of admissible evidence in this case. The Department objects to producing any remaining documents within the request because the request does not describe the items or categories of items with reasonable particularity. Notwithstanding these objections, the Department will produce decisions and determinations relating to these cases that are in its possession, custody, or control and are subject to inspection under the Freedom of Information Act. The Department's document retention policy requires that the Department keep documents for six years, therefore, it also appears that no information prior to 2004 is available. The Department does maintain a collection of appellate briefs and Department Determinations for most years, and any documents maintained will be produced, without waiving the objections stated.

19. Any and all documents relating in any way to the enactment, amendment, legislative intent behind, and/or repeal of S.C. Code § 12-6-2290 and the former S.C. Code § 12-7-1190.

ANSWER:

The Department objects to the extent that any such documents in the Department's possession, custody, or control are comprised of ordinary legal research that is obtainable from more convenient and less burdensome sources.

20. Any and all documents related to your policy, position, or analysis on the following terms or phrases used in S.C. Code § 12-6-2290 or former S.C. Code § 12-7-1190:

- (A) Taxpayers engaged in manufacturing of goods or materials; and
- (B) Sale of tangible personal property.

ANSWER:

The Department objects to the request because such documents do not constitute relevant evidence admissible at trial, and the request for the documents is not reasonably calculated to lead to the discovery of admissible evidence in this case. Notwithstanding this objection, the Department will produce documents related to its policies regarding the issues that are subject to inspection under the Freedom of Information Act and that are not already publicly available. Such documents that are already publicly available include regulations and official policy documents.

21. Any and all documents where you have previously ruled that an Electricity Producer or utility was entitled to apportion its income to South Carolina based on Gross Receipts Apportionment.

ANSWER:

The Department objects to the request because such documents do not constitute relevant evidence admissible at trial, and the request for the documents is not reasonably calculated to lead to the discovery of admissible evidence in this case. Notwithstanding this objection, the Department will produce such Department Determinations that are in the Department's possession, custody, or control, and that are subject to inspection under the Freedom of Information Act. However, because the Department cannot locate every such Determination, the Department will produce exemplars, if they exist, redacting information identifying taxpayers in compliance with S.C. Code Ann. § 12-54-220 (2000)

22. The entire file for the Waiver form, including any and all documents used or generated by you related to the promulgation, adoption, amendment (proposed or otherwise) or interpretation of the form, including but not limited to any positions, thoughts, suggestions and/or impressions.

ANSWER:

The Department objects to this request to the extent that it seeks information that is unreasonably cumulative or duplicative and is obtainable from some other source, as described in Rule 26(a)(i), SCRCP. The Department has addressed its interpretation of these provisions in the Final Agency Determination. If the Petitioner seeks further information regarding the Waiver form, the Petitioner can easily obtain such data from some other source that is more convenient and less burdensome.

23. Any policy documents or other document disseminated in any public forum in which you stated or otherwise took the position that a Waiver Document executed by you was ineffective, or otherwise did not toll or extend the statute of limitations, for refund claim purposes.

ANSWER:

The Department objects to this request to the extent it seeks information protected by the attorney client and/or attorney work product privileges. Additionally, the Department objects to this request to the extent that it seeks information that is unreasonably cumulative or duplicative and is obtainable from some other source, as described in Rule 26(a)(i), SCRCP. If the Petitioner seeks policy documents or other documents disseminated in any public forum, the Petitioner can easily obtain such data from some other source that is more convenient and less burdensome. The documents requested can be found at www.scstax.org.

24. All documents produced by you in *Southern Bell Tel. Co. v. South Carolina Tax Commission*, 297 S.C. 492, 377 S.E.2d 358 (S.C. Ct. App. 1989).

ANSWER:

The Department objects to this request to the extent it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, as described in Rule 26(b)(1), SCRCP. This request is not reasonably tailored to limit the production to relevant documents.⁴ However, the Department is providing a copy of its brief filed in this matter without waving its objection.

⁴Id.

25. All documents produced by you in *Consolidated Hydro Se., Inc. v. South Carolina Dep't of Revenue & Taxation*, 95-ALJ-17-0634-CC (Admin. L.J. Div. May 13, 1996).

ANSWER:

The Department objects to this request to the extent it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, as described in Rule 26(b)(1), SCRPC. Without waiving this objection, the Department is producing a copy of its Department Determination filed as a part of that case.

26. The complete personnel file for your former Auditor, Randy Wilson.

ANSWER:

The Department objects to the request because such documents do not constitute relevant evidence admissible at trial, and the request for the documents is not reasonably calculated to lead to the discovery of admissible evidence in this case.⁵

The Responses herein shall be supplemented as additional information becomes available.



Harry A. Hancock (Bar No. 065233)
Counsel for Litigation
Ray N. Stevens (Bar No. 5342)
Director
Harry T. Cooper, Jr. (Bar No. 1383)
Chief of Staff
Milton G. Kimpson, (Bar No. 7917)
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Attorneys for South Carolina Department
of Revenue

Columbia, South Carolina
November 18, 2010

⁵Id.

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

DUKE ENERGY CORPORATION,

Petitioner,

vs.

**SOUTH CAROLINA
DEPARTMENT OF REVENUE,**

Respondent.

Docket No.: 10-ALJ-17-0270-CC

AFFIDAVIT OF SHERWOOD L. LOVE

Appeared before the undersigned officer duly authorized to administer oaths, Sherwood L. Love, who deposed and stated as follows:

1.

My name is Sherwood L. Love. I am over the age of 18 years, and I am not under any disability that would impair my competency to provide an affidavit.

2.

This affidavit is given from my personal knowledge.

3.

During the period 1978-2001 ("Period at Issue"), Duke Energy

Corporation ("Duke Energy") was a North Carolina corporation engaged principally in the business of selling electricity, with principal offices located at 526 S. Church Street, Charlotte, North Carolina 28285.

4.

From March 1989 until April 2006, I was the Assistant Treasurer - Cash Management of Duke Energy. In that role, I was responsible for the cash management function at Duke Energy. The cash management function covered basic commercial banking; providing daily corporate liquidity through short-term borrowing and investing; and, establishing short-term bank borrowing facilities ("credit facilities").

5.

From April 2006 until the date of this affidavit, I was the General Manager Long Term Investments and Assistant Treasurer of Duke Energy. In that role, I am responsible for managing Duke Energy's long term trust investments.

6.

During the Period at Issue, Duke Energy maintained a Treasury Department and a Cash Management Group at its headquarters in North Carolina, as part of its operations.

7.

During the Period at Issue, Duke Energy's Cash Management Group

was engaged in investing Duke Energy's excess cash from its electricity sales to maximize its return, within approved investment guidelines, and providing for its short-term cash needs.

8.

The Cash Management Group maintained a daily interface with Central Cash Remittance, the department responsible for processing all direct payments from electric customers, and the daily consolidation of local branch deposits of electric customer payments across the Duke Energy service territory.

9.

The Cash Management Group received daily bank reports showing the value of checks being presented for payment on corporate disbursement accounts that needed to be funded that day. The Cash Management Group utilized reports from corporate financial models to forecast and fund maturing debt issues and all significant corporate payments, including quarterly dividends.

10.

The Cash Management Group was responsible for executing and funding all electronic payments, including all wire transfers.

11.

The Cash Management Group interfaced with various departments and subsidiaries to fund or manage cash from significant transaction settlements.

In addition, the Cash Management Group managed all short-term borrowing and investing, and the related cash settlements. Using corporate financial models, the Cash Management Group interfaced with Treasury, Finance and Corporate management to determine the sizing of short-term bank borrowing facilities that would provided required liquidity support for Duke Energy's commercial paper borrowing programs. Such programs were used for the short-term funding of additional electric generation, transmission and distribution facilities to serve our customers.

12.

The Cash Management Group was responsible for working with Duke Legal and our commercial and investment banks to negotiate and establish credit facilities.

13.

During the Period at Issue, the Treasury Department invested Duke Energy's excess operating cash in various short-term marketable securities including municipal bonds, loan repurchase agreements, and commercial paper.

14.

During the Period at Issue, all securities trading transactions were conducted, and all investment accounts were located, outside of South Carolina.

15.

During the Period at Issue, Duke Energy's Cash Management Group evolved into four subgroups: (1) Cash Operations; (2) Short-term Liquidity; (3) Credit Facilities; and (4) International Cash Management.

16.

An average of 10-12 employees were employed in the Cash Management Group.

17.

The Cash Management Group was located in Charlotte, North Carolina, and was responsible for funding Duke Energy's daily liquidity needs. The Cash Management Group provided funding for Duke Energy's operations, including purchasing fuel, payroll, acquiring and maintaining production, transmission and distribution equipment, and other capital expenditures.

18.

In addition, the Cash Management Group was responsible for forecasting cash needs and maximizing investment returns within approved investment guidelines.

19.

During the Period at Issue, the Cash Management Group maintained daily contact with investment dealers located outside of South Carolina in order to

maximize cash investment opportunities.

20.

During the Period at Issue, the Short-Term Liquidity Group generally consisted of an average of four employees located in Charlotte, North Carolina, and was responsible for gathering short-term borrowing and investment information, and for ensuring that short-term borrowings were minimized and that excess cash was appropriately invested, with a goal of minimizing cash in corporate bank accounts.

21.

Cash Management Group was responsible for setting commercial paper borrowing rates and selecting short-term investments, and, when market conditions allowed, negotiated investment rates.

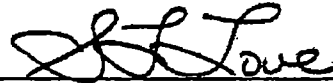
22.

Cash Management Group makes investment decisions in accordance with established investment guidelines approved by the Duke Energy Board's Finance and Risk Management Committee, which defines the type, term and ratings of permitted investment securities.

23.

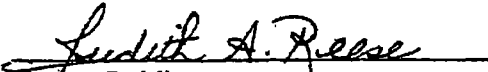
I declare under penalty of perjury that the foregoing is true and correct.

Further affiant sayeth not, this 31st day of December, 2010.



Sherwood L. Love

Subscribed before me this
31st day of December, 2010.


Notary Public

My commission expires: 02/26/12

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DUKE ENERGY CORPORATION,

Petitioner,

vs.

SOUTH CAROLINA
DEPARTMENT OF REVENUE,

Respondent.

Docket No.: 10-ALJ-17-0270-CC

AFFIDAVIT OF RICKEY MCCARVER

Appeared before the undersigned officer duly authorized to administer oaths, Rickey McCarver, who deposed and stated as follows:

1.

My name is Rickey McCarver. I am over the age of 18 years, and I am not under any disability that would impair my competency to provide an affidavit.

2.

This affidavit is given from my personal knowledge.

3.

During the period 1978-2001 ("Period at Issue"), Duke Energy

Corporation ("Duke Energy") was a North Carolina corporation engaged principally in the business of selling electricity, with principal offices located at 526 S. Church Street, Charlotte, North Carolina 28285.

4.

From July 2, 1984 until November 30, 2010, I was at various times the Assistant Tax Manager, Tax Manager, and Tax Director of Duke Energy. In those roles, I prepared Federal and state income tax returns, performed tax research and planning, and managing federal and state tax audits. Included in my responsibilities was the management of the South Carolina income tax audits.

5.

South Carolina first began auditing Duke Energy for South Carolina income tax purposes in 1978.

6.

Every year during the Period at Issue, South Carolina auditors would travel to, and spend a week at, the offices of Duke Energy in Charlotte, North Carolina, reviewing documentation relating to the income tax audit for that particular year.

7.

To the best of my knowledge, no South Carolina auditor ever provided Duke Energy with an audit report for any particular year during the

Period at Issue.

8.

To the best of my knowledge, every year during the Period at Issue, at the request of the South Carolina Department of Revenue ("Department"), the Department and Duke Energy agreed to sign a waiver extending the statute of limitations applicable to that particular year and including any previous year(s) that remained open under South Carolina law or by virtue of a previously executed waiver.

9.

To the best of my knowledge, both the Department and Duke Energy understood that all waivers extended the statute of limitations with respect to audits and refund claims.

10.

During the Period at Issue, the Department has never disputed or disagreed with Duke Energy's classification of investment securities as taxable or exempt.

11.

I declare under penalty of perjury that the foregoing is true and correct.

Further affiant sayeth not, this 7th day of January, 2011.

Rickey A. McCarver
Rickey McCarver

Subscribed before me this
7th day of January, 2011.

Ludith A. Reese
Notary Public

My commission expires: 02/26/2012

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation)

Petitioner,)

vs.)

South Carolina Department of Revenue,)

Respondent.)

Docket No. 10-ALJ-17-0270-CC

**AFFIDAVIT OF
MARVIN N. DAVANT**

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

PERSONALLY APPEARED BEFORE ME, Marvin N. Davant, who first being
duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) years old.
2. I was employed by the South Carolina Department of Revenue (formerly known as the South Carolina Tax Commission) (hereinafter referred to as the "Department") for thirty-seven (37) years beginning in 1964 as an auditor with the Estate & Gift Division, an assistant director of the Estate & Gift Division and then the combined Estate & Gift and Income Tax Divisions, and as Director, Field Services Division, until my retirement in 2001. After I retired, I acted as a consultant to the Director of the Department.
3. The Department authorized the Director of its Field Services Division to fill out, execute and issue Form FS-43 to taxpayers.
4. In the performance of my services as Director, I was authorized to issue and execute, and did routinely issue and execute, the Department's Form FS-43, Consent to Extend the Time to Assess Tax.

5. Form FS-43 was a commonly utilized form, to such extent that I, with approval of the Department, allowed my audit deputy to sign the form in the interests of time.

6. It was common practice for the Department to seek an extension of time to make an assessment and request that taxpayer's sign Form FS-43. For example, if auditors were on a short time frame to audit a file, they would request that the taxpayers sign Form FS-43 as an agreement with the Department to extend the time for both assessments and refunds.

7. The Department promulgated and issued Form FS-43 as an official Department form document. To the best of my knowledge, information and belief, the Department has utilized this form since at least the 1960s, as the form was in use prior to the time I became employed with the Department.

8. Form FS-43 was an official form issued by the Department and provided to the Field Services Division for use in its operations.

9. To the best of my knowledge, information and belief, the Department did not issue forms that had not been properly reviewed or approved.

10. The Department's forms identified which division used the form by including the division's name or initial on the form.

11. To the best of my knowledge, information and belief, no individual division of the Department promulgated its own forms, and every form used by any division was an official form provided to it by the Department.

12. The Field Services Division did not review or question Form FS-43 because it was instructed to use the form by the Department.

13. To the best of my knowledge, information and belief, the use of Form FS-43 by the Department was never questioned.

14. To the best of my knowledge, information and belief, the Department historically intended, believed and understood that Form FS-43 not only extended the time to assess additional tax, but also authorized or extended the time for a taxpayer to file a claim for refund within the time stated in the Form FS-43.

15. Prior to enactment of the South Carolina Revenue Procedures Act in 1995, the Department believed that after the execution of the FS-43 by the DOR and the taxpayer that it was authorized and permitted to issue refunds of overpaid tax even if a claim for refund by the taxpayer would not otherwise be timely under the applicable statutory limitations period for filing a refund claim and regardless of whether the period of time initially prescribed for filing a claim for refund had expired.

16. Prior to enactment of the South Carolina Revenue Procedures Act, it was my intent, belief and understanding as Director of Field Services that an executed Form FS-43 constituted the Department's agreement to issue a refund - whether resulting from a review of the taxpayer's records commenced by the Department's on its own initiative, upon consideration of a claim for refund filed by the taxpayer prior to the time stated in the Form FS-43, or otherwise - pursuant to its authority to issue refunds of overpaid tax even if a claim for refund would otherwise be untimely.

17. After enactment of the South Carolina Revenue Procedures Act, there was no difference in how Form FS-43 was interpreted by Department, and the content of the form remained the same.

18. To the best of my knowledge, information and belief, I had the same authority to sign Form FS-43 before and after enactment of the South Carolina Revenue Procedures Act.

19. Both before and after enactment of the South Carolina Revenue Procedures Act, the purpose of Form FS-43 was to allow the Department and the taxpayer by agreement to extend the time for assessment or refund, whether discovered on audit or a refund claim filed by the taxpayer. The form was specifically used for purposes of recording the agreement to extend the time limitations for both the Department and the taxpayer.

20. It was my intent, belief and understanding as Director of Field Services that a refund claim filed after the statute of limitations had expired would be treated differently than a refund claim filed during the extended period of time agreed to by the Department and the taxpayer by executing Form FS-43. The Department would not consider a refund claim filed in the former situation, but would, in accordance with its agreement, in the latter.

FURTHER AFFIANT SAYETH NOT.



Marvin N. Davant

SWORN and subscribed to before me
this 16th day of May, 2012.

Margie W. Rish (L.S.)
Notary Public for South Carolina
My Commission Expires: 11-4-2020

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation)

Petitioner,)

vs.)

South Carolina Department of Revenue,)

Respondent.)

Docket No. 10-ALJ-17-0270-CC

**AFFIDAVIT OF
ROBERT K. ANDERSON**

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

PERSONALLY APPEARED BEFORE ME, Robert K. Anderson, who first being
duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) years old.
2. I was employed by the South Carolina Department of Revenue (formerly known as the South Carolina Tax Commission) (hereinafter referred to as the "Department") from 1975 until I retired in 2008.
3. While employed with the Department, I served in various positions beginning with an entry-level position with the Audit Division, then was promoted to Regional Manager, then Manager of Audits, then Administrator of Field and Office Operations, and finally was employed as Senior Administrator until the time of my retirement.
4. Since the time I served as Manager of Audits, I had the primary responsibility and authority for executing Form FS-43, Consent to Extend the Time to Assess Tax.
5. In many cases, the authority to issue and execute Form FS-43 was delegated to the auditors auditing a taxpayer's file.

6. Form FS-43 was regularly and commonly used during my employment with the Department, and the Department typically was the party who requested that the form be executed.

7. Form FS-43 is an official document issued by the Department when agreeing to extend the time to assess additional tax or issue a refund with a taxpayer. I do not know when Form FS-43 was first promulgated, but it was many years, if not decades, ago.

8. The use of Form FS-43 was common knowledge within all levels of the Department. To my knowledge, the Department had a process for approving all forms and I assume the Form FS-43 went through such approval process.

9. The Department issued Form FS-43 to obtain the taxpayer's written consent to extend the time to assess or refund additional tax.

10. To encourage a taxpayer's agreement to extend the time to assess additional tax, the Department intended that Form FS-43 similarly extend the time for a taxpayer to file a refund claim with the Department or for the Department to grant a refund.

11. The Department did not issue any other form document or other writing to obtain a taxpayer's consent to extend the statute of limitations.

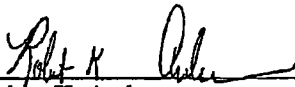
12. The Department had several revised versions of Form FS-43, all of which were intended to extend the time for the taxpayer to file a claim for refund during the waiver period.

13. By executing Form FS-43, the Department believed that it was exercising its discretionary authority to grant a refund upon examination of a taxpayer's return or otherwise, including the taxpayer's filing a refund claim with the Department within the period of time stated in the FS-43, in exchange for the taxpayer's consent to extend the period of time to assess additional tax.

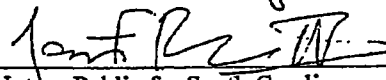
14. I am not aware of any conflicts or controversy either within the Department or with taxpayers regarding the wording of Form FS-43. To my knowledge, the Department has never refused to honor a valid refund claim filed during the time period covered by Form FS-43.

15. The multiple execution of the Form FS-43s in the Duke Energy Corporation Audits over a long period of years was principally requested by the DOR auditor assigned to the file.

FURTHER AFFIANT SAYETH NOT.


Robert K. Anderson

SWORN and subscribed to before me
this 17th day of May, 2012.


(L.S.)
Notary Public for South Carolina
My Commission Expires: 5/7/22

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

DUKE ENERGY CORPORATION,

Petitioner,

vs.

**SOUTH CAROLINA
DEPARTMENT OF REVENUE,**

Respondent.

Docket No.: 10-ALJ-17-0270-CC

AFFIDAVIT OF T. COOPER MONROE, III

Appeared before the undersigned officer duly authorized to administer oaths, T. Cooper Monroe, who deposed and stated as follows:

1.

My name is Thomas Cooper Monroe, III. I am over the age of 18 years, and I am not under any disability that would impair my competency to provide an affidavit.

2.

This affidavit is given from my personal knowledge.

3.

During the period 1978-2001 ("Period at Issue"), Duke Energy Corporation ("Duke Energy") was a North Carolina corporation engaged principally in the business of selling electric service, with principal offices located at 526 S. Church Street, Charlotte, North Carolina 28285.

4.

Since 1997, I have been at various times the Tax Manager and the Managing Director of State and Local Tax of Duke Energy. In those roles, I have had the opportunity to review and become familiar with Duke Energy's tax files and its correspondence related to its South Carolina and federal corporate income tax issues for the tax years 1978 through 2001.

5.

The Internal Revenue Service ("IRS") made certain adjustments to Duke Energy's federal corporate income tax returns for the tax years 1978 through 1983. The IRS made a final determination with regard to those adjustments on September 23, 1992.

6.

The Internal Revenue Service ("IRS") made certain adjustments to Duke Energy's federal corporate income tax returns for the tax years 1984 and 1986 through 1991. The IRS made a final determination with regard to those adjustments on May 11, 2001.

7.

The Internal Revenue Service ("IRS") made certain adjustments to Duke Energy's federal corporate income tax returns for the tax years 1992 through 1994. The IRS made a final determination with regard to those adjustments on July 17, 2001.

8.

On August 13, 2002, Duke Energy and the South Carolina Department of Revenue ("Department") agreed to offset certain assessments of additional South Carolina corporate income tax made by the Department for the tax years 1978 through 1994 against refunds of South Carolina corporate income tax owed to Duke Energy for the same tax years.

9.

On August 16, 2002, Duke Energy received a refund check for overpaid corporate income taxes from the Department attributable to the tax years 1978 through 1994.

Further affiant sayeth not, this 28th day of June, 2012.


T. Cooper Monroe, III

Subscribed before me this
28 day of June, 2012.

17862938.2

Natalie W Polk
Notary Public

My commission expires: 4-28-2013

Tax Year	Original Tax Return File Date	Federal Adjustment Final Determination
1978	9/14/1979	9/23/1992
1979	9/15/1980	9/24/1992
1980	9/15/1981	9/25/1992
1981	9/14/1982	9/26/1992
1982	9/15/1983	9/27/1992
1983	9/17/1984	9/28/1992
1984	9/15/1985	5/11/2001
1985	9/15/1986	
1986	9/15/1987	5/11/2001
1987	9/14/1988	5/11/2001
1988	9/15/1989	5/11/2001
1989	9/15/1990	5/11/2001
1990	9/15/1991	5/11/2001
1991	9/15/1992	7/17/2001
1992	9/14/1993	7/17/2001
1993	9/10/1994	7/17/2001
1994	9/15/1995	
1995	9/16/1996	
1996	9/15/1997	
1997	9/15/1998	
1998	9/14/1999	
1999	9/11/2000	
2000	9/17/2001	
2001	9/13/2002	

DUKE ENERGY CORPORATION
SOUTH CAROLINA WAIVERS SCHEDULE
INCOME/ LICENSE TAX

WAIVER EXPIRATION	WAIVER PERIODS
12/31/02	INCOME: 12/31/78 - 12/31/99 LICENSE: 12/31/84 - 12/31/00
06/30/02	INCOME: 12/31/78 - 12/31/98 LICENSE: 12/31/84 - 12/31/99
12/31/01	INCOME: 12/31/78 - 12/31/97 LICENSE: 12/31/84 - 12/31/98
12/31/00	INCOME: 12/31/78 - 12/31/96 LICENSE: 12/31/84 - 12/31/97
12/31/99	INCOME: 12/31/78 - 12/31/95 LICENSE: 12/31/84 - 12/31/96
12/31/98	INCOME: 12/31/78 - 12/31/94 LICENSE: 12/31/84 - 12/31/95
06/30/98	INCOME: 12/31/78 - 12/31/94 LICENSE: 12/31/84 - 12/31/95
12/31/97	INCOME: 12/31/78 - 12/31/93 LICENSE: 12/31/84 - 12/31/94
06/30/97	INCOME: 12/31/78 - 12/31/92 LICENSE: 12/31/84 - 12/31/93
06/30/96	INCOME: 12/31/83 - 12/31/91 LICENSE: 12/31/84 - 12/31/92
11/30/95	INCOME: 12/31/83 - 12/31/90 LICENSE: 12/31/84 - 12/31/91
05/30/95	INCOME: 12/31/83 - 12/31/90 LICENSE: 12/31/84 - 12/31/91
12/31/94	INCOME: 12/31/83 - 12/31/89 LICENSE: 12/31/84 - 12/31/90
12/31/93	INCOME: 12/31/83 - 12/31/89 LICENSE: 12/31/84 - 12/31/90
12/31/92	INCOME: 12/31/83 - 12/31/88 LICENSE: 12/31/84 - 12/31/89
12/31/91	INCOME: 12/31/83 - 12/31/87 LICENSE: 12/31/84 - 12/31/88
12/31/90	INCOME: 12/31/83 - 12/31/86 LICENSE: 12/31/84 - 12/31/87
12/31/89	INCOME: 12/31/83 - 12/31/85 LICENSE: 12/31/84 - 12/31/86
06/30/89	INCOME: 12/31/83 - 12/31/84 LICENSE: 12/31/84 - 12/31/85
03/31/89	INCOME: 12/31/83 - 12/31/84 LICENSE: 12/31/84 - 12/31/85
12/31/88	INCOME: 12/31/83 - 12/31/84 LICENSE: 12/31/84 - 12/31/85

DUKE POWER COMPANY
TAX DEPARTMENT
422 SOUTH CHURCH STREET
CHARLOTTE, N. C. 28242-0001

JOHN P. O'KEEFE
VICE PRESIDENT TAXES
(704) 373-6231
WILSON R. TAYLOR
MANAGER, INCOME TAXES
(704) 373-4206
JOE L. WALLACE
MANAGER, PROPERTY TAXES
(704) 373-4203

April 19, 1991

RICKEY A. MCCARVER
(704) 373-6706
H. LYNN BOYETTE
(704) 373-2781
LARRY C. AUTEN
(704) 373-8278
RICHARD L. ROGERS, JR.
(704) 373-3213
TELECOMER:
(704) 373-6984

Mr. Harold Ingram
Field Services Division
South Carolina Tax Commission
P. O. Box 125
Columbia, SC 29214

Dear Mr. Ingram:

In accordance with our verbal agreement that I would notify you when we had settled years 1978-1983 with the IRS, we received notification on March 12, 1991 that these years had been accepted by the Joint Committee. We have filed a protest for 1984 and 1985 on some issues.

Very truly yours,


Remi Taylor

RT/cj

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Administrative Law Judge

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

Duke Energy Corporation..... Appellant,

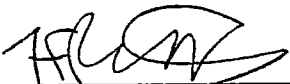
v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

July 3, 2013



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Administrative Law Judge

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

Duke Energy Corporation..... Appellant,
v.
South Carolina Department of Revenue..... Respondent.

BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. Did the ALC err in holding that Duke Energy's South Carolina amended income tax returns for the tax periods 1978-1993 were untimely when the Department and Duke Energy entered into written agreements to extend the time for Duke Energy to file its amended returns?
- II. Did the ALC err in holding that only Duke Energy's net receipts from sales of securities are included in the computation of its income apportionment formula when the plain language of the statutes requires that Duke Energy's gross receipts must be included in the computation of its apportionment formula?
- III. Did the ALC err in holding that Duke Energy is engaged in manufacturing and electricity is tangible personal property when as a matter of law and fact the record establishes that electricity is not tangible and Duke Energy provides a service?

STATEMENT OF THE CASE

This case arises from the South Carolina Department of Revenue's (the "Department") denial of Duke Energy Corporation's amended returns seeking a refund of South Carolina corporate income taxes (collectively "refund claims") for the tax years 1978 through 2001 ("Tax Periods at Issue") in the amount of \$126,240,645 plus interest. (R. pp. 4183-5531; R. p. 49; R. p. 2438, lines 14-21.) Duke Energy's refund claims were based primarily on two grounds. First, during the Tax Periods at Issue, Duke Energy sold securities in the regular course of its business and amended its corporate income tax returns to include the gross receipts from those sales in its sales factor denominator. (R. p. 8195-8197 § 5.A; R. p. 51.) Second, Duke Energy originally used a three-factor apportionment formula to apportion its income to South Carolina instead of the single factor apportionment formula which is required for service providers.

The Department denied Duke Energy's refund claims and Duke Energy timely appealed. (R. p. 5532; R. pp. 5533-5542; R. p. 123; R. p. 2439, lines 17-23; R. p. 2442, line 14-p. 2443, line 11.) The Department denied Duke Energy's appeal, (R. pp. 5546-

5556; R. p. 123; R. p. 2449, lines 13-18), and Duke Energy requested a contested case hearing before the Administrative Law Court ("ALC"). (R. pp. 5558-5581; R. p. 123; R. p. 2453, lines 10-11.)

On April 20, 2012, the Department filed a Motion for Summary Judgment asking the ALC to rule that: (1) Duke Energy's refund claims (amended returns) for the tax years 1978-1993 were untimely (the "Waiver Issue"); (2) Duke Energy was not permitted to include the gross proceeds from sales of securities in the calculation of the denominator of its South Carolina corporate income tax apportionment formula (the "Gross Receipts Issue"); and (3) Duke Energy is a manufacturer of electricity and thus not entitled to use the single-factor gross-receipts apportionment formula to apportion its income to South Carolina (the "Electricity Issue"). (R. pp. 166-370; R. pp. 49-50.)

Duke Energy opposed the Department's Motion for Summary Judgment ("Department's MSJ") on the grounds that: (1) genuine issues of material fact existed regarding the Waiver and Electricity Issues; and (2) as a matter of law, Duke Energy was required to include the entire proceeds from sales of securities in its apportionment formula. (R. pp. 371-824; R. p. 50.)

A hearing on the Department's MSJ and Duke Energy's Cross-Motion was held before the ALC on June 26, 2012. (R. p. 50.) On June 29, 2012, the ALC held a teleconference and informed the parties of its decision (1) to grant the Department's MSJ on the Waiver Issue; (2) to grant Duke Energy's Cross-Motion on the Gross Receipts Issue; and (3) to order an evidentiary hearing with regard to the Electricity Issue.¹

¹ As a result, the ALC asked the Department to draft a proposed order regarding the Waiver Issue and Duke Energy to draft a proposed order regarding the Gross Receipts and Electricity Issues.

On August 9, 2012, without any further briefing by the parties, the ALJ changed his mind and issued an Order finding for the Department on the Waiver Issue *and* the Gross Receipts Issue, and ordering an evidentiary hearing on the Electricity Issue. (R. pp. 11-46.) Duke Energy filed a Motion for Reconsideration on August 20, 2012, (R. pp. 1034-1152), which the ALC denied on October 11, 2012.² (R. pp. 147-165; R. pp. 49-84.)

The ALC held a hearing regarding the Electricity Issue on September 5 and 6, 2012 and on November 2, 2012, issued a Final Order and Decision finding for the Department. (R. pp. 93-119.) Duke Energy filed a Motion for Reconsideration which the ALC denied on December 4, 2012. (R. pp. 1034-1152; R. pp. 147-165; R. pp. 120-146.) On January 3, 2013, Duke Energy timely filed a Notice of Appeal from all orders issued in this matter.

Duke Energy filed a Motion to Consolidate asking this Court to consolidate all of the Notices of Appeal in this case and asking this Court to hold in abeyance the thirty-day timeline for filing its Initial Appellant's Brief and Designation of Matter while the Motion to Consolidate was pending. (R. pp. 2368-2379.) This Court granted Duke Energy's Motion on January 23, 2013. (Order Granting Motion to Consolidate, Jan. 23, 2013.) The appellate case number for the consolidated appeal is 2012-213180.

² On August 29, 2012, the ALC suspended its MSJ Order, pending a decision on Duke Energy's Motion for Reconsideration. (R. pp. 47-48.) On October 9, 2012, Duke Energy filed a Notice of Appeal appealing the MSJ Order. (R. pp. 1879-1925.) On October 11, 2012, the ALC issued an Order denying Duke Energy's Motion for Reconsideration in part and granting reconsideration in part, and an Amended MSJ Order. (R. pp. 85-92; R. pp. 49-84.) On October 23, 2012, an Amended Notice of Appeal was filed to include the orders from October 11, 2012. (R. pp. 1926-1974.) On November 6, 2012, this Court requested that Duke Energy submit a memorandum addressing the appealability of the pending orders. (Request for Memorandum, Nov. 6, 2012.) Duke Energy's appealability memorandum was filed and served on November 16, 2012. (Appealability Memorandum, Nov. 16, 2012.) The appellate case number for that appeal was 2012-213180.

STATEMENT OF FACTS

I. DUKE ENERGY'S BUSINESS OPERATIONS.

Duke Energy's primary business in South Carolina is the provision of electric service to its customers. (R. p. 2424, line 22-p.2426, line 1; R. p. 2496, line 18-p. 2497, line 5; R. p. 2514, lines 8-18; R. p. 2520, line 25-p. 2521, line 10; R. p. 5808; R. p. 5922;R. pp. 7707-7708;R. pp. 7272-7273.) During the Tax Periods at Issue, Duke Energy was required to list a Principal Business Activity Code on its Federal and South Carolina Income Tax returns. The Principal Business Activity Code is derived from the North American Industry Classification System ("NAICS"), formerly known as the U.S. Standard Industrial Classification system ("SIC"), and is determined based on the activity from which the company derives the highest percentage of its total receipts. (R. p. 2431, line 17-p. 2433, line 20.)

The NAICS lists industry classifications with different codes for "utilities" and "manufacturing." (R. p. 2433, line 7-p. 2435, line 25.) "Utilities" provide electric power, natural gas, steam supply, water supply, and sewage removal through a permanent infrastructure of lines, mines and pipes. *Id.* Electric power generation, transmission and distribution are included under "utilities." *Id.*

"Manufacturing" is a separate category. *Id.* During the Tax Periods at Issue, Duke Energy's federal and South Carolina income tax returns included the code for the electric power generation, transmission and distribution utilities category. (R. p. 2431, lines 9-13; R. p. 2433, lines 3-6; R. p. 2436, lines 4-8.) The Department never contested Duke Energy's use of the utility NAICS classification.

II. THE DEPARTMENT'S AUDIT OF DUKE ENERGY.

This case began with the Department's examination (also referred to as an "audit") of Duke Energy's corporate income taxes for the year 1978. (R. p. 50; R. p. 8219 ¶ 5.) What began as a routine audit evolved into a protracted review of Duke Energy's South Carolina tax returns that spanned decades. (R. pp. 50-51; R. p. 2443, line 21-p. 2447, line 25; R. p. 8219 ¶ 5.) Duke Energy, cooperatively and patiently, accommodated the Department's serial requests to extend the audit due to health issues experienced by the Department's auditor, changes in the Department's personnel, and the pending results of an audit of Duke Energy by the Internal Revenue Service ("IRS"). (R. pp. 50-51; R. pp. 8108-8156.)

III. THE AGREEMENT BETWEEN THE DEPARTMENT AND DUKE ENERGY TO EXTEND THE STATUTE OF LIMITATIONS.

The Department did not complete the audit in a timely manner and continued to audit Duke Energy for subsequent years. (R. p. 8219 ¶¶ 5, 6.) To extend their time to audit, the Department's auditors systematically asked Duke Energy to sign agreements extending the audit. (R. pp. 50-51; R. pp. 8108-8156.) These agreements, generally referred to as "Waivers" also extended the time period for Duke Energy to file corporate income tax refund claims. (R. pp. 50-51; R. p. 8220 ¶ 8; R. pp. 8223-8225 ¶¶ 6, 14, 19; R. p. 8227 ¶ 10; R. pp. 8086-8107.)

Years went by and each time a Waiver agreement was about to expire, the Department asked Duke Energy to sign a new agreement further extending the statute of limitations. (R. pp. 50-51; R. p. 8219 ¶ 6; R. pp. 8108-8156.) Duke Energy agreed to the Waivers because the Department represented verbally and in writing that the statute

of limitations was extended for both tax assessments and tax refund claims. (R. pp. 8218-8219 ¶¶ 8, 9; R. pp. 8223-8225 ¶¶ 6, 14, 19; R. p. 8227 ¶¶ 10, 12, 13; R. pp. 3401-3403.)

IV. DUKE ENERGY'S TAX OVERPAYMENTS.

Within the time frame agreed to by the Department in writing in the Waivers, Duke Energy filed amended South Carolina corporate income tax returns for the 1978 through 2001 tax periods. (R. p. 122; R. p. 51; R. p. 2437, lines 4-18; R. pp. 8196-8197 § 5.A.) The amended returns related to two issues in the computation of Duke Energy's apportionment formula – which is the mechanism for determining how much income is associated with Duke Energy's South Carolina's business activities. (R. p. 51; R. p. 2437, lines 4-18.)

The first issue was that South Carolina law requires a corporation to include all of its "gross receipts" in the denominator of its gross-receipts apportionment factor. Duke Energy's original returns for the tax years 1978-1999³ excluded receipts from certain sales of securities from the denominator of the gross-receipts factor. (R. pp. 8195-8196 § 5.A.) The amendments included these receipts in the gross receipts factor. (R. p. 51.)

The second issue was that because Duke Energy was primarily engaged in the business of selling electric service to its customers, it was required to apportion its income using the single-factor gross-receipts apportionment method rather than the three-factor method required for companies that manufacture tangible personal property. (R. pp. 8195-8196 § 5.A.) The amendments applied the single-factor formula (based on gross receipts) applicable to enterprises engaged in the provision of services. (R. p. 122; R. p. 51; R. p. 2437, lines 12-18.)

³ For 2000 and 2001, Duke Energy's original tax returns included receipts from sales of securities in the sales factor denominator.

V. THE DEPARTMENT'S DENIAL OF THE AMENDED RETURNS

The Department could not have been surprised by the receipt of the amended returns. For years Duke Energy discussed with the Department in emails and in writing that Duke Energy intended to file the amended returns. (R. pp. 8166-8175; R. pp. 3401-3403.) The Department denied Duke Energy's refund claims without conducting any examination. (R. p. 122; R. p. 2441, line 4-p. 2442, line 13.) Duke Energy timely protested the denial soon thereafter. (R. p. 123.) The Department took no action on Duke Energy's protest for approximately seven years before finally denying Duke Energy's Protest. (R. p. 2448, line 5-p. 2450, line 6; R. p. 123; R. pp. 5546-5556.) At no time during this seven-year period did the Department assert that the refund claims were not timely or that the Waivers did not allow Duke Energy to file refund claims.

In 2002, the Department issued assessments of corporate income, license, and sales taxes for the tax years 1978 through 1994 (some of the periods that are at issue in this case) and determined that for these same years, Duke Energy should receive corporate income tax refunds. (R. p. 8231 ¶¶ 8, 9.) On August 13, 2002, the Department and Duke Energy agreed to offset Duke Energy's corporate income tax refund against the unrelated tax assessments for the tax years 1978-1994. *Id.* Duke Energy received a net refund of \$3,067,703. *Id.*

VI. DUKE ENERGY'S PROVISION OF ELECTRICITY.

During the Tax Periods at Issue, the majority of Duke Energy's income was derived from the provision of electric service to its customers. (R. p. 2425, line 10-p. 2426, line 1; R. p. 123.) The evidence presented at trial shows that Duke Energy provides a service. Further, both parties' expert witnesses agreed that Duke Energy

provides a service.⁴ (R. p. 2640, lines 14-18; R. p. 2764, line 5-p. 2765, line 13.) Duke Energy's electric service business includes the generation, transmission and distribution of electricity. (R. p. 123.)

Duke Energy generates electricity by various means including hydro, nuclear, coal, natural gas, wind, and solar power. (R. p. 124; R. p. 2480, line 23-p. 2482, line 19.) Electric service is provided using a generator which creates a force field. (R. p. 2481, lines 13-22; R. p. 2678, line 22-p. 2680, line 19.) The force field causes oscillation of electrons in the generator which causes a flow of an electromagnetic field, or electricity, which is then transmitted and delivered to Duke Energy's customers. (R. p. 139; R. p. 2493, line 10-p. 2496, line 1; R. p. 2646, lines 8-22; R. p. 2668, line 12-p. 2669, line 3.) No electrons, charges or other particles are created by the generation process. (R. p. 2492, line 18-p. 2494, line 3; R. p. 2671, lines 2-13; R. p. 2682, line 14-p. 2683, line 5.)

Mr. Dhiaa Jamil, Duke Energy's Chief Generation Officer, and Professor Ioannis "John" Papapolymerou⁵, Duke Energy's expert witness, testified that Duke Energy does not create the electrons residing in the power lines, and the provision of electricity is not the transfer of electrons to the customer: the electrons simply facilitate the propagation of electricity. (R. p. 2492, line 18-p. 2494, line 3; R. p. 2567, lines 4-8; R. p. 2650, lines 12-14; R. p. 2678, lines 13-21; R. p. 2682, line 14-p. 2683, line 5.) The Department's expert witness agreed. (R. p. 2743, line 25-p. 2744, line 4; R. p. 2754, lines 13-25.) Professor Papapolymerou also testified that "Duke Energy provides a service, and that the electrical

⁴ The Department's expert Mr. Robinson testified that "if [electric energy] were provided on a flat-fee basis, you could consider it a service." (R. p. 2765, lines 2-3.)

⁵ Dr. Papapolymerou is an esteemed professor at the School of Electrical and Computer Engineering at the Georgia Institute of Technology. He is highly published, has won several awards, and is a fellow of the Institute of Electrical and Electronics Engineers, a highly selective worldwide professional organization. He also regularly consults for the United States government. (R. p. 2629, line 25-p. 2634, line 1.)

energy it sells is not something that one can possess or does not have physical dimensions.” (R. p. 2640, lines 14-18.) The Department’s expert agreed with Duke

Energy’s expert that electricity is a force and not a material and that Duke Energy provides electric service. (R. p. 2709, lines 15-18; R. p. 2743, lines 14-23; R. p. 2747, lines 13-17; R. p. 2764, line 10-p. 2765, line 13; R. p. 3568 [p. 0072], line 19-p. 3569 [p. 0073], line 20.)⁶

The evidence presented at trial showed that electricity is not an object that is manufactured; rather, it is a flow of electrical energy that is generated by the manipulation of magnetic fields. (R. p. 2493, lines 16-23; R. p. 2533, lines 4-7; R. p. 2543, lines 8-25; R. p. 2641, line 20-p. 2642, line 14; R. p. 2650, lines 12-14.) Electricity has no shape, form or geographic location. (R. p. 2501, lines 5-23; R. p. 2650, line 15-p. 2651, line 3; R. p. 2683, lines 11-17.) It cannot be created or destroyed. (R. p. 2566, line 23-p. 2567, line 8; R. p. 2658, line 20-p. 2659, line 3.) It is not a matter or a material, and it has no form or substance which can be touched. (R. p. 2500, line 1-p. 2501, line 4; R. p. 2528, line 20-p. 2529, line 4; R. p. 2567, line 9-p. 2568, line 15; R. p. 2641, line 14-p. 2642, line 14; R. p. 2650, lines 15-19; R. p. 2653, line 1-p. 2654, line 6.) It has no height, weight, volume or other dimension that is typically associated with tangible property. (R. p. 2499, lines 17-19; R. p. 2650, line 15-p. 2652, line 10; R. p. 2683, lines 11-17.) It is of a nature similar to heat, light, wind, and gravity, all of which can be sensed and measured, but are not considered tangible. (R. p. 2565, lines 5-22; R. p. 2638, line 20-p.

⁶ The Department itself agrees that Duke Energy provides a service. In its Determination denying Duke Energy’s refund claims, the Department stated that “while the taxpayer [Duke Energy] is correct that it provides a service, its service is statutorily defined [for sales and use tax] as tangible personal property.” (R. pp. 5546-5556.) As discussed below, the Department’s reliance on the sales tax statute is misplaced. Also, in its prehearing statement, the Department asserted that “Petitioner [Duke Energy] is a manufacturer of electricity and a power service provider” (R. p. 5589.)

2639, line 15; R. p. 2643, lines 13-24; R. p. 2656, line 1-p. 2657, line 10; R. p. 2744, line 16-p. 2747, line 7; R. p. 2670, line 8-p. 2671, line 1.) Professor Papapolymerou testified that electricity is not an electric charge; rather, an electron is the most fundamental carrier of charge and an electric charge is the source of the electromagnetic field. (R. pp. 2639-2640, 2644.) Disregarding the evidence presented at trial, the ALC incorrectly found that electricity is a physical product and that Duke Energy produces an electric charge. (R. pp. 126-127.)

Duke Energy provides electric service on both a metered and flat-fee basis. (R. p. 2486, line 18-p. 2488, line 4; R. p. 2491, line 20-p. 2492, line 12; R. p. 123.) The electricity provided to customers under either plan is the same. (R. p. 2487, lines 15-20; R. p. 2765, lines 4-13.) Under the flat-fee service plan, Duke Energy provides electric service to its customers for a fixed price, regardless of how much electricity a customer consumes. *Id.* The metered service plan is based on usage, i.e., the electricity provided by Duke Energy is read by a meter and billed to the customer on the basis of time and usage. *Id.*

Regardless of the service plan, a portion of each Duke Energy customer's service charge is known as a capacity charge. (R. p. 2488, line 5-p. 2491, line 19; R. p. 123.) The capacity charge is billed to the customer each month even if Duke Energy does not generate any electricity or if the customer does not use electricity in a given month. *Id.* The capacity charge is a significant portion of the customer's monthly bill. (R. p. 2491, lines 4-8.) As a result, Duke Energy receives electric service revenue, every month, notwithstanding whether the customer uses any electricity or whether Duke Energy generates any electricity. (R. p. 2488, line 5-p. 2491, line 19; R. p. 123.)

STANDARD OF REVIEW

The appellate court will reverse a decision of the ALC when the administrative decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by an error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-610(B); *Brownlee v. S.C. Dep't of Health & Envtl. Control*, 382 S.C. 129, 136, 676 S.E.2d 116, 119-120 (2009). Each of these factors exists in this case.

Summary judgment is appropriate only if "it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997). Even if the evidentiary facts are not disputed, but the conclusions or inferences to be drawn from them are, summary judgment should be denied. *Id.*; see also *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 821 (Ct. App. 2004). To determine if triable issues of fact exist, the evidence and all inferences must be viewed in the light most favorable to the nonmoving party. *Hancock v. Mid-S Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

ARGUMENT

- I. **THE ALC ERRED IN CONCLUDING THAT DUKE ENERGY'S AMENDED INCOME TAX RETURNS FOR THE TAX PERIODS 1978-1993 WERE UNTIMELY.**
 - A. During the periods 1978 through 1993, South Carolina Law authorized the Department to extend the applicable limitations period for assessments of tax underpayments and refund claims for tax overpayments.

For the periods 1978 through 1993, the Department signed Waivers to extend the time period for Duke Energy to file refund claims (amended returns) and for the Department to assess additional tax. (R. pp. 50-51; R. p. 8220 ¶¶ 8, 9; R. pp. 8223-8225 ¶¶ 6, 14, 19; R. p. 8227 ¶ 10; R. pp. 8086-8107). In many cases, the Department requested the Waivers so it could have more time to conduct its audit. (R. pp. 50-51; R. pp. 8108-8156; R. pp. 8219 and 8220 ¶¶ 6, 8.)

In spite of the Department's oral and written Waiver agreements, the ALC granted the Department's MSJ on the Waiver Issue. The ALC reasoned that whether the Department misled Duke Energy or not, an evidentiary hearing was not necessary because the Department did not have the authority to extend the limitations period for filing tax refund claims.

The ALC's ruling is the first of its kind. In South Carolina, like virtually every other state in the country, taxpayers and state revenue officials routinely agree, in writing, to extend the time period for assessments and refund claims. (R. p. 8220 ¶ 8; R. pp. 8223-8225 ¶¶ 6, 14, 19; R. p. 8227 ¶¶ 10, 12, 13.) And taxpayers and tax administrators routinely rely on waivers to allow additional time while preserving a taxpayer's rights to file refund claims as part of the audit process. *Id.* The ALC disregarded all of these facts and decades of past practice by the Department and other taxpayers.

Aside from the inequity in allowing the Department to renege on its written agreements, the ALC's decision is incorrect for a number of reasons. First, for tax years prior to 1995, former S.C. Code Ann. § 12-54-80 provided that: (1) "the amount of taxes due on a return which has been filed . . . must be *determined* or assessed within thirty-six months from the date the return was filed *or due to be filed*, whichever occurs later;" (2)

in the case of an adjustment made by the IRS to the taxpayer's federal income tax return,

"the commission *may determine* and assess *income taxes* after the thirty-six months

limitation if it makes the determination and assessment within one hundred eighty days of receiving notice from the Internal Revenue Service of a final determination of an income adjustment"⁷; and (3) "[i]f before the expiration of the time prescribed in this section for the mailing of a notice of any assessment, *the taxpayer has consented in writing to the mailing of the notice after the time*, notice of assessment may be mailed at any time prior to the expiration of the period agreed upon." See S.C. Code Ann. § 12-54-80 (Supp. 1990) (repealed 1995).

A "determination" is not limited to an assessment of additional tax. A determination of the amount of taxes due may produce an amount that is higher or lower than the amount reported on a taxpayer's return filing. This determination reflects information obtained from the receipt of supplemental information, including amended tax returns, provided by a taxpayer. A "determination" also contemplates assessment of a tax overpayment – a point the ALC failed to acknowledge in granting summary judgment for the Department. Indeed, taxpayers regularly seek refunds of tax overpayments, yet the Department did not, and could not, identify one instance where a taxpayer's refund claim was rejected because of the claimed inapplicability of S.C. Code Ann. § 12-54-80. (R. p. 8220 ¶ 8; R. pp. 8223-8225 ¶¶ 6, 14, 19; R. p. 8227 ¶ 10; R. p. 8209 ¶ 23.) In fact, the Department paid income tax refunds to Duke Energy for the years at issue in this

⁷ South Carolina Code section 12-54-80 was repealed and recodified effective for tax years after 1994. See S.C. Code Ann. § 12-54-85. Effective for years after 1994, a refund claim resulting from an IRS adjustment must be limited to the overpayment of taxes resulting from the IRS adjustment. S.C. Code Ann. § 12-54-85(D)(3). Such a limitation was not in place prior to 1995.

case, many years after the expiration of the limitations period the Department argues controls in this case. (R. p. 8231 ¶¶ 8, 9.)

Former S.C. Code Ann. §12-54-80 explicitly authorized the Department and a taxpayer to enter into an agreement to extend the limitations period applicable to assessments for underpayments or overpayments, prior to the expiration of the limitations period. And that was exactly what Duke Energy and the Department did for more than twenty years. (R. p. 8220 ¶ 8; R. pp. 8223-8225 ¶¶ 6, 14, 19; R. p. 8227 ¶ 10.)

Duke Energy's interpretation of the statutes at issue in this case is also supported by the plain language of the Waiver agreements, which were drafted by the Department. For periods prior to 1995, the Waiver agreements provided: "This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended." (R. pp. 8086-8107.)

The ALC's holding that S.C. Code Ann. §§ 12-47-210 and 12-47-220 were "the exclusive remedy for obtaining a refund of income taxes" is simply incorrect. (R. p. 57.) Those sections offered a different procedural mechanism for obtaining a refund. If S.C. Code Ann. §§ 12-47-210 and 12-47-220 were the sole remedial procedures available to taxpayers seeking refund claims, then every taxpayer would have been required to pay the tax under protest and file suit in circuit court within thirty days of filing its original tax returns. This interpretation of South Carolina law is not only inconsistent with the plain reading of the relevant statutes, but it also produces an unfair result that implicates

Due Process Clause concerns.⁸ In contrast, the refund claim procedure provided by S.C.

Code Ann. § 12-54-80 offered taxpayers the opportunity to correct an error – a tax

overpayment – within a reasonable period of time – a period of time that the Department universally accepted prior to articulating its litigation position in this case.

1. Waiver Agreements for the Tax Years 1978-1989

The Waiver agreements for tax years 1978-1989 were executed prior to the expiration of the statute of limitations and Duke Energy's amended returns were filed within the time frames provided for in the Waivers. (R. p. 8233.)

Additionally, the IRS made adjustments to Duke Energy's tax returns for the tax years 1984 and 1986 through 1989. The IRS made a final determination with respect to those adjustments on September 23, 1992. (R. p. 8230 ¶ 5; R. pp. 8157-8160.) The Waiver agreements for those years were executed long before the expiration of one hundred eighty days from the date the IRS notified the Department of those IRS final adjustments. (R. p. 8235; R. p. 8234; R. pp. 8086-8107.) Thus, the ALC erred in holding that Duke Energy's refund claims for tax years 1978 through 1989 were untimely.

2. Waiver Agreements for the Tax Years 1990-1993

For the years 1990 through 1993, the IRS made adjustments to Duke Energy's tax returns. The IRS made a final determination (1) on May 11, 2001 relative to the adjustments for the tax years 1990 and 1991; and (2) on July 17, 2001 relative to the adjustments for the tax years 1992 and 1993. (R. pp. 8230-8231 ¶¶ 6, 7; R. pp. 8161-8165.) The Waiver agreements for those years were executed long before the expiration of one hundred eighty days from the date the IRS notified the Department of those final

⁸ See *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36 (1990) (the U.S. Supreme Court has held Due Process requires a state to provide a procedural safeguards sufficient to ensure that a state collects only the amount of tax to which it is legally entitled.)

federal adjustments. Therefore, the ALC erred in holding that Duke Energy's refund claims for those years were untimely.

B. The ALC erroneously concluded that a tax limitations period cannot be tolled or waived.

The Department waived the limitations period contained in former S.C. Code Ann. § 12-54-80. The ALC's decision attempts to distinguish between a general statute of limitation and a statutory timeframe for filing a request for refund, holding that the former can be waived or tolled whereas the latter cannot. (R. pp. 62-63.) To support its view, the ALC relies exclusively on a single case, decided by a different court, in a different jurisdiction. *Dep't of Conservation v. Co-De Coal Co.*, 388 S.W.2d 614 (Ky. Ct. App. 1964). (R. pp. 62-63.) However, the ALC failed to recognize that it did not need to go beyond South Carolina's own legal precedents on this issue.

South Carolina law is clear that a statutory timeframe for issuing assessments for additional taxes or filing claims for tax refunds is a "Statute of repose as are all ordinary Statutes of Limitations" and **can be tolled or extended**. See *Webb v. Greenwood Cnty.*, 229 S.C. 267, 92 S.E.2d 688 (1956); *Hercules Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) ("[T]he statute in question is remedial since it has the effect of tolling the general three-year statute of limitations on tax assessments.")

A statute of limitations, even in the tax context, is simply procedural in nature and operates as a defense to limit the remedy available from an existing cause of action. *Hercules Inc.*, 274 S.C. at 143, 262 S.E.2d at 48 ("[A] statute of limitations affects the remedy and not the right . . ."); *Jenkins v. Meares*, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990) (holding that the statute of limitations "is remedial or procedural in nature"); *Langley v. Pierce*, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993) (same); *Case v.*

Hermitage Cotton Mills, 236 S.C. 285, 287, 113 S.E.2d 794, 795 (1960) (same). As a

procedural limitation, the statute of limitations can be waived as evidenced by the

opinions of the South Carolina Supreme Court and Court of Appeals:

A party can waive a statute of limitations defense, but the waiver must be shown by words or conduct, including an express agreement, failure to claim the defense, or any action or inaction inconsistent with an intention to use the statute of limitations defense.

See, e.g., Anon. Taxpayer v. S.C. Dep't of Rev., 377 S.C. 425, 440, 661 S.E.2d 73, 80 (2008) (emphasis added); *see also Mende v. Conway Hosp., Inc.*, 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991) (same); *City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 235, 599 S.E.2d 462, 466-67 (Ct. App. 2004) (same).

More importantly, the South Carolina Court of Appeals has specifically held that a “[w]aiver is a question of fact for the finder of fact.” *City of N. Myrtle Beach*, 360 S.C. at 234-35, 599 S.E.2d at 466 (emphasis added). “To constitute a waiver there need not be a new agreement for a valuable consideration.” *S.C. Tax Comm’n v. Metro. Life Ins. Co.*, 266 S.C. 34, 40, 221 S.E.2d 522, 524 (1975). The U.S. Court of Appeals for the Fourth Circuit has also held that “though ... a waiver of the applicable [statute of] limitations period [is] not a contract, many courts have recognized that principles of contractual interpretation must be utilized in construing them.” *Ripley v. Commissioner*, 103 F.3d 332, 337 (4th Cir. 1996) (citing *United States v. Hodgekins*, 28 F.3d 610, 614-15 (7th Cir. 1994) (holding that the IRS could not induce a taxpayer to relinquish the protection afforded by the statute of limitations based on representation contained in the extension agreement drafted by the IRS and then disregard the condition) (internal citation omitted)).

The ALC's holding that the Department could not extend the limitations period in this case is in direct conflict with prior holdings of this Court, the Department's written agreements, policies, and actions, and the principles set forth by the U.S. Court of Appeals for the Fourth Circuit and should be reversed.

C. Form FS-43 Extended the Statute of Limitations for Tax Refund Claims.

Form FS-43 is a formal agreement drafted by the Department to seek a taxpayer's agreement to extend the time in which the Department may assess a tax or the taxpayer may file a refund claim. Prior to 1995, Form FS-43 provided:

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.

(R. pp. 8086-8101, 8103) (emphasis added).) After 1995, Form FS-43 provided:

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

(R. pp. 8102, 8104-8107) (emphasis added).)

Form FS-43 remained substantially the same throughout all Tax Periods at Issue. Minor changes were made to Form FS-43 in 1995 to reflect the redesignation of S.C. Code Ann. § 12-54-80 into S.C. Code Ann. § 12-54-85. However, these changes still provided that upon agreeing to a Waiver, the Department had an extended period of time to assess taxes, and the taxpayer had an extended period of time to file a refund claim. Both versions of Form FS-43 use the term "refund" and contemplate a taxpayer's ability to file refund claims. Neither version limits the Department's ability to issue tax assessments nor a taxpayer's ability to file tax refund claims within the time frame

mutually agreed upon by the taxpayer and the Department. However, the ALC erroneously concluded that Form FS-43 applied only to actions by the Department. (R. p.

55.) In so doing, the ALC arbitrarily overwrote the plain language of the Waiver Form, disregarded the Department's interpretation of applicable limitations periods, and ignored the representations made by the Department by agreeing to execute the Waivers.

D. The ALC erred in holding that the Department is not estopped from arguing that the Waivers have no effect.

The Department should be held to its written agreement and should be estopped from claiming that the Waivers did not extend the statute of limitations to allow Duke Energy to file its refund claims prior to 1992. Only recently, this Court stated:

Estoppel may apply against a government agency, but "the party asserting estoppel against the government must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position."

Logan v. Cherokee Landscaping & Grading Co., 389 S.C. 611, 618-19, 698 S.E.2d 879, 883 (Ct. App. 2010) (citation omitted); *see also Bishop v. City of Columbia*, 2013 S.C. App. LEXIS 14, 15-18 (2013). "A governmental body is not immune from the application of the doctrine of estoppel where its officers or agents act within the proper scope of their authority." *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (citation omitted).

The Waivers were executed on a form drafted by the Department, on the Department's letterhead. In many instances, the Department even asked Duke Energy to execute the Waivers so it could continue its audit in exchange for the Department's agreement to extend the statute of limitations period. (R. pp. 50-51; R. pp. 2444-2447; R. p. 8220 ¶ 8.) Duke Energy justifiably relied on the Department's representations, its

published opinions, and the plain language of the Waivers that the time for filing refund claims for the Tax Periods at Issue had been extended. (R. pp. 8086-8107; R. p. 8220 ¶¶ 8, 9; R. pp. 8223-8225 ¶¶ 6, 14, 19; R. p. 8227 ¶ 10.) Therefore, the Department should be estopped from asserting that such a defense presented questions of fact for the ALC's consideration.

E. The ALC erred in holding that equitable tolling does not apply in this case.

The ALC held that the Department is not subject to equitable tolling. The ALC's holding is premised on its distinction between a general statute of limitations and "a condition precedent to seeking [a refund.]" As discussed earlier, Duke Energy contends that the ALC's distinction has no meaningful significance. In fact, tax statutes of limitations are viewed as general statutes of limitations by South Carolina courts.

Courts have invoked the equitable tolling doctrine to suspend or extend a statutory period to "ensure fundamental practicality and fairness." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 377 S.C. 217, 233-34, 659 S.E. 2d 213, 221-22 (Ct. App. 2008). Equitable tolling is a judicially created mechanism that "stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E. 2d 29, 32 (2009). *See also Nevada Dep't of Taxation v. Masco Builder Cabinet Group*, 265 P.3d 666 (Nev. 2011) (the doctrine of equitable tolling applied to extend the limitations period to allow taxpayer's refund claims.)

In this case, fundamental fairness requires that the Department be precluded from disregarding the agreements it entered into with Duke Energy. The Department repeatedly requested Duke Energy's consent to extend the time for assessment and the

time to file a refund claim. (R. pp. 8108-8156.) Equity requires the Department to live up to its agreement.

II. THE ALC ERRED IN CONCLUDING THAT DUKE ENERGY SHOULD NOT INCLUDE THE GROSS RECEIPTS FROM SALES OF SECURITIES IN ITS INCOME APPORTIONMENT FORMULA.

The only question before the ALC with respect to the Gross Receipts Issue was whether, as a matter of law, gross receipts from the sales of securities should be included in the gross-receipts apportionment formula.⁹ The ALC concluded that only net receipts should be included. As explained below, the ALC's conclusion conflicts with South Carolina law and this Court should reverse the ALC's holding.

A. The Plain Language of the South Carolina apportionment statute requires taxpayers to include all gross proceeds in the denominator of the gross receipts/sales apportionment factor.

During the Tax Periods at Issue, South Carolina law provided that a taxpayer required to apply the single-factor gross-receipts apportionment formula must do so "using a fraction in which the numerator is gross receipts from within this State during the taxable year and the denominator is **total gross receipts** from everywhere during the taxable year." *See, e.g.*, S.C. Code Ann. § 12-6-2290 (applicable for tax years beginning after 1995) (emphasis added); former S.C. Code Ann. § 12-7-1190 (applicable for tax years prior to 1996) (emphasis added). For a taxpayer required to apportion its income based on the three-factor apportionment formula, the sales factor consists of "[t]he ratio of sales made by such taxpayer during the income year which are attributable to this State to the **total sales** made by such taxpayer everywhere during the income year" S.C.

⁹ To the extent that the judge based his decision on distortion, summary judgment was inappropriate because there are factual issues in dispute. These factual issues were not before the ALC.

Code Ann. § 12-6-2280 (for tax years after 1995); former S.C. Code Ann. § 12-7-1170
(for tax years prior to 1996).

Neither “gross receipts” nor “total sales” were defined under South Carolina law during the Tax Periods at Issue. Accordingly the ALC should have looked to the plain meaning of the statute:

The language of a tax statute must be given its plain ordinary meaning in the absence of an ambiguity therein. . . . [I]f a legislative intent is clearly apparent from the language of the statute there is no occasion for resort to the rule of statutory construction.

Beach v. Livingston, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1996) (citation omitted); see also *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 320, 731 S.E.2d 869, 873 (2012); *Duke Power Co. v. S.C. Tax Comm'n*, 292 S.C. 64, 66, 354 S.E.2d 902, 903 (1987) (“The ... language [of the statute] clearly states that the license fee on power companies, such as Duke, is based on entire gross receipts and not just receipts from customer charges.”)

Applying this standard to the apportionment statutes at issue in this case, “gross receipts” or “total sales” does not mean “net receipts”. These terms mean exactly what they say: gross means gross and total means all. Neither of these terms can be interpreted as including only “net receipts” as set forth in the ALC’s Amended MSJ Order.

The plain meaning of S.C. Code Ann. § 12-6-2290 and § 12-6-2280 is further demonstrated by actions of the South Carolina Legislature. In 2006, the South Carolina Legislature specifically addressed the very issue in dispute in this case. It changed the meaning of “gross receipts” and total “sales” to eliminate receipts from the sales of securities from the South Carolina income tax apportionment formula. S.C. Code Ann. §

12-6-2295(B)(1) ("repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument").

This change in law was material and drastic. The 2006 law change added a new section to the statute which excluded ten new categories of receipts, including the sales of securities, from the definition of "gross receipts." When the Legislature amends a statute to include a **material** change, there is a **presumption** that the Legislature intended to change the existing law rather than to clarify its original intent. *Key Corporate Capital, Inc. v. Cnty. of Beaufort*, 373 S.C. 55, 60-61, 644 S.E.2d 675, 678 (2007). Excluding ten new categories of receipts from the definition of "gross receipts" is material by any measure.

Indeed, the Department previously argued that more limited statutory amendments were changes in the law. For example, in *Duke Power Co. v. South Carolina Tax Commission*, 292 S.C. at 66, 354 S.E.2d at 903, the Department argued that an amendment to the South Carolina license tax statute, which imposed the tax on "the entire gross receipts from business" and was later changed to "the gross receipts from services rendered from regulated business," limited the scope of the tax and was thus a change in the law. Br. App't at 8-9; *Duke Power* (1987). The South Carolina Supreme Court agreed with the Department and held that the language of the pre-amendment statute "clearly states that the license fee on power companies, such as Duke, is based on entire gross receipts and not just receipts from customer charges." *Duke Power Co. v. S.C. Tax Comm'n*, 292 S.C. at 66, 354 S.E.2d at 903.¹⁰

Ignoring the material nature of the 2007 legislative amendment, the ALC stated that it "has set forth in its Amended Order reasons not to apply the presumption [that the

¹⁰ Duke Power Company changed its name to Duke Energy Corporation, the Appellant in this case.

Legislature intended to change the existing law]" and held that the amendment was not a change in law but a mere clarification of original legislative intent. (R. p. 88.) The ALC offered no evidence in support of its holding and cited no cases on point in this regard. Indeed, nothing in the ALC's Amended MSJ Order supports the ALC's holding.¹¹

The 2006 law change was material. It excluded ten new categories of receipts from the definition of gross receipts. Accordingly, the ALC should have applied the presumption that the 2006 amendment was indeed a change in the law and found that, for the Tax Periods at Issue in this case, gross means gross and that Duke Energy was required to include all of its gross receipts in the denominator of its South Carolina corporate income tax apportionment formula.

B. The ALC did not apply the long-standing principle that in case of doubt, tax statutes must be construed in favor of the taxpayer and against the State.

In interpreting the meaning of "gross receipts," the ALC made a critical error by failing to apply the long-standing principle that "[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt." *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012), (citing *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989)). "[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor." *Id.*

¹¹ The only judicial authority relied upon by the ALC, *Duvall v. South Carolina Budget & Control Board*, 377 S.C. 36, 659 S.E.2d 125 (2008), provides no support for its holding. (R. pp. 86, 88.) The title of the legislative amendment at issue in *Duvall* specifically stated that the amendment was a clarification rather than a change. See, e.g., *Duvall*, 377 S.C. at 46, 659 S.E.2d at 130. In contrast, nothing in the title or language of the 2007 amendment or its legislative history suggests the same legislative intent as the intent of the Legislature in *Duvall*.

In its Amended MSJ Order, the ALC devotes more than eleven pages to an analysis of the meanings of “gross receipts” and “sales” in terms of purported logic,

holdings from other jurisdictions, and various tax principles. Because the ALC’s analysis is predicated on a conclusion that the statutes were ambiguous, and not plain, any ambiguity should have been construed in favor of Duke Energy.

The ALC also failed to consider South Carolina’s definitions of “gross receipts” and “sales” in other contexts. Most recently, the South Carolina Supreme Court affirmed the broad meaning of the term “gross proceeds” in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (S.C. 2011), *upholding Travelscape, LLC v. South Carolina Department of Revenue*, 08-ALJ-17-0076-CC (S.C. Admin. L.J. Div. Feb. 12, 2009). In *Duke Power Co. v. South Carolina Tax Commission*, 292 S.C. 64, 66, 354 S.E.2d 902, 903 (1987), the court held that the language of the license fee imposition statute “clearly states that the license fee . . . is based on **entire gross receipts**” (emphasis added). *See also* No. I-D-352, 1984 S.C. Tax LEXIS 14, at *2 (S.C. Tax Comm’n Mar. 26, 1984) (“[g]ross receipts is a **broad term** which includes **all** proceeds received by the entity so long as such receipts resulted from any part of its business”); No. I-D-384, 1985 S.C. Tax LEXIS 6, at *5 (S.C. Tax Comm’n May 17, 1985) (“gross receipts” are not “net receipts” because “[t]he two are something separate and apart. ‘Gross receipts’ has been defined to mean the whole receipts as opposed to net receipts.”); Op. Att’y Gen., 2012 WL 1615813, at *2 (Apr. 2, 2012) (“all ‘gross receipts’ not specifically excluded by ordinance and not exempted by other law should be reported . . . as the basis for its tax”). Indeed, a Westlaw search reveals that some eighty-five code sections in Title 12 of the South Carolina Code use the term “gross receipts.” (R. pp.

411-412; R. pp. 678-727.) These statutes **uniformly** have been interpreted by the

Department to mean “gross” and not “net.”

C. This Court should reverse the decision of the ALC because the ALC’s holding is premised on factual questions not before it.

1. The ALC erred in considering distortion principles in interpreting the meaning of “gross receipts.”

In determining the meaning of the term “gross receipts” and total “sales,” the ALC reasoned that including the principal from the sales of securities in the denominator of the corporate income tax apportionment formula is improper, because to do so would “encourage excessive distortion” and “distortion of business activity representation would be fostered on the front end (through the principal-inclusive standard apportionment formula).” (R. pp. 80-81.)

The ALC’s analysis is fundamentally flawed. The only issue before the ALC was whether, as a matter of law, the gross receipts from the sales of securities should be included in the standard apportionment formula. Whether the inclusion of the principal in the apportionment formula results in distortion is an entirely separate and inherently factual question, to be addressed only after the standard apportionment formula results have been determined. *See Media Gen. Commc’ns., Inc. v. S.C. Dep’t of Revenue*, 388 S.C. 138, 147-48, 694 S.E.2d 525, 529 (2010). In other words, **distortion falls under the second part of a two-part analysis**. Under part one, if a transaction is a “sale”/“gross receipt” for purposes of the sales factor/gross-receipts factor of the standard apportionment formula, then it must be included in the taxpayer’s apportionment formula. If such an inclusion is found to distort the revenue generating activities of the taxpayer, then part two of the analysis - the alternative apportionment statute - provides a specific mechanism for parties to deviate from the standard apportionment provision. *See*

CarMax Auto Superstores West Coast, Inc. v. S.C. Dep't of Revenue, 397 S.C. 604, 611,
725 S.E.2d 711, 714 (Ct. App. 2012).

Notably, the ALC itself correctly recognized this two-part analysis during the summary judgment hearing.¹² Contrary to its own reasoning, the ALC ignored the two-step analysis and subsumed fundamentally factual distortion arguments (part two of the inquiry) into its analysis of the standard apportionment formula (part one of the inquiry) and held that “distortion of business activity representation would be fostered on the front end (through the principal-inclusive standard apportionment formula).” (R. p. 81.)

Not only is the ALC’s analysis in direct conflict with South Carolina law, but it also renders South Carolina’s alternative apportionment statute set forth in S.C. Code Ann. section 12-6-2230 meaningless. The alternative apportionment statute is a “relief mechanism,” which authorizes a party to apply an alternative method to “effectuate an equitable apportionment of the taxpayer’s income” when the standard apportionment formula does not fairly represent the taxpayer’s business activities in the State. *Media Gen. Commc’ns*, 388 S.C. at 151, S.E.2d 525 at 531. The ALC’s reasoning presumes that the inclusion of principal in Duke Energy’s apportionment formula is distortive and the ALC’s remedy of that distortion was its limited construction of the standard apportionment formula. The ALC, thus, imputed an alternative apportionment

¹² The Court: Well, when you say it does not provide a reasonable basis, is that analysis more one that should be made in the second stage of – by this case or is that one that is more – I know you’re going to say “yes,” so it’s more proper in determining what the statute says.

The Court: Because if it does result in something that’s absurd, then you would find that the apportionment – the standard apportionment formula is one that should not be used and it would invoke the statute to allow you to use the more appropriate formula, is that not ...

Mr. Greene: If – yeah. If you – for instance, if you reach that conclusion, that gross receipts covers these types of transaction, the return of somebody’s principal within 30 days is a gross receipt, it has to be added to the apportionment basis, then yes, we would go to the next step. (R. p. 2936, lines 17-23; R. p. 2938, line 23-p. 2939, line 11. (emphasis added).)

mechanism into the standard apportionment provision. That was not, and could not have been, the intent of the Legislature in enacting both statutes.

South Carolina canons of statutory construction mandate that a statute must be construed in a manner so that “no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . .” *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal citations and quotations omitted). The standard apportionment formula statutes are intended to provide a reasonable representation of taxpayers’ business activities in South Carolina. S.C. Code Ann. § 12-6-2210. The alternative apportionment statute is intended to provide a remedy for any inequities that may result from the application of the standard apportionment statute. Contrary to the ALC’s suggestion, the application of alternative apportionment cannot be said to constitute mere “futility of going through this extra-step process needlessly.” (R. p. 81.) The Court is required by South Carolina law to apply the standard apportionment statute in a manner that gives full effect to the legislative intent of enacting the alternative apportionment statute and that does not render it meaningless. *CFRE*, 395 S.C. 67, 716 S.E.2d 877.

2. The ALC erred in determining that the inclusion of the principal in the standard apportionment formula produces an absurd result because it is inherently distortive.

The ALC determined that the inclusion of the principal from the sales of securities in the denominator would produce an absurd application of the standard apportionment formula because it would lead to inevitable distortion of business activity representation. (R. p. 81.) The ALC appears to conflate the “absurd result” theory under the standard apportionment method and the distortion analysis under the alternative apportionment method.

As discussed above, a determination of distortion is an inherently factual issue to be addressed only **after** the standard apportionment formula results are determined.¹³

Media Gen. Commc'ns., 388 S.C. 138, 694 S.E.2d 525; *CarMax Auto Superstores*, 397 S.C. at 611, 725 S.E.2d at 714. The Court must first apply South Carolina's apportionment provisions – including a calculation of the gross receipts or sales factor. Distortion, an issue not before the ALC, is determined only after the apportionment results are calculated. *See CarMax Auto Superstores*, 397 S.C. at 611, 725 S.E.2d at 714.

The ALC's application of its view of statutory construction – that a statute should not be interpreted to produce an “absurd result” – presupposes that the inclusion of the gross receipts in the apportionment factor is absurd. Concluding that inclusion of all of the receipts from the sales of securities produces an absurd result requires a factual inquiry of the nature of the taxpayer's activities in South Carolina, a comparison of that activity to the apportionment results (with and without gross receipts), and a factual finding that such a comparison produces an absurd result in most if not all cases. None of these steps were followed by this Court.

The inclusion of all of its gross receipts does not produce an absurd result or otherwise contradict the purpose of the standard apportionment statute. And certainly there is no evidence that including all of the receipts from the sales of securities in the sales factor or gross-receipts factor denominator produces an absurd result in most, if not all, cases. The ALC did not provide any analysis as to why the inclusion of all receipts from the sales of securities in the gross-receipts/sales factor denominator is distortive or

¹³ If the ALC's decision and the Department's argument are premised on distortion, there are facts at issue and summary judgment is not appropriate.

at a minimum would not (or could not) roughly approximate a taxpayers' business activity in South Carolina.

Duke Energy's sales of securities were conducted as part of its ordinary business operations. (R. pp. 8212-8213 ¶¶ 6, 7.) Including all of its receipts in its sales factor denominator using the standard apportionment formula reasonably represents the proportion of Duke Energy's business carried on in South Carolina. The Department presented no evidence whatsoever to show that including all of the receipts from the sales of securities in the gross-receipts/sales factor denominator produces an absurd result for Duke Energy.

3. The ALC erred in *sua sponte* considering the application of the alternative apportionment formula.

Not only is the ALC's analysis misapplied, but also it is impermissibly based on grounds not raised by the parties. *See, e.g., State v. Dicapua*, 383 S.C. 394 (2009); *Southern Ry. Co. v. Coltex, Inc.*, 285 S.C. 213 (1985) (a trial court lacks authority to grant relief *sua sponte* on a ground not raised by a party).

In its Order, the ALC devoted more than three pages to a discussion focusing on the notion that including the principal from the sales of securities in Duke Energy's standard apportionment formula would lead to an increased application of the alternative apportionment statute and thus result in an absurdity. (R. pp. 79-82.) This argument, a factual inquiry, was not raised by either party during the extensive briefing or at the summary judgment hearing.

4. The Court erred in interpreting the meaning of "Gross Receipts" based on the definition of "Gross Income."

The ALC erroneously determined that "gross receipts" excluded the principal from the sales of securities because "gross income necessarily excludes principal." (R. p.

76.) The fallacy of the ALC's reasoning is known as the "fallacy of denying the antecedent," which the ALC describes in detail in its Amended MSJ Order. (R. p. 61.)

"Gross receipts" and "gross income" relate to two entirely different tax concepts. A taxpayer's "gross income" determines the total amount of money that can be subject to tax. *Media Gen. Commc'ns*, 388 S.C. at 145, 694 S.E.2d at 528; I.R.C. § 61(a). In contrast, "gross receipts" as used in the income apportionment provisions determines the income subject to South Carolina income tax. *Id.* To describe the concepts colloquially, if gross income/taxable income is a cake, the gross-receipts apportionment provision is used to determine the portion of the cake South Carolina is entitled to. The Court's reliance on the definition of "gross income" in construing "gross receipts" conflates two different terms and results in a construction not intended by the Legislature. Accordingly, the ALC's reliance on "gross income" to limit the definition of "gross receipts" as used in the apportionment statute – an argument not advanced by either party – was an error.

5. The ALC erred in interpreting the meaning of "sales" based on the principle of "income-producing activity."

The ALC also concluded that the principal from the sales of securities was excluded from the term "sales" because the definition of "sales" contained the following language: "[i]f 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." (R. p. 77.) The Court focused on the term "income" from the phrase "income-producing activity" and held that because income means "an actual gain or actual increase of wealth," then sales must mean "net" sales.

(R. pp. 77-78.) Once again, this argument was not advanced by either party in its briefs or during the summary judgment hearing.

More importantly, the ALC once again confused two sections of the income tax statute intended to apply to different state income tax concepts. "Income-producing," as used in the sales factor apportionment statute, is a cost-based **sourcing principle** applied to determine **where** a receipt should be sourced for purposes of determining the numerator of the apportionment factor. The concept of income-producing activity has no bearing on whether particular receipts should be included or excluded from the sales factor **denominator**.

The ALC also relied on *Eastman Kodak Co. v. South Carolina Tax Commission*, 308 S.C. 415, 418 S.E.2d 542 (1992), in support of its holding. However, this case is irrelevant. The issue before the *Eastman Kodak* court was whether receipts from certain transactions were business income and thus includable in the apportionment formula denominator, or non-business income and thus allocable. The court held that the receipts at issue constituted business income and were properly includable in the apportionment formula. The issue of whether the receipts from the transactions were included at "gross" or "net" was simply not before the *Kodak* court.

III. THE ALC ERRED IN CONCLUDING THAT DUKE ENERGY IS ENGAGED IN MANUFACTURING AND ELECTRICITY IS TANGIBLE PERSONAL PROPERTY.

The ALC ignored much of the evidence in the record and the testimony of both Duke Energy's expert witness and the Department's expert witness who gave sworn testimony that electricity was not tangible personal property. (R. pp. 126, 141-145.) Instead, the ALC concluded on its own that electricity was tangible personal property. *Id.* The ALC then concluded that Duke Energy "manufactures" tangible personal

property. (R. pp. 131-138.) As a matter of law the ALC's holding is incorrect. Further, the ALC's holding is erroneous in view of the reliable, probative, and substantial evidence on the whole record, the ALC decision constitutes an abuse of discretion and, thus, this Court should reverse. S.C. Code Ann. § 1-23-610(B).

During the Tax Periods at Issue, taxpayers whose "principal business" in South Carolina was the "(a) manufacturing or any form of collecting, buying, assembling, or processing goods and materials within this State; or (b) selling, distributing, or dealing in tangible personal property within this State" were required to apportion their income based on a multi-factor apportionment formula, consisting of property, sales, and payroll factors. S.C. Code Ann. § 12-6-2250 (applicable to tax years after 1995); S.C. Code Ann. § 12-7-1140 (applicable to tax years prior to 1996). **All other taxpayers** (except certain specific industries not relevant here) whose "principal profits or income ... are derived from sources other than those described in Section 12-6-2250" had to apportion their income using a single-factor gross-receipts apportionment formula. S.C. Code Ann. § 12-6-2290 (applicable to tax years after 1995); S.C. Code Ann. § 12-7-1190 (applicable to tax years prior to 1996).

The ALC stated the Electricity Issue before it as follows:

[W]hether Duke Energy, based on its activities within the State, falls under Section 12-6-2250 as a "manufactur[er]," or whether Duke Energy is a seller of service, or otherwise falls under none of the above categories, and is therefore required to apportion its income to South Carolina based on the single-factor gross-receipts apportionment formula pursuant to Section 12-6-2290

(R. pp. 93-94 (emphasis added).)

A. The ALC's holding fails to recognize that taxpayers engaged in the business of manufacturing are only those dealing in tangible personal property.

South Carolina courts and the Department have always viewed manufacturers as persons dealing in tangible personal property. *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Rev.*, 2009 S.C. Tax LEXIS 56, *48, *58 (S.C. Admin. L. Ct. May 4, 2009) (the multi-factor apportionment method set forth in S.C. Code Ann. § 12-6-2250 "is used for taxpayers whose principal business in South Carolina is dealing in **tangible personal property** (typically used by businesses that manufacture, sell, or rent tangible personal property)," whereas the gross-receipts apportionment method set forth in S.C. Code Ann. § 12-6-2290 is "normally used by taxpayers **who do not deal with tangible personal property**, such as financial businesses and **service businesses . . .**") (emphasis added), *upheld on appeal*, 388 S.C. 138, 694 S.E.2d 525 (2010); S.C. Rev. Proc. No. 09-1, 2009 S.C. Tax LEXIS 84, *2-3 (S.C. Dep't of Rev. 2009) ("South Carolina generally requires the use of one of the following apportionment methods: 1. (a) A 'three factor' apportionment method (based on property, payroll, and double-weighted sales) or (b) [after 2006,] a 'single factor' apportionment method (based on sales) for taxpayers whose principal business in South Carolina is dealing in **tangible personal property**. This method is typically used by businesses that **manufacture**, sell, distribute, or rent **tangible personal property**. 2. A 'gross receipts' apportionment method for taxpayers **not dealing in tangible personal property**. This method is typically used in the financial businesses and **service businesses . . .**") (Emphasis added).¹⁴

¹⁴ See also Private Letter Ruling No. PLR-03-1, 2003 S.C. Tax LEXIS 263 (S.C. Dep't of Rev. March 10, 2003); Private Letter Ruling No. PLR-95-9, 1995 S.C. Tax LEXIS 325 (S.C. Dep't of Rev. Aug. 14, 1995) (same); Technical Advice Memorandum No. TAM-94-2, 1994 S.C. LEXIS 162, *4 (S.C. Dep't of Rev. Sept. 20, 1994) (same); *In Re: A Finding Concerning The Income Tax Liability Of XXX, Inc.*, 1993 S.C.

Taxpayers whose principal business in South Carolina is dealing in tangible personal property, and service providers are two distinct categories of taxpayers, subject to entirely different apportionment regimes. The ALC failed to recognize this distinction and held that Duke Energy is engaged in manufacturing – even though Duke Energy provides a service.

1. Electricity is not “tangible personal property.”

“Tangible property,” as set forth in Article 1 of the Income Tax Act, is defined to include “real property and corporeal personal property but does not include money, bank deposits, shares of stock, bonds, credits, evidence of debt, choses in action, or evidence of an interest in property.” S.C. Code Ann. § 12-6-30(11).

The Department agreed that Duke Energy was providing a service, but it, nevertheless, contended that Duke Energy was engaged in the sale of tangible personal property for **income tax purposes** because the service of providing electricity was included in the definition of tangible personal property for **South Carolina sales and use tax purposes**. See S.C. Code Ann. § 12-36-60. (R. pp. 1160-1161; R. p. 5549.) However, that very same statute clearly stated that electricity is a service. And nothing in the income tax code provides that the service of providing electricity is included in the definition of tangible personal property for income taxes. In fact, the income tax definition of tangible personal property makes no mention of electricity or electric service.

The sales and use tax definition of “tangible personal property” provides:

Tax LEXIS 113 (1993); Information Letter No. IL-11-13, 2011 S.C. Tax LEXIS 20 (S.C. Dep’t of Rev. Aug. 19, 2011); Information Letter No. IL-10-9, 2010 S.C. Tax LEXIS 42 (S.C. Dep’t of Rev. Sept. 14, 2010).

"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 [(referred to as the "First Clause")]. It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity [(referred to as the "Second Clause")]. . . .

S.C. Code Ann. § 12-36-60 (emphasis added). Unlike the definition of "tangible personal property" under the Sales and Use Tax Act, the definition of "tangible property" as set forth in the Income Tax Act does not include sales of any services or intangibles such as sales of electricity.

The ALC also failed to recognize the significance of the differences between the sales tax definitions of "tangible personal property" and the income tax definition of "tangible property." (R. pp. 142-143.) The ALC reasoned that because the first sentence of the sales and use tax definition of "tangible personal property" "coincides with the general understanding of the term 'corporeal' included in the [income tax] definition of 'tangible property,'" "according to the plain and ordinary meaning [of the income tax definition] which is supported by the general [sales and use tax] definition of tangible personal property given in the first sentence of Section 12-36-60, I conclude that electricity is tangible personal property." *Id.*

The ALC's reasoning makes little sense. While the First Clause of the sales tax definition of "tangible personal property" might be instructive in interpreting the term "corporeal" used in the income tax definition of "tangible property," it does not follow that electricity is tangible personal property for income tax purposes. Indeed, the South Carolina Legislature recognized that "tangible personal property" is not ordinarily understood to include services and intangibles such as sales of electricity when it

included services like electricity in the sales tax definition of tangible personal property.

The specific inclusion of electricity would be superfluous if, as the ALC reasoned, the

Legislature understood the general meaning of tangible personal property to include electricity. *See, e.g., CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (“a statute must be construed in a manner so that “no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the Legislature would not have enacted it into law.”) (internal citations and quotations omitted).

This common understanding of the nature of electricity in South Carolina law is also confirmed by *Consolidated Hydro Southeast, Inc. v. South Carolina Department of Revenue & Taxation*, No. 95-ALJ-17-0634, 1996 WL 909155 (S.C. Admin. L.J. Div. May 13, 1996). In that case, the court concluded that sale of power by the company was a sale of services for South Carolina license tax purposes. The Court specifically noted:

While electricity is included in [12-36-60] discussing the application of sales tax on the sale of tangible personal property, **the sale of electricity is specifically recognized and defined as a service.**

Id. at *4 (emphasis added).

Even if the definition of “tangible property” is deemed to be ambiguous, such ambiguities must be resolved in favor of Duke Energy. “Generally, a court must apply the rules of statutory construction to resolve the ambiguity and discover the intent of the legislature. However, in the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt.” *See, e.g., Alltel Commc’ns, Inc.*, 399 S.C. at 321, 731 S.E.2d at 873 (internal citations and quotations omitted).

2. Electricity is not “tangible” and thus, it cannot be “tangible personal property.”

The ALC abused its discretion in finding that electricity was tangible personal

property. The ALC denied the Department’s Motion for Summary Judgment on the Electricity Issue finding that material facts were necessary to determine the nature of electricity.

The ALC heard extensive testimony from a number of witnesses, all of whom concluded that the sale of electricity was the sale of a service.¹⁵ According to Professor Papapolymerou, Duke Energy’s expert witness, the provision of electricity involves the provision of a field – an electromagnetic field that lacks physical characteristics, cannot be created or destroyed, and is neither a matter nor a material. (R. p. 2634, lines 16-25; R. p. 2641, line 3-p. 2642, line 24; R. p. 2650, line 15-p. 2651, line 5; R. p. 2658, line 25-p. 2659, line 3.) Electricity is not an object; it is a flow of power that is generated by the manipulation of magnetic fields. *Id.* Electricity has no physical shape or form, height, weight, volume or other dimension typically attributable to tangible property. (R. p. 2499, line 13-p. 2501, line 4; R. p. 2650, line 15-p. 2651, line 24; R. p. 2682, line 2684, line 24.) Professor Papapolymerou testified that one could see the effects of electricity, as in a lightning strike, or feel the effects, as in a shock, but electricity itself cannot be seen or touched. Like wind, sunlight, sound, and heat, electricity has no physical form or body. (R. p. 2638, line 20-p. 2639, line 2; R. p. 2643, lines 1-3; R. p. 2650, lines 15-24; R. p. 2653, line 1-p. 2654, line 25; R. p. 2670, line 8-p. 2671, line 1.) *See Omaha Pub.*

¹⁵ The Department’s expert witness Glen Robinson’s testimony at trial was conflicting, at best. Mr. Robinson testified that Duke Energy’s provision of electricity on a flat-fee basis is a service, and its provision of electricity on a metered-basis is tangible property. (R. p. 2764, line 5-p. 2765, line 13.) Yet, Mr. Robinson acknowledged that in either scenario, the electricity provided is exactly the same. (R. p. 2765, lines 4-13.)

Power Dist. v. Neb. Dept't of Revenue, 248 Neb. 518, 531, 537 N.W.2d 312, 320 (1995)

(Caporale, J. concurring). (electricity "has no physical substance in the sense those two

words are commonly understood . . . it has no readily discernible physical form in the sense that do items such as axes, books, cloth, desks, elevators, fiddles, gavels, and the like.").

Professor Papapolymerou's testimony also established, and Respondent's expert agreed, that Duke Energy does not create the electrons residing in the power lines, and the provision of electricity is not the transfer of electrons to the customer: the electrons simply facilitate the propagation of electricity. (R. p. 2671, line 2; R. p. 2678, lines 13-21; R. p. 2743, line 25-p. 2744, line 4.)

Disregarding both experts' testimony, and the testimony of Duke Energy's Chief Generation Officer, Mr. Jamil, the ALC erroneously held that electricity is tangible personal property because: it "is a physical product" with "physical characteristics;" "the electric charge associated with electricity is a physical property of matter;" "the electric charge . . . can be stored;" "it certainly is possible to feel electricity's impact in the body;" "electricity can be moved, manipulated, and stored;" "electricity is a fungible product;" electricity "can be created, measured, felt, stored, and consumed, and an electric utility may exercise ownership rights over it." (R. p. 143.)

Many things that can be measured, manipulated, felt, or stored are not "tangible." For example, uncontroverted testimony shows that time can be measured and hardly anyone can argue that time is tangible. (R. p. 2656, lines 7-12; R. p. 2744, lines 23-24.) Gravity can be measured, manipulated and stored, but is not tangible. (R. p. 2528, lines 4-19; R. p. 2643, lines 13-18; R. p. 2655, lines 1-25.) Sunlight, heat and cold can be felt,

measured and stored, but are not tangible. (R. p. 2654, lines 7-19; R. p. 2670, line 14-p.

2671, line 1; R. p. 2682, lines 6-13.) As succinctly summarized in *EUA Ocean State*

Corp. v. Commissioner of Revenue, 2006 Mass. Tax. LEXIS 35, *29 (Mass. Tax 2006),

which examined this precise issue in the context of computing the sales apportionment

factor, electricity “is of a nature similar to heat, light and sound, all of which can be

sensed and even measured but, given their lack of form or substance, would not be

considered ‘tangible.’”

The ALC also refers multiple times to electricity as a “product” in interpreting its

meaning. (R. pp. 137, 139, 143, 145.) The reference is not proper and is not relevant.

First, the term “product” is not found in the income tax definition of “tangible property”

or the apportionment statutes at issue here. Second, there is nothing in the record that

indicates electricity is a “product.”

3. Other authority holding that electricity is not tangible personal property.

In reviewing the characterization of electricity for state income tax purposes, the

North Carolina Department of Revenue has opined as follows:

For corporate income tax purposes, North Carolina does not consider the sales of electricity as the sale of tangible personal property. Receipts from the sale of electricity by a generator are sourced for corporate income apportionment purposes as receipts from sales of a service. Although the Department is on record in some non-Department of Revenue publications as treating electricity as tangible personal property for corporate income tax purposes, this position is incorrect. The correct apportionment methodology, which treats the sale of electricity as a sale of service, will apply.

See, e.g., Request for Private Letter Ruling – Nexus Issues (N.C. Dep’t of Rev. Feb. 9, 2007).

Most recently, the Oregon Tax Court addressed the precise issue in this case — the characterization of electricity for purposes of the income apportionment formula — and gave a concise analysis of the nature of electricity. *Powerex Corp. v. Dep't of Revenue*, TC 4800, 2012 Ore. Tax LEXIS 299, 2012 WL 4068501 (Or. Tax Ct. 2012). The court held that sales of electricity are sales of other than tangible personal property for Oregon corporate income tax apportionment purposes. Specifically, the court found that:

The testimony of taxpayer's expert witness supports a finding that electricity does not involve the transfer of something that is tangible or a "thing" that is delivered to a purchaser. Rather, according to that testimony, the transmission of electricity involves transmission of a force occurring by reason of the operation of "virtual photons," which have no mass. Importantly, the testimony of taxpayer's expert established, and the department's witness agreed, that the sale of electricity is not the transfer of electrons from the seller to the buyer. There are as many electrons in the relevant system after the point of transmission of energy to the purchaser as before.

...

The conclusion that taxpayer's expert established is that electricity is a phenomenon in which virtual photons transmit force—not matter. Transmitters of force with no mass do not, in the opinion of the court, come within the legislative understanding of tangible personal property.

Id., 2012 Ore. Tax LEXIS 299 at *6-8, 2012 WL 4068501 at *2-3. The court also noted that the Multistate Tax Commission ("MTC")¹⁶ treats electricity as intangible property.

Id., 2012 Ore. Tax LEXIS 299 at *8-9, 2012 WL 4068501 at *3-4.¹⁷

California and Massachusetts have also concluded that electricity is other than tangible personal property for corporate income tax purposes.¹⁸ *In re Appeal of*

¹⁶ The Multistate Tax Commission is an intergovernmental state tax agency working on behalf of states and taxpayers to administer, equitably and efficiently, tax laws that apply to multistate and multinational enterprises. See About the Multistate Tax Commission, available at <http://www.mtc.gov/About.aspx?id=40>. South Carolina is a sovereignty member of the Commission.

¹⁷ The Department has looked to the Multistate Tax Commission for guidance in interpreting South Carolina's corporate income tax law. See Rev. Rul. No. 97-15 (Oct. 22, 1997).

PacifiCorp, 2002-SBE-005-A, 2002 Cal. Tax LEXIS 469 (Cal. SBE Sept. 12, 2002), the California State Board of Equalization ("SBE") concluded that electricity is intangible rather than tangible and that the sale of electricity is the sale of a service rather than a product. The SBE also noted that both the MTC and the Federation of Tax Administrators¹⁹ treat the sale of electricity as a service, rather than the sale of tangible personal property for corporate income tax purposes. *Id.* at *11.

The Massachusetts Appellate Tax Board also ruled that electricity was not tangible personal property for income tax apportionment purposes. *EUA Ocean State Corp. v. Commissioner of Revenue*, No. C258405-406, 2006 Mass Tax LEXIS 35 (Apr. 24, 2006).²⁰

4. The ALC improperly mischaracterized Duke Energy as a manufacturer.

The ALC's mischaracterization of Duke Energy as a manufacturer is premised on two decisions, issued in other contexts more than eighty years ago and disregards more current interpretations of Duke Energy's business: *Columbia Railway, Gas & Electric Co. v. South Carolina Tax Commission*, 134 S.C. 319, 132 S.E. 611 (1926), and *Duke Power Co. v. Bell*, 156 S.C. 299, 152 S.E. 865 (1930). Those decisions were, of course, issued under a different set of tax statutes - the Manufacturer's Tax Act, former 33 S.C. Stat. 12, § 11-A (1923). Unlike the tax regime at issue in those cases, the term "manufacturing" used in the income tax statutes presupposes a taxpayer dealing in tangible personal property. And more importantly, the courts in those cases did not

¹⁸ California and Massachusetts are Associate & Project members of the Multistate Tax Commission. Oregon is a Compact Member.

¹⁹ The Federation of Tax Administrators ("FTA") is an organization of state tax officials. See <http://www.taxadmin.org/>. The Department is a member tax agency of the FTA.

²⁰ Duke Energy notes that while other states have ruled that the sale of electricity is a sale of tangible personal property in other tax contexts, none of those cases are in the context of income tax apportionment.

examine the taxpayer's activities – the courts simply relied on a single statement in the company's charter. These cases are of little help in interpreting, eighty years later,

whether Duke Energy is principally engaged in manufacturing or in providing services.

B. The ALC erred in holding that the Department has a “Long-standing Policy” of Treating Electric Service Providers as Manufacturers.

Agencies adopt (or announce) policies through the promulgation of regulations or policy documents, which in the Department's case would include Revenue Rulings, Revenue Procedures, Public Letter Rulings and Agency Publications. The Department's only evidence of its purported longstanding policy to treat power companies as manufacturers is a corporation audit manual which was never published or otherwise distributed outside of the Department.²¹ (R. p. 2591, line 8-p. 2597, line 15; R. p. 2617, lines 10-14.)

At best, the audit manual offers conflicting evidence of Respondent's policy. On the one hand, the audit manual states that service providers (those whose principal business was providing a service) must apportion their income to South Carolina based on the single-factor gross-receipts apportionment method. If the provision of electricity constitutes the provision of a service, then under the audit manual, a company like Duke Energy, engaged in the provision of electric service, is required to apportion using the single-factor apportionment formula. On the other hand, the audit manual states, without any further explanation, that power companies must use the multi-factor apportionment formula. (R. p. 2603, lines 22-25.) The Department's witness was unable to explain this inconsistency.

²¹ The audit manual relied upon by the Department is not dated and the Department has not otherwise introduced testimony to indicate when the manual was prepared by the Department.

Indeed, the South Carolina Supreme Court only recently opined that because an agency guideline "has not been formally adopted as a regulation, it does not have the force and effect of law and is entitled to no deference." *Doe v. S.C. Dep't of Health & Human Srvs.*, 398 S.C. 62, 68, 727 S.E.2d 605, 608 (2011). Because the policy stated in Respondent's audit manual contains unexplained inconsistencies and is an invalid "bootleg" regulation, the ALC erred in affording it any deference. *Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control*, 372 S.C. 351, 359, 641 S.E.2d 763, 767 (Ct. App. 2007).

C. Other Evidence Indicating that Duke Energy's provision of electricity is a service.

The Department agreed that Duke Energy's provision of electricity was a service. (R. p. 5549, n.2.) However, as described above, it mistakenly relied on the sales tax definition of "tangible personal property" in concluding that Duke Energy's sales of electricity were sales of tangible personal property for income tax purposes. *Id.*

The General Assembly also repeatedly refers to the furnishing of electricity as a "service" in the South Carolina Public Service Commission ("SCPSC") statutes, *e.g.*, S.C. Code Ann. § 58-27-620. Mr. Jamil testified that Duke Energy was a service provider. (R. p. 2496, line 18-p. 2497, line 5; R. p. 2514, lines 8-18; R. p. 2520, line 25-p. 2521, line 10.) Duke Energy holds itself as a service provider in its annual reports filed with the U.S. Securities and Exchange Commission ("SEC"). (R. pp. 7707-7708; R. pp. 7272-7273.) Duke Energy is subject to the jurisdictions of the SCPSC, which regulates electricity service providers, not manufacturers. (R. p. 2491, lines 13-19; R. p. 2498, lines 23-24; R. p. 2504, line 6-p. 2507, line 2; R. p. 2514, lines 1-7.)

Further, in preparing its federal income tax returns which are part of Duke Energy's South Carolina income tax returns, Duke Energy was required to list a Principal Business Activity Code, which is derived from the NAICS (formerly the U.S. Standard Industrial Classification system ("SIC")).²² These codes are determined based on the activity from which the company derives the highest percentage of its total receipts. During all of the Tax Periods at Issue, on its original and amended returns, Duke Energy included the code for the electric power generation, transmission and distribution utilities category, and not the manufacturing category, on its federal corporate income tax returns, which it filed as part of its South Carolina corporate income tax returns. (R. p. 2436, lines 1-3.) The Department never contested Duke Energy's use of the utility NAICS classification despite multiple audits that lasted for years at a time.

- 1. Duke Energy is a service provider because more than 50 percent of its receipts are from the sale of electric service.**

The Department has previously ruled that:

[W]hether a business is a service related industry can be made by comparing the gross receipts of the business derived from providing services to total gross receipts of the business. **If over 50 percent of the gross receipts are from providing services, then the business would be service related. This method has been utilized by the [South Carolina Tax] [C]ommission in determining whether a multistate taxpayer is providing services and thus would utilize the gross receipts ratio to apportion its income.**

²² The NAICS codes are available on the U.S. Department of Commerce's website, <http://www.census.gov/eos/www/naics/>. The ALC took issue in its Amended Final Order that the NAICS and federal income tax return instructions referenced by the witness pertained to years after the Tax Periods at Issue. However, Appellant's witness Cooper Monroe, who has prepared or reviewed Duke Energy's federal tax returns for twenty four years, testified that the NACIS (formerly SIC) codes that exist today are substantially the same as the ones in effect during the Tax Periods at Issue. (R. p. 2474, line 15-p. 2475, line 25.)

Rev. Rul. No. RR-87-5, 1987 S.C. Tax LEXIS 15, at *3 (S.C. Tax Comm'n Sept. 16, 1987) (emphasis-added).

Mr. Jamil and Duke Energy's State and Local Tax Director, Mr. Cooper Monroe, testified that the provision of electric service is Duke Energy's primary and principal business because Duke Energy derives its principal receipts or income from sales of electrical service. (R. p. 2425, line 10-p. 2426, line 1; R. p. 123.) Mr. Jamil's and Mr. Monroe's testimony is supported by Duke Energy's Form 10-Ks filed with the SEC and its federal income tax returns filed with the IRS and the Department. (R. pp. 5927-7887; R. pp. 4183-5530.) Although Duke Energy was engaged in other lines of businesses, such as sales of appliances, telecommunications, etc., at all times during the Tax Periods at Issue, more than 50 percent of Duke Energy's gross receipts were derived from the provision of electric services. *Id.*; (R. p. 2425, line 10-p. 2426, line 1.)

2. The ALC erred in holding that Duke Energy is engaged in processing goods or materials.

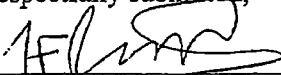
The ALC held that because Duke Energy uses coal, water or nuclear fuel to power its generators, it is engaged in the processing of goods and materials for income tax purposes and thus, required to use the three-factor formula. The ALC's reasoning makes little sense. Duke Energy's generators do not process any goods or materials. Instead, the generators cause a changing magnetic field that induces a flow of current, or electricity. Nothing tangible is created by this process. As the *Powerex* court stated succinctly, "[t]here are as many electrons in the relevant system after the point of transmission of energy to the purchaser as before." *Powerex Corp.*, 2012 WL 4068501 at *3.

CONCLUSION

Based on the foregoing, Duke Energy respectfully requests that this Court:

- I. Reverse the ALC and enter a finding that the ALC erred in holding that, as a matter of law, Duke Energy's refund claims for the tax years 1978 through 1993 were untimely.
- II. Reverse the ALC and enter a finding that Duke Energy is required to include its gross receipts from the sales of securities in the computation of its apportionment formula.
- III. Reverse the ALC and enter a finding based on the uncontested evidence that Duke Energy is not a manufacturer, is not engaged in processing goods and materials, that electricity is not tangible personal property, and therefore, Duke Energy is required to apportion its income pursuant to the single-factor gross-receipts apportionment method.

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UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE

REPORT OF THE UNITED STATES DEPARTMENT OF AGRICULTURE

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Statement of the Issues

1. On December 30, 2002, Duke Energy filed amended returns for the years 1978-2001 seeking an income tax refund in excess of \$120 million, plus interest. The 1978-1993 returns were filed outside of the statutory limitations periods for those years and the Department had no authority to extend those periods. Did the Administrative Law Court correctly determine that the refund claims for the years 1978-1993 were untimely?

2. Duke Energy regularly invests excess cash from its operations in relatively risk-free short-term investments and recovers the invested asset plus an investment return within a short period of days or a few weeks. Did the Administrative Law Court correctly determine that Duke Energy is not entitled to include in its apportionment formula the amount of principal recovered from short-term investments of excess cash from operations?

3. The Supreme Court has held at least twice that an entity engaged in generating electricity is engaged in manufacturing. Duke Energy is engaged in the generation, transmission, and distribution of electricity, the processes Duke Energy uses to produce electricity are interconnected, and the process of generating, transmitting, and distributing electricity employed by Duke Energy is machinery-intensive. Does substantial evidence support the Administrative Law Court's determination that Duke Energy is engaged in manufacturing?

Statement of the Case

This case involves Duke Energy Corporation's amended South Carolina corporate income tax returns for the years 1978-2001 (Periods at Issue) filed on December 30, 2002 and seeking a total refund of tax in the approximate amount of \$125 million, plus interest (Refund Claims).¹ During the Periods at Issue, Duke Energy was engaged in the generation, transmission, distribution, and sale of electricity in portions of North Carolina and South Carolina. [See R. at 122 (Am. Final Order & Decision, p.3 (Dec. 4, 2012) (Mfg. Order)).] Because it operated in more than one state, Duke Energy was required to calculate its South Carolina taxable income using an appropriate apportionment formula. S.C. Code Ann. §§ 12-6-2210(B), -2240.

In its originally-filed returns for all the Periods at Issue, Duke Energy apportioned its income using the property, payroll, and sales factors,² used by entities "whose principal business in this State is (a) manufacturing or any form of collecting, buying, assembling, or processing goods and materials within this State or (b) selling, distributing, or dealing in tangible personal property within this State." See S.C. Code Ann. § 12-6-2250.³ Duke Energy did not include in the apportionment formula of its 1978-1999 original returns the amount of principal recovered from short-term investment transactions. [R. at 51 (Am. Order Granting Summ. J. in Part & Denying Summ. J. in Part, p.3 (Oct. 11, 2012) (SJ

¹ The refund amount was derived from a comparison of the original and amended returns filed by Duke Energy for the Periods at Issue. The amended returns followed an initial round of amended returns filed on or about September 24, 2002.

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

³ The 2006 amendments to the apportionment formulas do not apply to the Periods at Issue. S.C. Code Ann. § 12-6-2252; see 2007 S.C. Acts. No. 110, § 50A, No. 116, § 55A.

Order)).] It did, however, include these amounts in its originally-filed returns for 2000-2001. [R. at 51 (SJ Order, p.3 n.6).]

The Refund Claims were based on the following substantive and substantial changes to its originally-applied apportionment formulas for the Periods at Issue:

- Duke Energy postulated that, despite years of contrary practice, it provides services and, as such, must use the single factor formula for entities whose “principal profits or income ... are derived from sources other than those described in Section 12-6-2250” S.C. Code Ann. § 12-6-2290.⁴
- Duke Energy contended that the apportionment statutes require it to include in the denominator of the pertinent apportionment formula the amount of principal recovered from short-term investments of excess cash generated from its operations.

On February 4, 2010, the Department issued a written determination denying the Refund Claims in whole (Determination) on the following grounds:

- *Timeliness.* The applicable limitations periods for the governing refund statutes had expired for many of the Periods at Issue and could not be extended or revived by execution of myriad Forms FS-43 entitled “Field Services Division—Consent to Extend the Time to Assess Tax.”⁵ [R. at 5555-56 (Dep’t Det’n, pp.9-10)].
- *Manufacturing.* Duke Energy is a manufacturer required to use the three-factor formula based on Supreme Court precedent and Department policy. [R. at 5548-49 (Dep’t Det’n, pp.2-3).]
- *Recovery of Principal.* Including recovered principal in the apportionment formula was contrary to the Department’s long-standing administrative policy, would unreasonably represent the amount of business Duke Energy does in South Carolina, and would lead to an absurd result. [R. at 5549-54 (Dep’t Det’n, pp.3-8).]

Duke Energy timely filed a request for contested case hearing with the South Carolina Administrative Law Court (ALC) on March 3, 2010. After discovery concluded, the Department moved for summary judgment on April 20, 2012 on all three grounds in the Determination. On May 21, 2012, Duke Energy filed its opposition to the motion for

⁴ Section 12-6-2290 was enacted in 1995 and was substantially the same as section 12-7-1190 under prior law. None of the exclusions in section 12-6-2290 apply here.

⁵ [See R. at 216 (schedule showing Forms FS-43 expiration date, periods included, and dates signed); R. at 218-40 (separate Forms FS-43).]

summary judgment and also filed a cross-motion for summary judgment on the ground that it was entitled to include the return of investment principal in its apportionment formula as a matter of law. On June 4, 2012, the Department filed its reply and opposition to the cross-motion for summary judgment.

On June 26, 2012, the ALC heard arguments on the motions for summary judgment.⁶ By Order dated August 9, 2012, the ALC granted in part the Department's motion for summary judgment, ruling that Duke Energy's amended returns filed for the 1978-1993 tax years were untimely and that Duke Energy could not include recovered principal in its apportionment formula. The ALC denied the Department's motion with respect to the manufacturing issue, concluding that a hearing would be necessary to determine factual issues related to the claim. Duke Energy filed a motion to reconsider the grant of summary judgment on August 20, 2012 and the Department filed its opposition to that motion on September 14, 2012.⁷ On September 21, 2012, in response to an inquiry from the ALC on September 19, 2012, the parties stated their position regarding a statement made by Duke Energy in its motion to reconsider. On October 11, 2012, the ALC issued the SJ Order and its Order Denying Motion for Reconsideration in Part and Granting Reconsideration in Part (SJ Recons. Order), in which the ALC amended its original order in some respects but reaffirmed the grant of summary judgment to the Department on the same grounds.

In the meantime, the ALC conducted a contested case hearing on September 5-6, 2012 regarding the manufacturing issue. Both parties presented witnesses and introduced

⁶ The ALC stated in a June 29, 2012 call that it would draft the Order regarding timeliness. Duke Energy's contrary assertion, Br. of Appellant, p.3 n.1, is incorrect.

⁷ The ALC stayed its August 9, 2012 Order after the motion to reconsider was filed [R. at 86 (SJ Recons. Order, p.2 n.1).]

exhibits, both separately and jointly. On November 2, 2012, the ALC issued an Order ruling that Duke Energy did not meet its burden to prove that it is not a manufacturer and,

thus, is not eligible to use the single-factor apportionment method reported on its amended returns. Duke Energy moved to reconsider the ALC's order on November 13, 2012. On December 4, 2012, the ALC reaffirmed its original decision through the Mfg. Order and the Reconsideration Order (Mfg. Recons. Order).

Duke Energy timely filed a Notice of Appeal on January 3, 2013. Duke Energy moved to consolidate all appeals before this Court by motion dated January 14, 2013. This Court granted that motion by Order dated January 23, 2013.⁸

Summary of Arguments

The Pre-1994 Amended Returns were Untimely

The amended returns for 1978-1993 did not comply with the pertinent statutory requirements for filing refund claims during those years. Duke Energy's incantation of Forms FS-43, Consent to Extend the Time to Assess Tax, is unavailing because that form did not extend the time limitations for filing refund claims. At bottom, Duke Energy is demanding that the Department apply today's statutory standard retroactively even though that standard was unavailable to other filers during those periods. Duke Energy's position is not based in case law or the proper application of recognized principles of statutory construction. The ALC therefore correctly determined that Duke Energy's pre-1994 refund claims were untimely because none of those claims was filed before the applicable limitations periods closed and because the doctrines of estoppel and equitable tolling do not save or revive those claims.

⁸ The Department does not accept Duke Energy's recitation of the facts *in toto*, but addresses the pertinent facts separately for each issue.

Apportionment Factors do not Include Recovered Principal

The ALC correctly ruled that Duke Energy was not entitled to include in its apportionment formula the amount of principal recovered as part of the company's routine and regular investment of excess cash from its operations in short-term instruments. As a matter of law, the principal recovered from an investment transaction is simply the return of a company asset and a reading of the statute that allows including such non-income in the apportionment formula is contrary to the plain language of the relevant statutes and yields an absurd result.

Generating Electricity is Manufacturing

The ALC also correctly ruled that Duke Energy did not meet its burden to prove that it is not a manufacturer of electricity. The Supreme Court has held that an electric utility which generates electricity is engaged in manufacturing. The ALC also correctly determined that the Department has consistently maintained a policy that electric utilities are manufacturers. And the substantial evidence introduced at the hearing shows that electricity is a unique product with unique physical characteristics required by customers that is produced at a generation facility using a mechanical device known as a generator. The electricity delivered to customers is measured and Duke Energy charges its customers based on the quantity of electricity consumed.

Standard of Review

This appeal presents two different standards of review. Below, the Department moved for summary judgment on all three of the issues comprising this appeal; however, Duke Energy took varying approaches in response, opposing the Department's motion as to two issues, while filing a cross-motion for summary judgment as to the third. The ALC

decided the timeliness and recovery-of-principal issues against Duke Energy in the context of summary judgment and decided the manufacturing issue following a contested

case hearing. The pertinent standards of review are set forth below.

Timeliness. Because Duke Energy did not file a cross-motion for summary judgment on this issue, it is limited to arguing that a genuine issue of material fact exists. It instead argues that the ALC erred as a matter of law and that it is entitled to judgment. In analyzing this issue, the Court is required to apply the same standard applied by the trial court. *See Hansson v. Scalise Builders of S. Carolina*, 374 S.C. 352, 354, 650 S.E.2d 68, 70 (2007) (“When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP.”); *see also* R.P.A.L.C. 68. Importantly, the non-moving party cannot simply rest on allegations or denials but must identify facts establishing a genuine issue for trial. *E.g., Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 589, 635 S.E.2d 649, 654 (Ct. App. 2006).

Recovery-of-Principal. The parties filed cross-motions for summary judgment on this issue, thereby agreeing that there are no disputed issues of material fact and the issue may be resolved as a matter of law. *Alltel Commc'ns, Inc. v. S. Carolina Dep't of Rev.*, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012). The standard to be applied in determining the legal question is the same as that for the timeliness issue.

Manufacturing. The ALC conducted a contested case hearing on the merits of this issue, ultimately agreeing with the Department. Consequently, this Court may reverse the ALC's determination of the manufacturing issue only if that decision was

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;

- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
 - (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
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S.C. Code Ann. § 1-23-610(B); *see Travelscape, LLC v. S. Carolina Dep't of Rev.*, 391 S.C. 89, 96-97, 705 S.E.2d 28, 32 (2011).

Argument

1. The ALC correctly determined that Duke Energy's refund claims for tax years prior to 1994 were untimely.

"A refund of taxes is solely a matter of governmental grace ... and any person seeking such relief must bring himself clearly within the terms of the statute authorizing same...." *Asmer v. Livingston*, 225 S.C. 341, 344, 82 S.E.2d 465, 466 (1954) (internal citations omitted); [*see R.* at 55 (SJ Order, p.7 ("This Court cannot simply by implication extend the time to file a refund request."))]. The "terms of the statute" include limitations periods, which are crucial aspects of the fair administration of tax policies and procedures. *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 301 (1946). The 1978-1993 amended returns did not comply with the pertinent limitations periods.

- A. *The Refund Claims for 1978-1993 did not comply with the statutory requirements for claiming refunds in effect during those years.*

There is no genuine dispute of material fact that, with respect to the 1978-1993 tax years, Duke Energy did not pay any amounts under protest, did not institute any action in circuit court, and did not file a refund claim within three years after the original due date of the return. These failures are fatal to the refund claims for these years.⁹ Instead, Duke

⁹ The Department does not dispute that the Refund Claims for 1994 and later were timely because the limitations periods for those years were extended using the substantially-different provisions enacted effective August 1, 1995 by the Revenue Procedures Act (RPA). *See* 1995 S.C. Acts No. 60, § 4.D.(1).

Energy's arguments can be condensed to the following: the statutes at issue, and therefore the ALC's interpretation of their plain language, cannot mean what they say, because such a construction would be unfair to Duke Energy.

- (1) *The Refund Claims for 1978-1989 did not comply with Sections 12-47-210 and 12-47-220, which authorized a refund only if the taxpayer paid the tax under protest and, within 30 days, instituted an action in circuit court.*

The South Carolina Supreme Court made clear in *Bass v. State* that, as of 1992, South Carolina Code Sections 12-47-210 and 12-47-220¹⁰ were the "exclusive remedy" for obtaining a refund of income taxes for years prior to 1990. 307 S.C. 113, 116, 414 S.E.2d 110, 112 (1992), *cert. granted, judgment vacated on other grounds by Bass v. S. Carolina*, 509 U.S. 916 & *abrogated by Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993); *Perpetual Bldg. & Loan Ass'n of Columbia v. S. Carolina Tax Comm'n*, 255 S.C. 523, 527, 180 S.E.2d 195, 197 (1971) (noting "exclusive remedy"). Duke Energy's contrary assertion, Br. of Appellant, p.14, is incorrect.¹¹

Sections 12-47-210 and 12-47-220 required a taxpayer who sought a refund of taxes to pay the amount under protest and institute an action in circuit court within 30 days after payment. *See S. Carolina Nat. Bank v. S. Carolina Tax Comm'n*, 297 S.C. 279, 282, 376 S.E.2d 512, 514 (1989). Failing to pay under protest was fatal to any refund claim.

¹⁰ Because the statutes changed over the 23-year period at issue, the year is omitted from the citation. [See R. at 56 (SJ Order, p.8 n.10).] Some of the statutes at issue were repealed in 1995 and are not in the current Title 12 of the South Carolina Code of Laws.

¹¹ Duke Energy obliquely references "Due Process Clause concerns," Br. of Appellant, p.14, but has not preserved that issue for review. Nothing about constitutional issues, let alone Due Process, is included in its statement of issues on appeal. Br. of Appellant, p.1; *see* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). Moreover, this claim would in any event be an "as applied" contention that has been waived because it was not presented to or ruled upon by the ALC. *See Travelscape*, 391 S.C. at 109, 705 S.E.2d at 38-39 (addressing the ALC's ability to consider "as applied" constitutional claims).

See, e.g., City of Columbia v. Glens Falls Ins. Co., 245 S.C. 119, 139 S.E.2d 529 (1964).

There is no genuine dispute of fact that none of these payments was made under protest.

[R. at 56 (SJ Order, p.8).] There also is no genuine dispute that Duke Energy did not file an action in circuit court within 30 days after the payment was made. [*Id.*] Consequently, the ALC correctly determined that Duke Energy's refund claims for the tax years 1978-1989 were untimely.¹²

- (2) *The Refund Claims for 1990-1993 did not comply with sections 12-47-210 and 12-47-220 and also did not comply with section 12-47-440, which required filing a refund claim within three years of the original due date for the return.*

In 1994, the General Assembly amended section 12-47-440 to apply to refund claims for tax years beginning in 1990 and later. 1994 S.C. Acts No. 464, § 3(B). As amended, section 12-47-440 allowed filing an income tax refund claim within three years from the original due date of the return, without regard to extensions of time to file. Because Duke Energy's tax period is the calendar year, its tax returns and payment for any year originally were due on March 15th of the following year. S.C. Code Ann. § 12-6-4970(B)

¹² Although Duke Energy disputes, without support, the determination that an exclusive remedy existed for claiming a refund for payments made before 1990, it does not appeal from the finding that it neither made payment under protest nor instituted a challenge action in the circuit court within 30 days of payment. [*See* R. at 56 (SJ Order, p.8 ("[T]here is no evidence that any of the payments for [the years of 1978 to 1989] were made under protest ... and no action was filed in circuit court within 30 days after the payment was made."))].] Consequently, if the Court affirms the ruling that sections 12-47-210 and -220 were exclusive before 1990, the ALC's findings with respect to filing under protest and instituting an action are the law of the case and alone require affirming the ALC for 1978-1989. *See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed factual ruling by a lower court is the law of the case); *see also Brading v. County of Georgetown*, 327 S.C. 107, 113, 490 S.E.2d 4, 7 (1997) (holding an unappealed ruling is the law of the case); *State Farm Mut. Auto. Ins. Co. v. James*, 337 S.C. 86, 95, 522 S.E.2d 345, 349 (Ct. App.1999) (same).

(after 1995); S.C. Code Ann. § 12-7-1640 (before 1996). The applicable periods for the years 1990-1993 therefore were as follows:

Income Tax Year	Return Originally Due	Refund Period Closed
1990	March 15, 1991	March 15, 1994
1991	March 15, 1992	March 15, 1995
1992	March 15, 1993	March 15, 1996
1993	March 15, 1994	March 15, 1997

Because there is no dispute that claims for these years were not filed until December 2002, the refund claims for these years were untimely. [R. at 57, 65-66 (SJ Order, pp.9, 17-18).]

B. Forms FS-43 executed for the 1978-1993 tax years did not render Duke Energy's refund claims timely because those authorized an extension only of the time in which the Department could issue a notice of assessment.

Despite failing to comply with sections 12-47-210, -220, and -440 for 1978-1993, Duke Energy contends that its claims were rendered timely by myriad Forms FS-43 executed by the parties. However, these forms, entitled "Consent to Extend the Time to Assess Tax," did nothing more than extend the time in which the Department could issue an assessment of taxes against Duke Energy because the Department had no authority to extend the time to file a refund claim before enactment of the RPA in 1995.

- (1) *Form FS-43 must be interpreted in light of the authority granted by section 12-54-80 in effect during the Periods at Issue.*

Form FS-43, consistent with its title, simply explains its purpose as follows:

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.¹³

¹³ [R. at 218-40 (Forms FS-43).]

The legal effect of Form FS-43 thus depends on the provisions and limitations of section 12-54-80¹⁴ because the form expressly references that statute and no employee or agent

of the Department may exceed the authorization granted by a statute. *TNS Mills, Inc. v. S. Carolina Dep't. of Rev.*, 331 S.C. 611, 621-22, 503 S.E.2d 471, 478 (1998) (“[I]n fact, the only inference arising from the legislative history is that only the General Assembly may extend the application deadline.”); *Asmer*, 225 S.C. at 343-44, 82 S.E.2d at 466.

Section 12-54-80 contains no language regarding refunds, let alone language authorizing an extension of time to claim a refund.¹⁵ [R. at 55 (SJ Order, p.7)]. The statute governed the time in which a notice of assessment could be issued and, if a taxpayer consented in writing to an extension, allowed the “notice of assessment” to be mailed “at any time prior to the expiration of the period agreed upon.” In sum, it is a statute directed to and operative on the Department because a notice of assessment always is issued to the taxpayer by the Department. [R. at 55, 59 (SJ Order, pp.7, 11)]; see *SCANA Corp. v. S. Carolina Dep't of Rev.*, 384 S.C. 388, 391, 683 S.E.2d 468, 469 (2009) (court must interpret tax statute according to its plain meaning). The statute does not apply to refund claims, shown by the fact that section 12-54-85, adopted in 1995 to replace section 12-54-80, contains express language regarding refund claims. Compare S.C. Code Ann. § 12-54-80 with S.C. Code Ann. § 12-54-85(F)(1).

¹⁴ Section 12-54-80 became effective on September 1, 1985, but was not retroactive. See *S. Carolina Nat. Bank*, 297 S.C. at 280-81, 376 S.E.2d at 513. The RPA replaced section 12-54-80 with section 12-54-85.

¹⁵ Duke Energy attempts to make much out of assertions that the Department requested the execution of some Forms FS-43. Br. of Appellant, p.11. However, in other situations, Duke Energy requested execution of the forms. [See R. at 836, 909-13 (Reply & Opp'n to Duke Resp. & Cross-Mot. p.12 & Exs. H & I).] Because Form FS-43 only extended the time in which the Department could issue an assessment, the question of who initially requested any of the Forms FS-43 is irrelevant to the issue before this Court.

The absence of language in section 12-54-80 authorizing extensions for refund claims is significant because, prior to enactment of the RPA in 1995, the Department had

no authority to extend the time for filing refund claims. The statutes in effect before 1995, sections 12-47-210, -220, and -440, did not authorize extensions of time. Section 12-60-40, which generally authorizes the Department to "extend time limitations provided by [Title 12] and for other taxes," was not effective until 1995. *See* 1995 S.C. Acts No. 60, § 4.L. No other statutes authorized extensions of time for refund claims, which is confirmed by the fact that Duke Energy's brief does not cite to any other statutes for that proposition. In sum, the effect of Form FS-43 claimed by Duke Energy for 1978-1993 was wholly outside the Department's authority.

Prior to 1995, the only authority granted to the Department regarding income tax refunds other than sections 12-47-210, -220, and -440 was section 12-54-30, which permitted it to refund amounts discovered on examination of a return or otherwise even if a claim for refund was untimely.¹⁶ This statute did not modify the refund statutes. S.C.

¹⁶ Duke Energy contends that the Department paid other income tax refunds to Duke Energy many years after the pertinent limitations periods expired. Br. of Appellant, p.13. This and other assertions in Duke Energy's brief are supported by citation to an affidavit from T. Cooper Monroe, III, who currently is the Director of State and Local Tax for Duke Energy. However, the ALC expressly declined to consider Mr. Monroe's affidavit because it was submitted after the hearing on the summary judgment motion. [R. at 62 (SJ Order, p.14 n.13).] Parties are precluded from raising new issues and arguments in post-trial submissions to the court that could have been raised at trial. *See Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995). Moreover, Duke Energy did not request reconsideration of the ALC's ruling in a motion for reconsideration, [see R. at 1039-40 (Pet's. Mem. Auth. Supp. Mot. Recons., pp.4-5 (omitting any discussion of ruling rejecting Monroe Affidavit))], and, thus, has not preserved that issue for review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) (first step in preserving an issue for appellate review is to actually raise it below); *see also Home Medical Sys., Inc. v. S. Carolina Dep't of Rev.*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009) ("Although a Rule 59(e) motion may effectively seek a reconsideration of issues and arguments, this type of motion is often required for issue preservation purposes.") (emphasis in

Tax Comm'n Decision 88-162, 1988 WL 409374 (June 30, 1988); see *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011) ("The

construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons."). Section 12-54-30 was a narrow remedy, available only in the context of review by the Department, and a taxpayer had no right to judicial review of any decision made under that statute. See *Argent Lumber Co. v. Query*, 178 S.C. 1, 182 S.E. 93 (1935) (holding no right to judicial review of predecessor statute), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985); see also S.C. Rev. Rul. 91-10, 1991 WL 11666893 (May 29, 1991) (noting no right to appeal decisions under section 12-54-30 and citing to *Argent Lumber*). But this statute did allow the Department to grant refunds in appropriate circumstances, such as overpayments identified during an examination, which explains the "refund" reference in Form FS-43.

- (2) *Forms FS-43 did not extend the period in which Duke Energy could file a refund claim for any year before 1994.*

Duke Energy contends that the Forms FS-43 executed for the years 1978-1993 timely extended the period for filing a refund claim for these years. Even assuming, without at all conceding, that Form FS-43 authorized an extension of time to file a refund claim, Duke Energy fails to acknowledge that, once a tax limitations period closes, it cannot be reopened. See *Berry v. Commissioner*, 97 T.C. 339, 347 (1991) ("When the assessment period is extended after the period for filing a claim for credit or refund has expired, the consent agreement does not revive or extend the expired claim period.").

original). Indeed, based on the paucity of argument in its motion, virtually all of the issues presented in its brief concerning timeliness are not preserved for review.

There is no genuine dispute that the 30-day limitations period of sections 12-47-210 and -220 closed for 1978-1989 well before enactment of the RPA in 1995 and well before any Form FS-43 was executed for those years.¹⁷ [R. at 216 (Form FS-43 Schedule).]

Similarly, although the limitations period for any open years could have been extended by a Form FS-43 after the RPA was enacted, *see* S.C. Rev. Proc. 95-5, 1995 WL 17817640 (1995), there is no genuine dispute that the limitations periods for the years 1990-1993 expired before any Form FS-43 was executed for those years. The refund periods for 1990 and 1991 closed before the RPA became effective on August 1, 1995. And although 1992-1993 had not closed on August 1, 1995, those years were not timely extended because a Form FS-43 was not executed before the applicable three-year period expired on March 15 of the succeeding year.¹⁸ That is, the Form FS-43 for 1992 was not executed until May 30, 1996, [R. at 216 (Form FS-43 Schedule),] which is more than two months after the three-year period expired on March 15, 1996. The Form FS-43 for 1993 was not executed until June 20, 1997, [R. at 216 (Form FS-43 Schedule),] which is more than three months after the three-year period expired on March 15, 1997.

Finally, Duke Energy contends that its amended returns were timely because the Forms FS-43 were executed prior to the expiration of 180 days from an IRS adjustment

¹⁷ The 1978-1983 tax years appeared for the first time on the Forms FS-43 with the execution of the form effective May 30, 1996. [R. at 218-40 (Forms FS-43).] The only available avenue for reviewing the taxable income of the years 1978-1982 in 1996 would have been an assessment based on an IRS adjustment. *See* S.C. Code Ann. §12-54-85(D)(1); *cf.* S.C. Code Ann. § 12-54-80 (prior law). Duke Energy makes no argument in its brief that the timeliness of refund claims for these years is saved by an IRS adjustment. *Cf.* Br. of Appellant, p.15 (alleging that IRS adjustment opened the years 1984, 1986-1989, & 1990-1993). In any event, any refund would be limited to the issue contained in the IRS adjustment, which would not include allocation and apportionment issues.

¹⁸ [R. at 218-240 (Forms FS-43).]

for the years 1984, 1986-1989, and 1990-1993.¹⁹ Br. of Appellant, p.15; *see* S.C. Code Ann. §12-54-85(D)(1); *cf.* S.C. Code Ann. § 12-54-80 (prior law). However, this

assertion is supported by the post-hearing affidavit of T. Cooper Monroe, which Duke Energy cannot rely upon because the ALC correctly refused to consider the affidavit. *See* discussion *supra* p.13 n.16. In any event, any extension attributable to an IRS adjustment would have been limited to the tax issues raised by the IRS. [R. at 56-57 (SJ Order p.8-9 n.11).] To accept Duke Energy's argument would require this Court to hold that an IRS adjustment on any single issue serves to fully open an otherwise-closed tax year, a holding inconsistent with the rule that refund statutes are construed narrowly. *See, e.g., Asmer*, 225 S.C. at 344, 82 S.E.2d at 466. Because the state allocation and apportionment issues raised in the amended returns could not have been at issue in a federal determination, the purported extensions of the 1984, 1986-1989, and 1990-1993 tax years are in any event untimely as a matter of law.

C. Duke Energy is not entitled to prevail based on theories of waiver, estoppel, or equitable tolling because these doctrines do not apply against the Department and are not applicable here in any event.

In each of its arguments regarding waiver, estoppel, and equitable tolling, Duke Energy fails to recognize that the Department has no authority to extend a limitations period except as provided by statute. *See, e.g., TNS Mills*, 331 S.C. at 623, 503 S.E.2d at 478; *Asmer*, 225 S.C. at 343-44, 82 S.E.2d at 466. That is, even if any of these provisions are applicable against the Department, the application must involve a matter within the authority of the Department or its agent. Otherwise, Duke Energy was obligated to ascertain for itself the scope of the Department's authority, including the correct

¹⁹ The Forms FS-43 actually were executed *before the IRS adjustment was even made*.

limitations periods for filing refund claims. See *Am. Legion Post 15 v. Horry County*, 381 S.C. 576, 583, 674 S.E.2d 181, 184 (Ct. App. 2009).

- (1) *Duke Energy's waiver argument is based upon cases decided outside of the taxation context, a crucial distinction, and does not recognize that the Department has no authority to waive or extend limitations periods except as authorized by statute.*

Because refund limitations are unlike general statutes of limitation, employees of the Department cannot waive enforcement of a limitations period if they lack authority to do so. Put succinctly, rules regarding the waiver of general statutes of limitations cannot be transplanted into the revenue context. The Supreme Court long ago held that refund claims are not subject to estoppel or waiver. See *Heyward v. S. Carolina Tax Comm'n*, 240 S.C. 347, 351, 126 S.E.2d 15, 17 (1962). In the only waiver case cited by Duke Energy actually involving the Department, the theory of recovery was based on a contract. *Anon. Taxpayer v. S. Carolina Dept. of Rev.*, 377 S.C. 425, 431-32, 661 S.E.2d 73, 76 (2008) (noting that there “was a contract providing for continuing performance, thus the limitations period began anew each year.”) Although a contractual limitations period is subject to waiver and estoppel, refund claims are not contractual. See *Heyward*, 240 S.C. at 351, 126 S.E.2d at 17 (“We have held that the State may be subject to the doctrine of estoppel in its contractual relations.”) (emphasis added); see also *C. W. Matthews Contracting Co., Inc. v. S. Carolina Tax Comm'n*, 267 S.C. 548, 554, 230 S.E.2d 223, 226 (1976) (tax refund claim created by statute).

Duke Energy contends that waiver is appropriate because a “statute of limitations affects the remedy and not the right.” Br. of Appellant, p.16 (citing *Hercules v. S. Carolina Tax Comm'n*, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980)). But *Hercules* addressed not the refund limitations period, but the timeliness of an assessment based on

a tolling process expressly provided by statute. *See id.*, 274 S.C. at 140, 262 S.E.2d at 47.

Hercules thus holds that refund periods may be extended when authorized by statute, not

that employees of the Department may extend a limitations period without authorization.

Duke Energy's waiver arguments do not render its 1978-1993 refund claims timely.

(2) *The Department is not subject to estoppel because it is not bound by an erroneous interpretation of law espoused by its employees or agents.*

Estoppel also does not assist Duke Energy because the Department is not bound by representations of its agents that are inconsistent with the statutory language and, thus, outside of the agent's scope of authority. *Texaco, Inc. v. Wasson*, 269 S.C. 255, 265, 237 S.E.2d 75, 79 (1977); *Heyward*, 240 S.C. at 352, 126 S.E.2d at 18. In *Texaco*, the Court held that the Department was not estopped from assessing additional taxes based on the use of an improper accounting method even though Department employees had expressly and in writing authorized the taxpayer to use that method "until such time as the South Carolina Tax Commission grants permission to change such method." *Texaco*, 269 S.C. at 264-65, 237 S.E.2d at 79. In *Heyward*, the taxpayer argued that the Department was estopped "because of acquiescence in and approval of the taxpayer's election of the installment method of reporting profit" *Heyward*, 240 S.C. at 351, 126 S.E.2d at 17. The Court rejected that argument, holding that "estoppel [does not] deprive the government of the due exercise of its police power, or *to effect public revenues* or property rights, or to frustrate the purpose of its laws or thwart its public policy." *Id.* (emphasis added).

Simply put, the Department cannot make changes in or expand the refund procedures and limitations established by the General Assembly. *TNS Mills*, 331 S.C. at 623, 503 S.E.2d at 478; *Asmer*, 225 S.C. at 343-44, 82 S.E.2d at 466. In *TNS Mills*, the taxpayer

contended that the Department had the authority to grant a property tax exemption retroactively—effectively a refund. 331 S.C. at 621, 503 S.E.2d at 476-77. This

contention was based in part on a memorandum prepared by a Department employee opining that a recently-enacted statute authorized accepting exemption applications at any time. *Id.* The Court rejected this contention, holding that “[a]lthough [the employee] believed the Department had the authority to grant retroactive exemptions, and exemptions may have been granted under this erroneous view, neither the Commission nor the courts are bound by his erroneous interpretation.” *Id.* at 621-22, 503 S.E.2d at 477.

Thus, the Department is not estopped from invoking the correct refund limitations period even if its employees erroneously believed they had the authority to grant extensions of time for filing refund claims. Form FS-43 did not extend the refund limitations periods for 1978-1993 even if Department and Duke Energy thought that it did. This conclusion is supported by *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010), which was cited by Duke Energy, Br. of Appellant, p.19, but which holds that the government is not estopped from contesting erroneous statements made by its employees. *See id.* at 236, 692 S.E.2d at 506 (“[W]e agree with County’s argument that the RU zoning classification was a mistaken statement of law and, thus, could not be used to estop County from enforcing it.”). In other words, *Quail Hill* is entirely consistent with the holdings of *Texaco*, *Heyward*, and *TNS Mills* discussed above and supports—not refutes—the Department’s position.

Finally, as the ALC determined, Duke Energy also failed to establish that it met the elements of estoppel: (1) lack of knowledge; (2) justifiable reliance; and (3) prejudicial

change in position. [R. at 68 (SJ Order, p.20).] As a matter of law, Duke Energy could have referenced the pertinent statutes and learned the correct limitations periods. *Am.*

Legion Post 15, 381 S.C. at 583, 674 S.E.2d at 184; [see R. at 69 (SJ Order, p.21).] Moreover, Duke Energy never introduced any evidence that it contemplated wholesale changes to its apportionment formula until the 1978-1993 years closed and never demonstrated any evidence regarding misrepresentations by a Department employee in this regard. [R. at 68-69 (SJ Order, pp.20-21).] The ALC correctly found that Duke Energy did not come forward with any evidence to support its estoppel argument. [R. at 68-69 (SJ Order, pp.20-21).]

(3) *For generally the same reasons that it is not subject to estoppel, the Department also is not subject to equitable tolling.*

Revenue statutes do not incorporate equitable limitations on their application. See *United States v. Brockamp*, 519 U.S. 347, 352 (1997); see also *Rothensies*, 329 U.S. at 301. This is reflected in the Supreme Court's repeated rejection of any effort to apply estoppel against the Department. In fact, in the only South Carolina appellate decision remotely touching upon taxation issues and equitable estoppel, this Court—in interpreting section 12-54-85(F)(1) regarding refunds—held that equitable estoppel did not bar a county from asserting the limitations period as a defense to refunding fees paid in connection with bingo games. *Am. Legion Post 15*, 381 S.C. at 583, 674 S.E.2d at 184. This Court rejected the taxpayer's argument that the refund request was timely based on a letter sent before the limitations period expired, holding that “[n]othing prevented the [taxpayers] from learning of the governing statutes, as we find is required for due diligence.” *Id.* This Court also recognized that employees cannot bind the government when they act outside their scope of authority. *Id.*, 381 S.C. at 584, 674 S.E.2d at 185

("Estoppel will not lie against a governmental entity when a government employee gives erroneous information in contradiction of statute."). Duke Energy points to only two

South Carolina decisions in support of this argument, neither of which involves the Department or taxpayers. Br. of Appellant, p.20 (citing *Hooper v. Ebenezer Sr. Svcs. & Rehab Ctr.*, 386 S.C. 108, 687 S.E.2d 29 (2009) & *Hooper v. Ebenezer Sr. Svcs. & Rehab Ctr.*, 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2008)). The ALC therefore correctly determined that the limitations periods for tax years prior to 1994 should not be equitably tolled.

Finally, although Duke Energy makes much of fairness, there is nothing at all unfair about requiring Duke Energy to abide by the same refund statutes today that every other taxpayer had to live by prior to 1995. [See R. at 69-70 (SJ Order, pp.21-22).] It would be unfair for Duke Energy to pull from the General Fund of this state money paid over 35 years ago using—as discussed more fully below—methods uniformly applied when the original returns were filed and the taxes paid. In short, fairness dictates that Duke Energy not receive a windfall benefit unavailable to any other entity for years prior to 1995 by pursuing refunds for long-closed years based on novel theories of law wholly inconsistent with Supreme Court precedent.

- 2. The ALC correctly determined that Duke Energy is not entitled to include in its apportionment formula the amount of principal recovered from short-term investments of excess cash from operations.**

Duke Energy's recovery of principal from short-term investment transactions should not be included in the apportionment formula because these transactions are nothing more than loans and the principal recovered is just the return of Duke Energy's own money. Because the investments occurred outside of South Carolina, Duke Energy reported the

principal solely in the denominator of the sales factor (or the erroneous single-factor formula reported on the amended returns) and drastically diminished its taxable income apportioned to South Carolina.²⁰

A. Factual Background

During the Periods at Issue, Duke Energy used its excess cash from operations for various short-term investment transactions. [R. at 2998:4-10 (Love Dep.).] These transactions consisted of investing in municipal bonds, loan repurchase agreements, and commercial paper and then, after a short time period, recovering the invested cash (i.e., the principal) plus a small amount of interest or gain. [R. at 3007:16-21 (Love Dep.).] These transactions were not risky and were typically outstanding between one and 30 days. [R. at 3007:22-3008:3, 3034:21-25, 3039:5-7 (Love Dep.).] Indeed, Duke Energy never suffered a loss on these investments. [R. at 3039:2-7 (Love Dep.).] The gain or interest was minimal relative to the principal invested, but Duke Energy could repeatedly reinvest the principal recovered. [See R. at 2998:4-17 (Love Dep.).] All activities concerning these transactions occurred outside of South Carolina. [R. at 3012:19-3016:14 (Love Dep.).]

²⁰ For example, on its originally-filed 1999 return, Duke Energy reported about \$1.2 billion in sales within South Carolina and \$4.8 billion in total sales from everywhere, yielding a sales factor of approximately 25%. [See R. at 5193 (Pet'r Hr'g Ex. 22).] On its 1999 amended return, Duke Energy added almost \$6 billion of recovered principal to its total sales, thereby reducing the apportionment formula to approximately 11% because sales in this state did not change. [*Id.*]

B. The ALC correctly rejected Duke Energy's position that recovered principal must be included in the apportionment formulas.

- (1) *The plain language of sections 12-6-2280 and 12-6-2290 requires the exclusion of recovered principal from the calculation of the apportionment formulas.*

Recovered or returned principal is like nothing else in tax apportionment accounting. As the ALC correctly recognized, it is not income; it is not an expense; and it is not a deduction. [R. at 75-77 (SJ Order, pp.27-29); *see also* R. at 1831-32 (Mem. Opp'n. Duke Energy's Mot. for Recons of SJ Order, pp.12-13).] It is merely the return of the taxpayer's own money. As the ALC determined, the logical interpretations of the apportionment statutes and the terms "sales"²¹ and "gross receipts" exclude the return of principal. [R. at 75-79 (SJ Order, pp.27-31 & n.28);] *see Moon v. City of Greer*, 348 S.C. 184, 188, 558 S.E.2d 527, 529 (Ct. App. 2002) ("Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.") (internal quotation marks and citations omitted). Duke Energy provides no explanation as to why the terms "gross receipts" and "sales," and the apportionment formula statutes as a whole, should be read to include the return of principal from short-term investment transactions other than to say "gross means gross." Br. of Appellant, p.22. However, taken to its logical conclusion, Duke Energy's interpretation would require an entity to record a "sale" or "gross receipt" every time it makes a withdrawal from the bank and would require a car rental entity to include the basis of the vehicle as a "sale" or "gross receipt" every time a customer returns a leased

²¹ Duke Energy argues the ALC's focus on the "sales" factor's emphasis on income-producing activity improperly narrows the definition of "sales." Br. of Appellant, p.32. However, it is Duke Energy's interpretation that improperly expands the term "sales" to include recovered principal from loan repurchase agreements and the redemption of municipal bonds and commercial paper.

vehicle. The ALC correctly rejected this interpretation. *See Moon*, 348 S.C. at 188, 558 S.E.2d at 529 ("Subtle or forced construction of statutory words for the purpose of expanding the operation of a statute is prohibited.") (citing *TNS Mills*, 331 S.C. at 624, 503 S.E.2d at 479).

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

The ALC correctly rejected Duke Energy's illogical position and proposed construction because it would lead to absurd results. [R. at 73-75, 83 (SJ Order, pp.25-27, 35).] No matter how "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." *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). Including the amounts of repeatedly invested and recovered principal in the apportionment formula is absurd because the transactions giving rise to the invested cash (i.e., Duke Energy's sales of electricity) already have been reflected in the apportionment formula.

As such, Duke Energy's position is inconsistent with the statutory requirement that an entity's taxable income in this State must be calculated upon a base which reasonably represents the proportion of trade or business carried on within this State. S.C. Code Ann. § 12-6-2210; S.C. Code Ann. § 12-7-250 (repealed in 1995); *Hertz Corp. v. S. Carolina Tax Comm'n*, 246 S.C. 92, 94-95, 142 S.E.2d 445, 446 (1965). Because statutory "language must be construed in the light of the intended purpose of the statute," the standard apportionment formulas must be construed in a way that promotes the reasonable representation of the taxpayer's business activities. *Kiriakides*, 312 S.C. at

275, 440 S.E.2d at 366; *see Travelscape*, 391 S.C. at 99, 705 S.E.2d at 33 (stating that undefined words must be construed in conjunction with whole purpose of the statute and policy of law); *Lockwood Green Eng'rs, Inc. v. S. Carolina Tax Comm'n*, 293 S.C. 447, 361 S.E.2d 346 (Ct. App. 1987) (interpreting the single-factor apportionment formula in accordance with the purpose of the allocation and apportionment statutes).

Contrary to Duke Energy's contentions, *see* Br. of Appellant, pp.26-30, the absurdity of its interpretation does not hinge on the extent to which the inclusion of principal unreasonably represents its business activity.²² [See R. at 83-84 (SJ Order, pp.35-36).] The absurdity is that the inclusion of principal will never, absent pure coincidence, reasonably represent the business activities of a taxpayer whose principal business does not include transactions in financial instruments. This view would allow two taxpayers, equal in all respects except for their level of investment activity, to report drastically different apportionment formulas due solely to this difference in investment activity unrelated to their primary operations. Even more, it would provide an undue benefit to larger corporate taxpayers that engage in more of these investment transactions than other taxpayers with less excess cash or resources by allowing them to load up the denominator of the apportionment formula with recovered principal and thereby decrease the amount of income tax owed in South Carolina.

While an issue of first impression for South Carolina courts, courts in other states have rejected Duke Energy's position. [See R. at 71-75 (SJ Order, pp.23-27).] One court concluded that the position advanced by Duke Energy is absurd because "[i]t is no true reflection of the scope of [the taxpayer's] business done within and without [the state] to

²² However, it does perfectly illustrate the absurdity that Duke Energy's interpretation would promote. [R. at 81-82 (SJ Order, p.33-34, n.31).]

allocate to the numerator or the denominator of the [standard apportionment formula] fraction the full amount of money returned to [the taxpayer] upon the sale or redemption of investment paper.” *Am. Tel. & Tel. Co. v. Dir., Div. of Taxation*, 476 A.2d 800, 802 (N.J. App. Div. 1984). “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.” *Id.*

Other courts agree. The court in *Walgreen Ariz. Drug Co. v. Ariz. Dept. of Rev.*, 97 P.3d 896 (Ariz. Ct. App. 2004), rejected the taxpayer’s “mechanistic interpretation” like that proposed by Duke Energy and concluded that the return of principal from short-term investments is not included in the denominator of the apportionment formula because “the ‘strict’ interpretation approach urged by the [t]axpayer would create a tax loophole...neither intended by the [] Legislature nor required by the plain meaning of the [statute] and the related statutory scheme.” 97 P.3d at 902. Likewise, the court in *Sherwin-Williams Co. v. Indiana Dept. of State Rev.*, 673 N.E.2d 849 (Ind. T.C. 1996), determined that “‘gross receipts’ for the purpose of the [standard apportionment formula] includes only the interest income, and not the *rolled over capital* or return of principal, realized from the sale of investment securities.” 673 N.E.2d at 853 (emphasis added).

- (3) *The Department’s long-standing administrative policy to exclude the return of principal from the calculation of the apportionment formulas is entitled to deference.*

Duke Energy contends the ALC erred by determining there was an ambiguity in the statutes and then not resolving the ambiguity in Duke Energy’s favor. Br. of Appellant, p.24. However, the statutes are not ambiguous because the interpretation reached by the ALC is the only reasonable and logical interpretation of the apportionment statutes. See *S. Carolina Dep’t of Soc. Servs v. Lisa C.*, 380 S.C. 406, 416, 669 S.E.2d 647, 652 (Ct.

App.2008) (stating statute is ambiguous if susceptible to two *reasonable* interpretations).

Because Duke Energy's position is unreasonable, the ALC would have been required to ignore the absurdity resulting from Duke Energy's interpretation and mechanistically accept Duke Energy's interpretation as South Carolina law. A prerequisite to a taxpayer receiving the "benefit of the doubt" is that they put forth a reasonable and acceptable alternative to the Department's interpretation. *See id.* Duke Energy did not do that, and the ALC properly rejected its interpretation.

Moreover, the Supreme Court has previously held that the rule of resolving doubt in favor of the taxpayer is subordinate to the Department's long-standing administrative interpretation if the Legislature has given such interpretation at least its implied assent. *Ryder Truck Lines, Inc. v. S. Carolina Tax Comm'n*, 248 S.C. 148, 152-53, 149 S.E.2d 435, 437 (1966). In resolving a similar issue as in this case, the Supreme Court in *Ryder* held that "a strong presumption arises that [a 35-year] administrative construction has the approval of the legislature..." and that the Court "would not be justified in overturning the commission's long continued application of the statute to which the legislature has given at least implied assent." *Id.*; *see also Etiwan Fertilizer Co. v. S. Carolina Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) ("[W]here the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons").

For over 30 years, the Department interpreted the allocation and apportionment statutes and the terms "sales" and "gross receipts" as excluding the return of principal. [See R. at 87 (SJ Recons. Order, p.3 & n.2); R. at. 203 (Dep't Mot. Summ J., p.36); R. at

857-66 (Dep't Mot. Summ J. Reply, pp.33-42).] Duke Energy recognized this policy for at least 21 years by filing its original returns based on the Department's policy. And although the statutes were amended numerous times throughout this period, and were even completely reenacted under a new chapter of the Code of Laws, the Legislature never altered or amended the statutes to reject the Department's interpretation and, in fact, ultimately adopted legislation affirming the Department's position.²³ [R. at 864-66 (Dep't Mot. Summ J. Reply, pp.40-42).]

- (4) *The Legislature's express confirmation that the terms "gross receipts" and "sales" do not include the return of principal from short-term investment transactions does not support Duke Energy's interpretation.*

After the Periods at Issue, the Legislature enacted S.C. Code Section 12-6-2295, which, in part, expressly defined the terms "gross receipts" and "sales" to exclude "the repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument" and "the principal amount received under a repurchase agreement or other transaction properly characterized as a loan." S.C. Code Ann. § 12-6-2295 ("Items included and excluded from terms 'sales' and 'gross receipts'"). The ALC correctly rejected Duke Energy's argument that this statute resulted in a "material and drastic"²⁴ change to South Carolina law that confirms the

²³ See discussion *infra* Part 2.B.(4).

²⁴ Duke Energy also misreads the statute, contending that "[t]he 2006 law change added a new section to the statute which excluded ten new categories of receipts, including the sales of securities, from the definition of 'gross receipts.'" Br. of Appellant, p.23. However, Section 12-6-2295(B) plainly excludes only the "principal" and thus is entirely consistent with the Department's long-standing administrative policy and the ALC's decision. [R. at 87-92 (SJ Recons. Order, pp.3-8); R. at 1831 (Mem. Opp'n. Duke Energy's Mot. for Recons of SJ Order, p.12 n.6).]

plain meaning of these terms includes the return of principal.²⁵ Br. of Appellant, pp.22-24. The Legislature may amend the law to clarify its original intent. [R. at 88 (SJ

Recons. Order, p.4 ("An amendment to the language of a law does not necessarily mean a change in the meaning of that law, for an amendment may also be interpreted as a clarification by the legislature of its original intent") (citing cases));] *see also Stuckey v. State Budget and Control Bd.*, 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) ("A subsequent statutory amendment may be interpreted as clarifying original legislative intent"). This is especially so given the Department's long-standing interpretation of the apportionment formulas.²⁶ In view of the Department's policy, the ALC correctly determined that "[i]f the Legislature was so troubled by an interpretation that would allow the inclusion of principal in the sales factor, it is just as likely, if not more so, that this troublesomeness would motivate the Legislature to clarify the existing law so as to avoid an application that it never intended." [R. at 86 (SJ Recons. Order, p.2);] *see Cotty v. Yartzeff*, 309 S.C. 259, 262 n.1, 422 S.E.2d 100, 102 n.1 (1992) ("[L]ight may be shed upon the intent of the General Assembly by reference to subsequent amendments which, although normally presumed to change existing law, may be interpreted as clarifying it.").

²⁵ In support, Duke Energy cites to *Duke Power Co. v. S. Carolina Tax Comm'n*, 292 S.C. 64, 354 S.E.2d 902 (1987). However, that decision is rendered in the license fee context. Moreover, in contrast to the situation here, where the General Assembly later amended the apportionment statutes to conform to the Department's long-standing policy, the General Assembly amended the license fee statute to reject the result in *Duke Power*. 292 S.C. at 66, 354 S.E.2d at 903.

²⁶ Duke Energy has not challenged the ALC's finding that it was the Department's long-standing administrative policy to exclude recovered principal from the apportionment formulas, and thus, it is the law of the case, thereby further diminishing Duke Energy's "drastic and material" change argument. *ML-Lee*, 327 S.C. at 241, 489 S.E.2d at 472

- (5) *The existence of the alternative apportionment provision does not negate the need to properly interpret the standard apportionment formulas.*

Duke Energy contends that the ALC's analysis is inappropriate because there is a statute "intended to provide a remedy for any inequities that may result from the application of the standard apportionment statute." Br. of Appellant, p.28.²⁷ The statute to which Duke Energy refers is South Carolina Code Section 12-6-2320, which, for years after 1995, provided that a taxpayer could request, or the Department could require, an alternative apportionment formula if application of the standard apportionment formula did "not fairly represent the extent of the taxpayer's business activity in this State." See 1995 S.C. Acts No. 76, § 25 (effective for taxable years beginning after 1995). Thus, section 12-6-2320 as adopted by Act 76 is not even available for tax years prior to 1995, further undermining Duke Energy's argument that, even if its interpretation of the standard apportionment formulas leads to an absurd result, it nonetheless should be accepted because section 12-6-2320 exists to cure any problem. See Br. of Appellant, p.28 (arguing that "[t]he Court is required by South Carolina law to apply the standard apportionment formula in a manner that gives full effect to the legislative intent of enacting the alternative apportionment statute and that does not render it meaningless.").

²⁷ Although not mentioned in its brief, Duke Energy essentially advocates the positions in *Sherwin Williams Co. v. Johnson*, 989 S.W.2d 710 (Tenn. App. 1998), and *Microsoft Corp. v. Franchise Tax Bd.*, 139 P.3d 1169 (Cal. 2006) that were addressed by the ALC. [R. at 74-75, 79-82 (SJ Order, pp.26-27, 31-34).] The ALC properly rejected these holdings, concluding that the absurdity determination must be part of the statutory construction of the standard apportionment formula or else the alternative apportionment provision will become the standard. [R. at 80-82 (SJ Order, pp.32-34).] Notably, both of these courts ultimately excluded the return of principal. *Johnson*, 989 S.W.2d at 715 ("The very absurdity of the result sought...lays a sound basis for the implementation of [the alternative apportionment method statute]"); *Microsoft*, 139 P.3d at 1177 (applying the alternative apportionment method to exclude the return of principal "so that...an 'absurd result' may be avoided.").

The critical failure of Duke Energy's position is that it turns the entire scheme on its head because the standard formulas—as reflected in the language of section 12-6-2320—are the presumptive base for apportioning income and the alternative relief provisions apply only when the standard formula “does not fairly represent” the taxpayer's business activity in the state. Moreover, the statute at issue was not enacted until 1995 and, thus, has not always accompanied the standard apportionment formula. The ALC was correct in determining that section 12-6-2320 should *not* be interpreted in a manner to minimize the coverage or application of the standard apportionment formulas.

Duke Energy's position, however, would make application of section 12-6-2320 the rule and not the exception because large corporations commonly engage in these types of transactions.²⁸ The ALC correctly recognized this flaw, finding that the alternative apportionment method is the *exception* that “should be utilized only when the standard apportionment statute does not operate sensibly in a given case.” [R. at 79-81, 83 (SJ Order, pp.31-33, 35); *see also* R. at 1821-31 (Mem. Opp'n. Duke Energy's Mot. for Recons. of SJ Order, pp.2-12).] Duke Energy acknowledges that the standard apportionment formulas are intended “to provide a reasonable representation of taxpayers' business activities in South Carolina” and that the alternative apportionment statute is a “relief mechanism” to be used only “when the standard apportionment formula does not fairly represent the taxpayer's business activities in the State.” Br. of Appellant, p.27. Duke Energy nevertheless maintains that section 12-6-2320 must drive

²⁸ Although it claims the ALC “imputed an alternative apportionment mechanism into the standard apportionment provision” by constructing the standard apportionment formula to avoid an “absurd result,” Br. of Appellant, p.28, Duke Energy's interpretation would actually have this effect by requiring the application of the alternative apportionment provision in every instance.

application of the standard apportionment statutes. The ALC correctly rejected this position.

Duke Energy latches onto the ALC's use of the term "distortion," arguing that "distortion" implies a factual inquiry. However, the ALC's use of the term "distortion" was not a factual analysis and not an invocation of section 12-6-2320 because that statute never uses the term "distortion." Rather, the ALC used the term "distortion" to illustrate the unreasonableness and arbitrariness of Duke Energy's principal-inclusion position and that such a position would encourage misrepresentation of business activity. [R. at 80-81 (SJ Order, pp.32-33).] More importantly, though, the ALC correctly stated that it was "not the amount of distortion that determines absurdity here." [R. at 83-84 (SJ Order, p.35-36).] Instead, the ALC rejected Duke Energy's interpretation because it promotes distortion in all cases but still requires the Department to engage in an intensely factual inquiry under section 12-6-2320 on a case-by-case basis each time a taxpayer includes the return of principal from short-term investment transactions in its apportionment formula. [*Id.*]²⁹

- (6) *Use of the term "gross receipts" in other contexts does not support the inclusion of the return of principal for purposes of the standard apportionment formula.*

Duke Energy does not identify a single example in which "gross receipts" or "sales" were defined to include the return of principal from short-term investment transactions in any context.³⁰ Instead, Duke Energy cites to *Travelscape* as affirming the "broad meaning" of this term. Br. of Appellant, p.25. However, in *Travelscape*, the term "gross

²⁹ If, however, the Court were to reverse the ALC on the recovery-of-principal issue, it would be necessary to remand for further proceedings pursuant to section 12-6-2320.

³⁰ Indeed, Duke Energy does not even provide one reference to the use of the term "sales" in other contexts.

proceeds" was defined for sales tax purposes to include "the value obtained...without deduction for the cost of services." 391 S.C. at 98, 705 S.E.2d at 33 (emphasis in

original). Thus, in that context, the statute defined the term at issue. Duke Energy's citation to statutes using the term "gross receipts" in different contexts and for separate purposes does not assist the resolution of this case, especially in light of the Department's long-standing policy regarding the exact issue in this case.

C. The ALC did not sua sponte consider the application of the alternative apportionment formula.

The cases cited by Duke Energy regarding *sua sponte* decision-making deal with a trial court granting a new trial *sua sponte*. See Br. of Appellant, p.30 (citing *State v. Dicapua*, 383 S.C. 394 (2009) (holding trial court lacks authority to grant new criminal trial on ground not raised by party) & *Southern Ry. Co. v. Coltex, Inc.*, 285 S.C. 213 (1985) (holding trial court lacks authority to grant new civil trial on ground not raised by party)). That situation obviously does not apply here if for no other reason than that the issues decided by the ALC were raised by the Department. [R. at 201, 204-05 (Dep't Mot. Summ J., pp.34, 37-38; R. at 857-61 (Dep't Mot. Summ. J. Reply, pp.33-37).]

3. Based on the substantial evidence of record, the ALC correctly determined that Duke Energy failed to establish that its principal business is not manufacturing.

The ALC correctly rejected Duke Energy's argument that it is not a manufacturer and, thus, that the apportionment formula it used for 23 years was wrong. Interestingly, its predecessor, Duke Power Company, was specifically incorporated, *inter alia*, "[t]o manufacture, generate, buy, sell, accumulate, store, transmit, furnish and distribute electric current for light, heat and power." [R. at 7938-8085 (Resp't Hrg. Exs. 2-4 (emphasis added)).]

A. *Factual background.*

Duke Energy's "primary business" is "providing electricity." [R. at 2496:18-2497:5.]

Duke Energy operates generation plants in both South Carolina and North Carolina. [R. at 2537:14-2538:19.] In South Carolina alone, Duke Energy has two nuclear power plants, four coal power plants, three hydroelectric power plants, and several oil or gas power plants. [*Id.*] Although the sources or inputs (e.g., coal, uranium, and water) used at generation facilities may vary, all use a generator to produce electricity. [R. at 2538:20-2539:6.] A generator is a "fairly large machine" and "mechanical device" that uses mechanical energy to produce electricity. [R. at 2539:7-16, 2718:25-2719:12.] The generator creates an electric current that is processed through the transmission and distribution system. [R. at 2537:9-13.] Generators have been used to produce electricity in substantially the same manner for over 100 years. [R. at 2539:7-16, 2550:11-24, 2669:6-19, 2718:25-2719:12, 2730:3-20.] Many, though not all, of Duke Energy's generation facilities use a turbine driven by steam power to turn the generator. [R. at 2538:15-2539:6, 2549:25-2550:6, 2674:18-2675:6.] The design of a turbine used in these generation facilities has not significantly changed since the early 20th century. [R. at 2550:7-10.]

The generator is connected to the transmission and distribution network, which is a "fairly elaborate system." [R. at 2532:3-6, 2539:17-22.] Duke Energy cannot provide electricity to its customers without the transmission and distribution system. [R. at 2563:19-2564:1.] The transmission and distribution system consists of transmission and distribution lines, which are conductors made of copper, towers and poles, and transformers. [R. at 2483:11-2484:2, 2532:3-12, 2551:19-22, 2753:11-12.] Duke Energy

processes electrons and manipulates the charges and other aspects of electricity to transmit and distribute electricity to the consumer. [R. at 2680:4-19.] During the transmission and distribution process, the transformers process electricity by "stepping up" and "stepping down" the voltage. [R. at 2532:3-2533:7.] This processing is done in order to efficiently deliver electricity at the specified voltage so that it can be used by customers in their homes and businesses while at the same time reducing "line loss," which is the loss to Duke Energy of a quantity of electricity as heat during the transmission and distribution process. [R. at 2483:11-20, 2539:23-2541:4.] Thus, the process by which Duke Energy generates or produces electricity does not end at the generator.

After processing, electricity is delivered "at the right specification for customer use." [R. at 2481:16-22.] Electricity is not usable by a customer unless it typically is at 120 volts, although sometimes it is delivered at 220 volts. [R. at 2495:21-23.] Whatever the required voltage, electricity delivered to a customer must be "stepped down" to the usable voltage, which is "done closer to the customer's house." [R. at 2483:23-2484:2.] A customer obtains electricity through a meter by activating a switch, which creates a load and completes a circuit. [R. at 2531:14-22, 2712:3-13.] The electricity then passes through the customer's meter and operates the device. [R. at 2456:16-23, 2718:25-2719:12.] Duke Energy measures the amount of electricity consumed by each customer using the meter and then charges the consumer by the quantity consumed. [R. at 2456:16-23, 2711:8-2712:2, 2717:14-17; *see also* R. at 2530:9-2531:6.]

B. Based on holdings of the Supreme Court, Duke Energy is a manufacturer for purposes of a tax statute as a matter of law.

Because electricity has been generated using the same process for over 100 years, the Supreme Court already has held on two occasions that the process employed by Duke Energy is manufacturing. In 1926, the Court held that a corporation generating electricity was engaged in manufacturing and thereby subject to a tax imposed on manufacturers. *Columbia Ry., Gas & Elec. Co. v. Query*, 134 S.C. 319, 324, 132 S.E. 611 (1926) ("We do not think that there is any doubt that the [company] is engaged in the business of manufacturing gas and electricity, and it is clearly within the provisions of [the Manufacturer's Tax Act]."). And even more significantly, the Court held in 1930 that Duke Power Co., a predecessor of Duke Energy, was entitled to an exemption for manufactories—defined as a physical plant, or a place or building, where manufacturing is carried on—because it was a manufacturer. *Duke Power Co. v. Bell*, 156 S.C. 299, 306, 152 S.E. 865, 868 (1930) (citing *Columbia Ry.*, 134 S.C. 319, 132 S.E. 611 (1926)).

In short, the Supreme Court has held that electric utilities in general, and Duke Energy in particular, are engaged in manufacturing for purposes of all tax statutes. See *Duke Power*, 156 S.C. at 306, 152 S.E. at 868 ("If a company engaged in the generation of electricity is a 'manufacturer' for the purposes of a Statute imposing a tax ...") (emphasis added). Aside from the fact that the two cases reached the same conclusion with respect to separate tax statutes,³¹ the Manufacturer's Tax Act at issue in *Columbia*

³¹ Other states have concluded that generating or producing electricity is manufacturing, some even citing to *Columbia Railway* and *Duke Power*. [R. at 134 (Mfg. Order, p.15 n.19).] See generally *State ex rel. Winterfield v. Hardin County Rural Elec. Co-op.*, 285 N.W. 219, 224-25 (Iowa 1939) ("The great preponderance of authority as evidenced by the decisions of the courts supports the proposition that one engaged in the generation of electricity is engaged in a manufacturing or mechanical business.").

Railway also supports this conclusion. That statute stated that "every person, firm or corporation engaged in the business of manufacturing" was subject to the tax imposed on manufacturers. 1923 S.C. Acts 12, No. 21, §11-A. And although the tax at issue was a license tax on "the entire receipts," it was specifically imposed on "the business of manufacturing." Thus, the *Columbia Railway* decision is based on a statute using identical language as the apportionment statute at issue in this case. Compare S.C. Code Ann. § 12-6-2250 (applying to "a taxpayer whose principal business in this State is ... manufacturing") with 1923 S.C. Acts 12, No. 21, §11-A (applying to a taxpayer "engaged in the business of manufacturing"). [See R. at 133 (Mfg. Order, p.14 n.18).] The *Columbia Railway* and *Duke Power* decisions mean that Duke Energy is engaged in manufacturing as a matter of law.³²

C. Substantial evidence supports the ALC's determination that Duke Energy did not meet its burden of proof to show that it is not engaged in manufacturing, especially in view of Duke Energy's failure to appeal certain factual findings by the ALC.

In addition to the decisions of the Supreme Court, substantial evidence reflects that Duke Energy is engaged in manufacturing. Duke Energy's argument hinges upon its assertion that it is not engaged in manufacturing because it is not engaged in producing tangible personal property. Because section 12-6-2250 does not define manufacturing, it is necessary to ascertain whether the term's usual and customary meaning includes the production of tangible personal property. E.g., *Travelscape*, 91 S.C. at 99-100, 705 S.E.2d at 33-34. The ALC recognized that "manufacture" is defined as "the process of making wares by hand or by machinery especially when carried on systematically with

³² In addition to the fact that the electric generation process has remained unchanged, Duke Energy's charter remained exactly the same during the Periods at Issue as that described in the *Duke Power* decision. Compare [R. at 7941 (Resp't Hrg. Ex. 2, art. III, § (b))] with *Duke Power*, 156 S.C. at 303, 152 S.E. at 867.

division of labor” and includes “productive industry using mechanical power and machinery.” [R. at 132 (Mfg. Order, p.13) (citing to Merriam-Webster dictionary).] By

comparison, the 1927 Century Dictionary defined manufacture as “the making of goods or wares by ... machinery, esp. on a large scale” [R. at 133 (Mfg. Order, p.14 n.17).]³³

Manufacturing is, in short, a process and the question in this case really is whether the process of generating electricity is manufacturing, not whether electricity is tangible personal property. Section 12-6-2250 is directed at “manufacturing,” not tangible personal property. Although section 12-6-2250(a) references “manufacturing or any form of collecting, buying, assembling, or processing goods and materials within this State,” the statutory history reflects that the subsequent clause does not modify “manufacturing.” The original apportionment statute applied only to corporations “engaged in the business of manufacturing.” 1927 S.C. Acts 1, No. 1, § 15(1). That language was codified in section 2451 of the 1932 and 1942 Codes and remained unchanged until it was amended in 1946 to apply to taxpayers whose “principal business ... in this State is manufacturing, or if it is any form of collecting, buying, selling, assembling or processing goods and materials within this State.” 1946 S.C. Acts 1491, No. 553, § 3. In short, section 12-6-2250 is implicated if a taxpayer is engaged in “manufacturing.”

Substantial evidence supports the ALC’s determination that producing electricity is manufacturing based on the common understanding of that term. Duke Energy provides electricity that is created, processed, and delivered through its interconnected generation, transmission, and distribution system. *See* discussion *supra* Part 3.A. As such, the

³³ The 1927 definition is substantially the same as the current definition, further supporting the continuing application of *Columbia Railway* and *Duke Power*. [See also R. at 132-33 (Mfg. Order, pp.13-14 (citing *Winterfield*, 285 N.W. at 224-225)).]

interconnected process of producing and delivering electricity employed by Duke Energy is substantially the same as that used by any entity that creates and produces a product using an assembly line and then charges the customer based on the quantity sold. [R. at 135-38 (Mfg. Order, pp.16-19).]

The ALC also found that electricity is a "physical product with physical characteristics." [R. at 126 (Mfg. Order, p.7).]³⁴ This finding alone requires affirming the ALC because Duke Energy did not appeal from the ALC's factual ruling in this regard and, thus, the finding is the law of the case. *ML-Lee*, 327 S.C at 241, 489 S.E.2d at 472; *see also Brading*, 327 S.C. at 113, 490 S.E.2d at 7; *State Farm*, 337 S.C. at 95, 522 S.E.2d at 349. In fact, Duke Energy's statement of the issues on appeal contains no reference to the ALC's finding in this regard. *See* Br. of Appellant, p.1 (no reference to "product").

In any event, substantial evidence supports the conclusion that electricity is a manufactured product. Duke Energy's itself regularly and repeatedly uses the term "produce electricity,"³⁵ which means that it is engaged in the "act or process of producing something" and that "something" necessarily is a product. That electricity is a product further is shown by the fact that electric current delivered to a customer is a flow of charges or charged particles, the rate of which is measured in amperes. [R. at 2665:21-25, 2668:8-15, 2709:3-13, 2710:1-14.] Electricity also is a fungible product that is sold in quantifiable amounts. [R. at 2717:3-9.] In short, electricity can be measured and is

³⁴ The fact that the amount of the electricity produced that will be lost can be quantified further supports that characterization of electricity as a product.

³⁵ [E.g., R. at 2482:16-19; R. at 5810 (Pet'r Hr'g Ex. 37) (identifying "Functions" of Duke Energy as "Production," "Transmissions," and "Distribution.").]

delivered to customers in specified amounts at precise specifications. [R. at 2481:13-22, 2483:11-2484:2.] The fact that electricity may exist in nature does not change that

conclusion because Duke Energy generates and produces the electricity that it sells and the electricity found in nature is not usable. *See, e.g., Chicago, M., St. P. & P.R. Co. v. Custer County*, 32 P.2d 8, 9 (Mont. 1934) (holding that "the electricity which exists in nature is not subject to use; the current which will cause the wheels of industry to turn, or will light a city, must be produced by the employment of labor and machinery and is, therefore, generally said to be manufactured"). The nature of electricity as a product manufactured by Duke Energy is also shown by the fact that Duke Energy's ability to generate electricity is limited by its generation capacity. [R. at 2551:13-18.]

Duke Energy's citations to ALC decisions and Department rulings in other contexts, Br. of Appellant, p.34, do not change the analysis properly applied by the ALC. Contrary to Duke Energy's citation to general assertions involving other businesses, the Supreme Court has specifically held that producing electricity is manufacturing. None of the authorities Duke Energy references in this context are from the Supreme Court or this Court. Moreover, the authorities that Duke Energy does cite implicitly recognize that tangible personal property is not always involved in the manufacturing process because all of the quotes set forth by Duke Energy use the words "generally" or "typically. Br. of Appellant, p.34 ("typically used by businesses that manufacture ... tangible personal property"; "generally requires the use of one of the following apportionment methods; "typically used by businesses that manufacture ... tangible personal property"; "typically used in the financial businesses and service businesses"). In short, these general authorities do not assist in resolving the question before this Court.

D. Substantial evidence supports the ALC's determination that electricity is tangible personal property.

Even assuming that Duke Energy is correct that the term manufacturing requires production of a tangible product, there is substantial evidence supporting the ALC's determination that electricity is tangible personal property. [See R. at 126-27 (Mfg. Order, pp.7-8 (discussing physical nature of electricity)).] As noted above, electricity is a physical product with physical characteristics. [See also R. at 2503:12-21, 2715:12-14.] The electric charge associated with electricity is a physical property of matter. [R. at 2639:19-25.] Electricity can be felt. [R. at 2715:9-11; see also R. at 2500:1-4, 2653:9-11.] It also can be moved and manipulated. [R. at 2483:21-2484:2, 2493:18-23, 2494:13-2495:25.] The electric charge can be stored. [R. at 2639:23-25, 2657:18-20.] In short, there is substantial evidence that, in addition to constituting a physical product, electricity is tangible.³⁶ Because, as the ALC determined, electricity becomes a customer's personal property after delivery through the meter, it also is tangible personal property.

In making its determination, the ALC applied section 12-6-30(11) of the Income Tax Code, which defines "tangible property" as "including ... corporeal personal property" [R. at 142 (Mfg. Order, p.23).] The term "corporeal," as the ALC noted, generally means tangible, [R. at 142-43 (Mfg. Order, p.23 & nn.31-32),] and the ALC determined that electricity is tangible based on the evidence. Duke Energy's argument that the "ALC's reasoning makes little sense," Br. of Appellant, pp.36-37, misses the mark because the court based its determination that electricity is tangible on the record and on section 12-6-30(11), not on section 12-36-60 found in the sales tax code. As the ALC

³⁶ Duke Energy is wrong in stating that the Department's expert testified that electricity is not tangible. See Br. of Appellant, pp.32-33. In fact, he testified exactly the opposite. [R. at 2715:20-21 ("Q: So you believe electricity is tangible? A: Yes.").]

noted, Duke Energy has not been consistent with the invocation of section 12-36-60. [R. at 143 (Mfg. Order, p.24).] This inconsistency continues with its citation of section 12-36-60 on appeal to support its argument that selling electricity is a service. Actions taken by the General Assembly to ensure coverage of electricity in the sales tax context, a wholly different taxing framework, should not govern the determination of whether Duke Energy is a manufacturer in the income tax context. That is especially so when the sales tax statute at issue never references the term—manufacturing—that is in the income tax statute actually before the Court. Because the statutory frameworks are different, there is no imperative to interpret them consistently. See *Sloan v. S. Carolina Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 470, 636 S.E.2d 598, 607 (2006) (noting that only “statutes dealing with the same subject matter are *in pari materia*”); *State v. Liggett & Myers Tobacco Co.*, 171 S.C. 511, 531, 172 S.E. 857, 864 (1933) (holding that a “license tax based upon property or business done within the state” is not *in pari materia* with a “fee based upon authorized capital”). Finally, Duke Energy’s reference to the *Alltel* decision in this context is unhelpful because the issue resolved by the ALC is whether electricity is tangible, not whether the term “tangible property” as found in section 12-6-30(11) was ambiguous.³⁷

Although dismissing decisions of the Supreme Court, Duke Energy has repeatedly relied on *Consolidated Hydro Southeast, Inc. v. Dep’t of Rev.*, No. 95-ALJ-17-0634, 1996 WL 909155 (S.C. Admin. Law J. Div. May 13, 1996). As the ALC noted, that decision is not binding. [R. at 144 (Mfg. Order, p.25).] Moreover, *Consolidated Hydro*

³⁷ A review of Duke Energy’s motion for reconsideration and the ALC’s reconsideration order reflects that Duke Energy never presented to the ALC any claim that the term “tangible property” is ambiguous. That claim therefore is not preserved for review. *Home Medical*, 382 S.C. at 562, 677 S.E.2d at 586.

involved the question of whether providing electricity was a service under the license tax, not whether providing electricity is manufacturing for purposes of the apportionment statutes. [R. at 144 (Mfg. Order, p.25).] Like the sales tax, the license tax is a wholly-different taxing framework than the income tax and, thus, is not *in pari materia* with the apportionment statutes. *See Sloan*, 370 S.C. at 470, 636 S.E.2d at 607; *Liggett & Myers*, 171 S.C. at 531, 172 S.E. at 864. Characterizing the sale of electricity as a service for license fee—or sales tax—purposes does not mean that it is a service for income tax apportionment purposes. [R. at 144 (Mfg. Order, p.25).]

The ALC's decision hardly is an isolated enclave. Numerous other courts have determined that electricity is tangible in the taxation context, negating Duke Energy's inferential suggestion, Br. of Appellant, pp.40-42, that finding electricity tangible is unreasonable based on decisions in other states. [See R. at 145 (Mfg. Order, p.26 n.34).]³⁸ Moreover, bankruptcy courts have concluded that electricity is a tangible good for purposes of Article 2 of the Uniform Commercial Code because it "really is some *thing*, something that can be felt (although we are loathe to) and something that can be created, measured and stored." *In re Erving Industries, Inc.*, 432 B.R. 354, 367-69 (emphasis in original) (finding that, for purposes of Article 2 of the Uniform Commercial Code, "electricity is tangible and *does* possess physical properties"); *see also GFI Wisconsin, Inc. v. Reedsburg Util. Comm'n*, 440 B.R. 791 (W.D. Wisc.) (electricity is a good under Article 2), *aff'g In re Grede Foundries, Inc.*, 435 B.R. 593 (Bankr. W.D. Wisc. 2010) (same); *In re Pac. Gas & Elec. Co.*, 271 B.R. 626, 640 (Bankr. N.D. Cal. 2002) (same).

³⁸ Interestingly, in one case cited by Duke Energy, *Powerex Corp. v. Dep't of Rev.*, TC 4800, 2012 WL 4068501 (Or. T.C. Sept. 17, 2012), the Court noted the expert testimony that science had not yet resolved the nature of electricity.

Courts also have determined that electricity is a commodity, specifically including the electricity produced by Duke Energy. *Williams v. Duke Energy Intern., Inc.*, 681 F.3d 788, 800 (6th. Cir. 2012) (“[E]lectricity is a commodity as it is produced, sold, stored in small quantities, transmitted, and distributed in discrete quantities”) (internal quotation marks and citation omitted); *see also Town of Concord, Mass. v. Bos Edison Co.*, 676 F.Supp. 396, 397-98 (D. Mass.1988); *City of Gainesville v. Fl. Power & Light Co.*, 488 F.Supp. 1258, 1280-83 (S.D. Fla.1980). These decisions, rendered in contexts other than taxation, demonstrate that a finding that electricity is tangible is not dependent upon issues of revenue.

E. Duke Energy's self-characterization of itself as a service provider does not control its characterization under the apportionment statutes.

Duke Energy's position in this case really boils down to nothing more than an *ipse dixit* assertion that it is a service provider. *See* Br. of Appellant, pp.44-45. But Duke Energy's witness testimony or its self-characterization in Forms 10-K filed with the United States Securities and Exchange Commission, Br. of Appellant, p.44, are not determinative for state apportionment purposes. Similarly, Duke Energy's self-characterization on its federal income tax returns for purposes of the North American Industry Classification System (NAICS) is not determinative.³⁹ And Duke Energy's

³⁹ Although it never sought to introduce the actual NAICS codes before the ALC, [*see* R. at 2432:12-2435:25,] Duke Energy now cites to those codes on the internet. Br. of Appellant, p.45 n.23. This citation should be rejected because it involves evidence not before the lower court. S.C. R. App. P. 210(c) (“The Record shall not ... include matter which was not presented to the lower court or tribunal.”). In any event, Duke Energy identified only the NAICS codes adopted after the Periods at Issue. [R. at 2461:7-16, 2463:6-2464:12, 2464:20-2465:14.] And contrary to Duke Energy's suggestion, Br. of Appellant, p.45 n.23, the ALC was entitled to give the testimony of Mr. Monroe regarding these codes as much or as little weight as it deemed prudent. *E.g., MRI at Belfair, LLC v. S. Carolina Dep't of Health & Envtl. Control*, 392 S.C. 314, 324, 709

regulation by the South Carolina Public Service Commission is not determinative of the issue here because, as the ALC noted, the definition of service includes "a facility supplying some public demand." [R. at 144 (Mfg. Order, p.25).] Although Duke Energy regularly cites to a statement in the Determination that it provides a service, a statement best understood as recognizing Duke Energy's nature as a public utility, it fails to ascribe similar weight to the repeated statements that it is a manufacturer. [R. at 5549 (Dep't Det'n, p.3 ("The taxpayer is a manufacturer within the meaning of the statute"))].

The ALC correctly rejected Duke Energy's self-characterization argument in favor of analyzing the company's actual nature and the characteristics of electricity. Duke Energy cannot provide its "electric service" without electricity, which is a physical and tangible product that is produced and generated by Duke Energy based on the substantial evidence of record. [R. at 138-39 (Mfg. Order, pp.19-20).] Undaunted, Duke Energy contends that it provides services, based in large part on the testimony of its expert witness. Br. of Appellant, pp.38-39. However, in its reconsideration order, the ALC specifically found that the testimony of Duke Energy's expert witnesses in this regard "was not persuasive," noting also that it "gave this evidence little, if any weight" in "reaching [its] factual determinations." [R. at 153 (Mfg. Recons. Order, p.7 ¶16).] This determination is wholly within the province of the finder of fact. *See, e.g., S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). Because Duke Energy did not appeal from this factual determination, it is the law of the case and the expert testimony therefore is improperly used in support of Duke Energy's argument. *E.g., ML-Lee Acquisition Fund*, 327 S.C. at 241, 489 S.E.2d at 472.

S.E.2d 626, 631 (2011). Ultimately, neither the NAICS nor federal classification for data purposes answers the question of whether Duke Energy is a manufacturer.

In any event, although its expert witness did testify that electricity is a service and lacks physical characteristics, the record contains other testimony and evidence supporting the ALC's determination that electricity is tangible and does have physical characteristics. See discussion *supra* pp.39-44. The Mfg. Order reflects that the ALC weighed and evaluated all of the evidence and testimony of the experts in reaching its determination that Duke Energy failed to meet its burden of proof. And the testimony of Duke Energy's expert witness that it does not create the electrons residing in the power lines is a red herring. Although acknowledging that electrons are used to "facilitate the propagation of electricity," Br. of Appellant, p.39, Duke Energy ignores the fact that the propagated electricity it delivers to customers is generated and produced by Duke Energy and does not exist but for Duke Energy's operation of its generators. As the ALC and other courts have recognized, a customer gets "some thing" when electricity passes through the meter. That "some thing" was generated and produced by Duke Energy.

F. Substantial evidence supports the determination that the Department had a long-standing policy that electric utilities are engaged in manufacturing.

Aside from the fact that substantial evidence supports a contrary conclusion, Duke Energy's self-characterization that it provides a service is inconsistent with the Department's long-standing policy that electric utilities are manufacturers. [R. at 129-31 (Mfg. Order, pp.10-12).] Duke Energy did not appeal from the finding that the Department had a long-standing administrative policy that electric utilities are manufacturers. As such, that finding is the law of the case and an alternative sustaining ground. *E.g., ML-Lee Acquisition Fund*, 327 S.C. at 241, 489 S.E.2d at 472; *see also I'On, LLC v. Town of Mt. Pleasant*, 338 S.C 406, 419, 526 S.E.2d 716, 723 (2000).

At any rate, the record reflects that the Department's policy was based on the Supreme Court's decisions in *Columbia Railway* and *Duke Power*. In 1985, the South Carolina Tax Commission determined that "'X' Electric and Gas" was a manufacturer because the Supreme Court had held that its predecessor was a manufacturer in the *Columbia Railway* decision. S.C. Tax Comm'n Decision P-D-532, 1985 WL 192777 (Apr. 11, 1985) (allowing utility the lower property tax assessment rate applicable to manufacturers). Although this ruling was rendered in the context of property taxes, it reflects the Department's policy to apply the plain language of the *Columbia Railway* and *Duke Power* decisions in all instances involving the question of whether an electric utility is a manufacturer. This published ruling also shows that the audit manual introduced at the hearing is not the "only evidence," Br. of Appellant, p.43, of the Department's long-standing policy. [See R. at 154 (Mfg. Recons. Order, p.8 ¶18 (noting that finding of a long-standing policy was based in part on P-D-532 and not solely on the audit manual)).] Given the existence of *Columbia Railway* and *Duke Power*, it is not surprising that the Department has not issued numerous publications on that issue.

Substantial evidence also reflected that this policy was implemented and consistently applied. The audit manual required electric utilities to use the multi-factor apportionment formula. [R. at 7931 (Resp't Hr'g Ex. 1, p.37); R. at 2581:17-2582:23.] Although Duke Energy contends that the manual is conflicting, Br. of Appellant, p.43, that is so only if Duke Energy's position is accepted as given, a flawed conclusion in light of the Supreme Court's previous decisions regarding electric utilities and tax statutes. The policy also was consistently applied as evidenced by the testimony that no other electric utility challenged the policy. [R. at 2582:24-2583:2.] The conclusion that the policy was known

and consistently applied is further supported by the fact that, for 23 years, Duke Energy filed its returns using the multi-factor apportionment formula before filing the Refund Claims. [R. at 129-30 (Mfg. Order, pp.10-11).] Although Cooper Monroe testified that Duke Energy filed its returns in error for 23 years, he acknowledged but failed to account for the fact that "Duke Energy and accounting firms 'in [his] experience' apply a review process before a tax return is filed." [R. at 130 (Mfg. Order, p.11); see R. at 2465:15-2466:18.] Duke Energy's challenge to the policy does not mean that the Department had no policy during the Periods at Issue or that Duke Energy was unaware of it. [See also R. at 154-55 (Mfg. Recons. Order, pp.8-9 ¶21).]

G. Duke Energy did not meet its burden of proving that more than 50 percent of its gross receipts were derived from services rendered.

The ALC correctly rejected Duke Energy's contention that the applicable test to determine whether Duke Energy files under section 12-6-2250 or section 12-6-2290 is to determine whether "over 50 percent of [its] gross receipts are from providing services." Br. of Appellant, p.45 (citing S.C. Rev. Rul. 87-5 (Sept. 16, 1987)). Duke Energy introduced no evidence supporting any breakdown of its gross receipts between services and non-services or otherwise. [R. at 145-46 (Mfg. Order, pp.26-27).] This entire argument is based on Duke Energy's characterization of itself as a service provider through the testimony of its witnesses and the filing and submissions of various forms and documents. See Br. of Appellant, pp.45-46; see also discussion *supra* Part 3.E. Because the ALC determined that Duke Energy is engaged in manufacturing and because substantial evidence supports that determination, this argument simply is without merit.⁴⁰

⁴⁰ Combining this "50 percent" argument with the recovery-of-principal argument would mean that Duke Energy's principal business is in financial services or investment

H. *Duke Energy did not meet its burden of proving that it does not fall within section 12-6-2250 because its business does not constitute "any form of ... processing goods and materials within this state."*

The ALC also correctly determined that that manufacturing, generating, transmitting, and distributing electricity constitutes "any form of...processing goods and materials within this state." S.C. Code Ann. § 12-6-2250(a); [R. at 141 (Mfg. Order, p.22).] The record shows that generating electricity is a form of processing raw materials and inputs such as coal, water, or nuclear fuel. These items are goods and materials, [R. at 2675:20-22, 2677:14-18,] that are processed and used to turn a generator either directly or indirectly. [R. at 141 (Mfg. Order, p.22); R. at 2538:20-2539:6, 2549:25-2550:6.] Although citing no evidence or support for its contention, Duke Energy makes the conclusory statement that operating a generator itself does not involve processing goods and materials. *See* Br. of Appellant, p.46.⁴¹ However, the fact is that the generator would not operate without the processing and consumption of these raw materials. The use of "any form" in the statute reflects a legislative intent that the language be applied as broadly as possible and, concomitantly, a legislative preference for using the three-factor formula whenever possible. *Hertz*, 246 S.C. at 96, 142 S.E.2d at 447 (identifying "any form" in predecessor to section 12-6-2250 as "broad language"). Substantial evidence therefore supports the ALC's determination that Duke Energy's processing of inputs to

trading because the "gross receipts" from these transactions would exceed those from the production and sale of electricity.

⁴¹ By making only this conclusory statement, Duke Energy has abandoned this issue and the ALC's findings are the law of the case. *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, n.3, 439 S.E.2d 283, 285, n.3 ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority."). In fact, it is not clear if Duke Energy is challenging the finding that the raw materials are "goods or materials" or the finding that Duke Energy is involved in "any form of...processing" these materials. As such, this is an alternative sustaining ground on which to affirm the ALC. *I'On*, 338 S.C. at 419, 526 S.E.2d at 723.

operate its generators constitutes "any form of...processing goods and materials within this state."

Conclusion

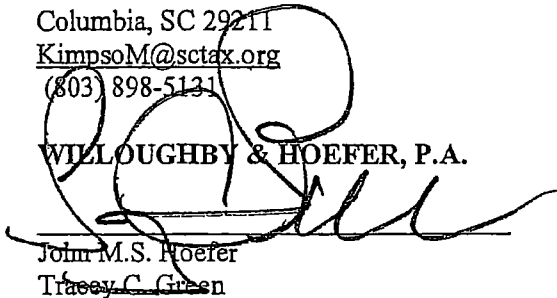
For the reasons explained above, this Court should deny the appeal of Duke Energy and affirm the Orders of the Administrative Law Court.

Respectfully submitted,

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July 8, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Administrative Law Judge

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

Duke Energy Corporation..... Appellant,
v.
South Carolina Department of Revenue..... Respondent.

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INTRODUCTION

The South Carolina Department of Revenue ("Department") asks this Court to selectively defer to its interpretations of South Carolina law. On the one hand, the Department advocates for deference to its purported administrative policy with regard to the Gross Receipts Issue and Electricity Issue. On the other hand, the Department claims to have a long-standing policy with regard to the Waiver Issue even though a different policy was evidenced by its own forms, bulletins, and the sworn testimony of the Department's senior-ranking officials.

The inconsistencies in the Department's arguments do not stop there. Several times in its briefs to the South Carolina Administrative Law Court ("ALC") and its brief to this Court, the Department argued that the plain meaning of South Carolina statutes should control. Yet with regard to the meanings of "gross receipts" and "total sales," the Department asks this Court to disregard the plain meaning of the statutes. Even though the term "gross" is used eighty-five times in the South Carolina Code and means "all" in every other instance, in this case the Department claims that "gross" is not really "gross."

The Department's positions obfuscate the important legal questions presented in this appeal. The Department cannot unilaterally breach contracts it entered into that kept open the statute of limitations for both the Department and the taxpayer. The Department cannot retroactively apply law changes that limited the statutory definition of "sales" and "gross receipts" and changed the effect of IRS federal audit adjustments. The Department cannot ignore its own application of "manufacturing" and the substantial evidence that demonstrates that Duke Energy is a service provider and does not manufacture goods. For these reasons and for those set forth in Duke Energy's Brief and below, Duke Energy respectfully requests that this Court reverse the ALC's decision and

grant the relief requested in Duke Energy's Brief.

ARGUMENT

I. THE DEPARTMENT DISREGARDED ITS LONG-STANDING INTERPRETATION OF THE LAW AND IGNORED FACTUAL ISSUES WHICH RENDER THE ALC'S SUMMARY JUDGMENT DECISION IMPROPER.

A. The Department makes inconsistent arguments regarding the effect of its policies.

For over twenty years, two of the Department's most senior officials represented to Duke Energy that Form FS-43 ("Waivers") extended the time period for Duke Energy to file South Carolina income tax refund claims.¹ The Department's officials' representation was "[c]onsistent with its *longstanding administrative position*, . . . [that] [i]f the taxpayer agrees to the Department's request that a waiver of the time limitations on assessments be extended, . . . the Department will also consider the *time within which a taxpayer may file a claim for refund to be extended until the agreed upon date*." S.C. Rev. Proc. Bulletin No. 00-3; 2000 S.C. Tax LEXIS 144, at *6-7(S.C. Dep't of Rev. Dec. 4, 2000).² (Emphasis added.)

The ALC disregarded and gave no weight to the Department's long-standing positions with regard to the effect of Form FS-43. The ALC chose not to hold an evidentiary hearing to determine whether the acts of the Department's senior officials and the Department's published guidance regarding the Waiver Issue constituted long-standing policy that should be afforded deference by the court. The consequences of the

¹ (See R. pp. 8223-8225 ¶¶ 6, 14, 19 ("[T]he purpose of Form FS-43 was to allow the Department and the taxpayer by agreement to extend the time for assessment or refund."); R. p. 8227 ¶¶ 10, 12, 13 ("To encourage a taxpayer's agreement to extend the time to assess additional tax, the Department intended that Form FS-43 similarly extend the time for a taxpayer to file a refund claim or for the Department to grant a refund.") Collectively, these officials had been with the Department over seventy years.

² This Revenue Procedure Bulletin is almost identical to S.C. Rev. Proc. Bulletin No. 95-5 (S.C. Dep't of Rev.), which it superceded.

ALC's ruling are dramatic – South Carolina taxpayers will no longer be able to reasonably rely on the Department's interpretations without fear that these interpretations could be retroactively changed in an instant when it supports the Department's purposes.

The Department has argued throughout this case that its long-standing views should be entitled to deference by the Court. (Respondent's Brief at 26-28, 46-47.) The ALC ruled in this case that, with regard to the Gross Receipts Issue and the Electricity Issue, the Department's alleged long-standing position is entitled to deference, even when evidence of such a position is found in a "secret" audit manual that was never published or distributed outside of the Department. Duke Energy acknowledges that the Department's long-standing administrative positions are entitled to deference when they are published and are consistent with South Carolina tax law. Nonetheless, the ALC afforded deference to the Department's claimed administrative position that did not exist (or was not memorialized or communicated), and to administrative positions that are inconsistent with South Carolina law.³

B. Under the plain language of the South Carolina statutes, Duke Energy's refund claims for the 1978 through 2001 Tax Years ("Tax Periods at Issue") were timely.

South Carolina law authorized the Department to extend the applicable limitations period for both assessments and refund claims. (Appellant's Brief at 11-15.) Specifically, former S.C. Code Ann. § 12-54-80 explicitly authorized the Department and a taxpayer to enter into an agreement to extend the limitations period applicable to assessments for underpayments or overpayments, prior to the expiration of the limitations

³ The Department's former employees disagree on the Department's long-standing policy regarding the effect of the Waivers. (Compare R. p. 4050, lines 1-2 and 10-11; R. p. 4099, lines 14-25; R. p. 4100, lines 1-2, with R. pp. 8223-8224 ¶¶ 6, 14.) The disagreement over whether the Department actually waived the statute of limitations in this case is "*a question of fact for the finder of fact*" and thus precludes summary judgment. *City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 234-35, 599 S.E.2d 462, 466 (Ct. App. 2004) (emphasis added).

period. And that is precisely what the Department and Duke Energy did year after year, for more than two decades. (R. p. 8220 ¶ 8; R. pp. 8223-8225 ¶¶ 6, 14, 19; R. p. 8227 ¶ 10.) At no point during any of the tax years at issue did the Department refuse to sign a Waiver because it lacked the authority to do so.

The Department's position is inconceivable: that the Department and Duke Energy entered into contracts on a serial basis to extend the statute of limitations that were designed to only allow the Department to assess tax and were not designed to allow Duke Energy to seek a refund. No taxpayer of a sound mind would repeatedly agree to such a one-sided arrangement.

The Department's depiction of the facts does not reflect the facts or the law, and produces an "absurd result." Indeed, the Department paid income tax refunds to Duke Energy for the years at issue in the instant case – there is no question that both parties that executed Form FS-43 knew and intended that the statute of limitations remained open for both parties to review and revise the tax calculations contained within Duke Energy's tax return. (Appellant's Brief at 13.)⁴

The Department's position is particularly distressing in light of the express

⁴ The Department attempts to distract this Court by mistakenly asserting that Duke Energy's contention that the Department paid income tax refunds to Duke Energy after the applicable limitations periods expired is a "new issue" raised in post-trial submission to the ALC and thus, it claims the issue is not preserved for review. (Respondent's Brief at 13, n.16.) The Department is simply wrong. Duke Energy did raise that very same issue in its Memorandum of Law in Opposition to the South Carolina Department of Revenue's Motion for Summary Judgment and in Support of Duke Energy's Cross-Motion for Partial Summary Judgment filed with the ALC. (See R. p. 385, n.2 (discussing that Duke Energy was owed a corporate income tax refund for years 1978-1994 which the Department determined and paid to Duke Energy in 2001 – more than 20 years after the first tax year at issue).) Moreover, contrary to the Department's assertion, Duke Energy was not required to request a reconsideration of the ALC's ruling on this issue or any of the other issues presented in its brief concerning timeliness in a Motion for Reconsideration. A Motion for Reconsideration is not necessary to preserve issues that have been ruled upon at trial. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76-77, 497 S.E.2d 731, 734 (1998). Further, contrary to the Department's contention, this Court can consider all issues raised by Duke Energy in its Brief that are not specifically set out in the statement of issues because those issues are *reasonably clear* from Duke Energy's arguments. See *Eubank v. Eubank*, 347 S.C. 367, 555 S.E. 2d 413 (S.C. Ct. App. 2001).

language of the Waiver Form that the Department executed. Prior to 1995, Form FS-43 provided:

This agreement extends the time for mailing the notice of assessment *or refund* of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of laws, as amended.

(R. pp. 8086-8107 (emphasis added).) The Department's officials who were authorized to sign – and did sign – the Waivers did not contemplate the “one-way” position adopted in the Department's Brief. (R. p. 8220 ¶ 8; R. pp. 8223-8225 ¶¶ 6, 14, 19; R. p. 8227 ¶¶ 10, 12, 13.)

In addition, South Carolina law holds that a statute of limitations is procedural in nature and operates as a defense to limit the remedy available from an existing cause of action. *Hercules, Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 143, 262, S.E.2d 45, 48 (1980); *Jenkins v. Meares*, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990). The Department's argument and the ALC's holding to the contrary ignore South Carolina's long-standing law which unequivocally provides that, in a tax context, “[a] party can waive a statute of limitations defense.” *Anonymous Taxpayer v. S.C. Dep't of Rev.*, 377 S.C. 425, 440, 661, S.E.2d 73, 80 (2008). Indeed, this Court has found that a “waiver is a *question of fact for the finder of fact*.” *City of N. Myrtle Beach*, 360 S.C. at 234-35, 599 S.E.2d at 466 (emphasis added).

Finally, the Department has not, and cannot, identify any other state that takes the position that a properly executed agreement between a department of revenue and a taxpayer authorizes assessments but not refund claims. Such a position is not only absurd, but out of step with tax procedure everywhere.

C. The Department's view of the impact of federal income tax adjustments is wrong.

Federal adjustments made by the IRS to Duke Energy's federal tax returns had the effect of re-opening the statute of limitations for tax years 1978 through 1984 and 1986 through 1993. (Appellant's Brief at 15; R. pp. 8230-8231 ¶¶ 5-7; R. pp. 8157-8165; R. p. 8235; R. p. 3234; R. pp. 8086-8107.) The Department claims that any extension resulting from an IRS adjustment would have been limited to the tax issues raised by the IRS. (Respondent's Brief at 16.) The Department cites no statutory authority in support of its assertion.⁵ In fact, the Department did not cite to anything it has ever issued authorizing such an interpretation. Yet, in 1995 the South Carolina legislature *changed the law* to specifically limit the effect of a federal adjustment on extensions only to issues raised by the IRS. *See, e.g.* S.C. Code Ann. § 12-54-85(D)(1). The Department's penchant for retroactively applying law changes in this case is disconcerting and undermines the Department's credibility in this case and with taxpayers generally. The ALC's ratification of these retroactive law changes is an error of law.

II. THE DEPARTMENT'S CLAIM THAT THE PLAIN LANGUAGE OF THE STATUTE DOES NOT REQUIRE DUKE ENERGY TO INCLUDE ALL OF ITS SALES IN ITS SOUTH CAROLINA INCOME TAX APPORTIONMENT CALCULATION IS ERRONEOUS.

A. Duke Energy's sales of securities are "sales," not "recoveries of principal."

In an attempt to confuse this Court, the Department repeatedly characterizes Duke Energy's sales of securities as "recoveries of principal" or "loans" that are without risk. (Respondent's Brief at 21-23.) First, nothing in the record supports such an analogy.

⁵ The Department cites to the ALC's Amended Summary Judgment Order which likewise cites to no authority in making the same erroneous assertion as the one made by the Department in its Brief. (*See* R. pp. 56-57, n.11.)

Furthermore, the timing of this appeal demonstrates the irony – and inaccuracy – of the Department’s characterization. Only recently we have seen more than a few local governments declare bankruptcy and default on their bonds.⁶ In short, there is no such thing as a risk-free investment. The Department’s characterization of Duke Energy’s investment in government securities is naive at best and disingenuous at worst.

The record demonstrates that Duke Energy’s sales of securities, which generated gross receipts upon disposition, were just that – sales, and not loans. (R. p. 3007, lines 3-7; R. p. 8214.) Marketable securities are bought and sold. The fact that one may repeatedly buy similar, short-term investments is reflective of an investment strategy designed to provide liquidity and a rate of return at an acceptable level of market risk. The Department seems to concede that an alternative investment strategy – perhaps one that involves the purchase and sale of common stock – would produce “gross receipts” rather than a “return of principal.” (Respondent’s Brief at 21-23.) However, the Department cannot provide a legal (or policy) basis for favoring an investment strategy that is longer term, yields more volatile returns, and/or attracts greater market risk.

When a security is sold or redeemed, the entire amount is received from the relinquishment of a commodity. *See General Motors Corp. v. Franchise Tax Bd.*, 39 Cal. 4th 773, 786-87, 139 P.3d 1183, 1190-91 (2006). In contrast, in a loan transaction, (which is substantially different than buying and selling securities), amounts paid on the

⁶ *See, e.g., Detroit is Broke; Could Bankruptcy Lie Ahead?* (May 13, 2013), available at <http://news.yahoo.com/detroit-broke-could-bankruptcy-lie-ahead-185859786.html>; *Another California City Scrambling to Avoid Bankruptcy* (September 27, 2012), available at <http://www.foxnews.com/politics/2012/09/27/another-california-city-scrambling-to-avoid-bankruptcy/> (stating that Central Valley would be the fourth California city to file for municipal bankruptcy this year); *City Council in Harrisburg Files Petition of Bankruptcy* (October 12, 2011), available at http://www.nytimes.com/2011/10/13/us/harrisburg-pennsylvania-files-for-bankruptcy.html?_r=0.

loan typically reflect a return of principal and an interest payment. As the California Supreme Court succinctly put it:

To better understand this basic distinction and how it applies even in the case of debt instruments like bonds and Treasury bills, consider the case of a security (a \$ 10,000 Treasury bill, say) bought on the market from a securities dealer, then redeemed with the issuer, the United States government. The price the purchaser/taxpayer receives on redemption, \$10,000, is dependent on the value of the commodity it holds and independent of the price it paid to the broker. *The taxpayer is not being repaid for money it lent; it had, in fact, paid nothing and lent nothing to the United States government. The entire amount received is properly treated as gross receipts. . . .*

General Motors Corp., 39 Cal. 4th at 786-87, 139 P.3d at 1190-91 (emphasis added).

Unlike a "loan," Duke Energy was not protected from fluctuations in the value of the securities it had acquired, and the purchase/redemption price was dependent on the market rates for the purchased securities.

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

B. The Department ignores the plain language of South Carolina's income apportionment statutes.

For the Tax Periods at Issue in this case, South Carolina law required the inclusion of "total gross receipts" or "total sales" in the computation of a taxpayer's single-factor or multi-factor apportionment formula. (Appellant's Brief at 21-22.) It is black letter law that "[t]he language of a tax statute must be given its plain ordinary

meaning in the absence of an ambiguity therein.” *Beach v. Livingston*, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1996)); *Alltel Commc'ns, Inc. v. S.C. Dep't of Rev.*, 399 S.C.

313, 320, 731 S.E.2d 869, 873 (2012).⁷ Applying this standard of statutory construction, “gross receipts” means gross, and “total sales” means all. The Department argues that gross and total do not mean all receipts but rather “net receipts.” Not only is the Department’s view inconsistent with the plain language of the statutes, but the Department has not cited to any part of the South Carolina Code that supports such view.

C. The Department misconstrues the South Carolina Legislature’s actions.

If there was any doubt as to whether “gross” means “gross” or “total” meant “all,” the South Carolina Legislature removed it in 2006. In 2006, the Legislature enacted sweeping changes to the South Carolina apportionment statutes. Rather than require the inclusion of all of a taxpayer’s receipts in the sales factor numerator, the Legislature’s amendment carved out *ten new categories of receipts to be excluded from “gross receipts” and “sales.”* 2007 S.C. Laws Act 110 § 51.A (enacted as S.C. Code Ann. § 12-6-2295(B)) (emphasis added). Indeed, the plain language of the title to the 2006 amendment indicates that the purpose of the enactment of S.C. Code Ann. § 12-6-2295 was to add a new definition of gross receipts for apportionment purposes. *See Demas v. Convention Motor Inns*, 268 S.C. 186, 190, 232 S.E.2d 724, 726 (1977) (recognizing the propriety of discerning legislative intent from the title of an act).

These changes, for the first time, excluded sales of securities from the South Carolina income apportionment formula. S.C. Code Ann. § 12-6-2295(B)(1) (“gross receipts” or “sales” excludes “repayment, maturity, or redemption of the principal of a

⁷ The Department agrees that the plain language of a statute should control. (Respondent’s Brief at 22.)

The Department's argument that "gross" means "net" is premised on its alleged long-standing administrative policy to require only the inclusion of the net gain or interest from short-term investment transactions in the calculation of the apportionment formula. (Respondent's Brief at 27.)⁸ While, as a general matter, the construction of a statute by an agency will be accorded deference, "where the terms of the statute are clear, the court must apply those terms according to their literal meaning . . . [and] the court will reject the agency's interpretation where it is specifically contrary to the statute or regulation." *Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control*, 372 S.C. 351, 359, 641 S.E.2d 763, 767 (Ct. App. 2007) (emphasis added).

If the Legislature wanted to limit the scope of "gross receipts" by only including the net receipts from certain transactions, it was free to do so (and subsequently did do so in 2007). The Department's policy is in effect asking the Court to retroactively usurp the role of the Legislature and create a limitation that did not otherwise exist. *Am. Petroleum Inst. v. S.C. Dep't of Rev.*, 382 S.C. 572, 579, 677 S.E.2d 16, 20 (2009); *Henderson v. Evans*, 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977).

E. Contrary to the Department's contention, including gross receipts from sales of securities in the standard apportionment formula does not misrepresent every taxpayer's business activity.

The standard apportionment formula is designed to reasonably represent and provide a "rough approximation" of a taxpayer's income attributable to business activity in each state. S.C. Code Ann. § 12-6-2210; *Eastman Kodak Co. v. South Carolina Tax*

⁸ The Department is incorrect in asserting that Duke Energy has not challenged the ALC's finding that the Department had a long-standing administrative policy to exclude recovered principal from the apportionment formulas. (Respondent's Brief at 29, n.26.) First, there is no such finding in the Amended MSJ Order. Furthermore, Duke Energy brought this issue before the ALC in its Memorandum of Law in Opposition to the South Carolina Department of Revenue's Motion for Summary Judgment and in Support of Duke Energy's Cross-Motion for Partial Summary Judgment filed with the ALC. (See R. pp. 423-426.) Duke Energy also raised this very issue at the summary judgment hearing. (R. p. 2919, line 13-p. 2924, line 5.)

Comm'n, 308 S.C. 415, 419, 418 S.E.2d 542, 544 (1992); *Covington Fabrics Corp. v. South Carolina Tax Comm'n*, 264 S.C. 59, 66-67, 212 S.E.2d 574, 577-78 (1975).

The Department argues that it would always be a misrepresentation of a taxpayer's business activities to include gross receipts from sales of securities in the standard apportionment factor. (Respondent's Brief at 31.) Yet the Department offers no evidence whatsoever in support of its position. Furthermore, it offers little explanation as to why including receipts from sales of securities in the gross-receipts/sales factor denominator does not, or could not, roughly approximate a taxpayer's business activity in South Carolina. Indeed, in many cases, depending on the size of the taxpayer, the location of its business operations, the type of industry it is in, and a variety of other factors, including all of the taxpayer's gross receipts fairly reflects its business activities.⁹

Further, in its initial brief the Department argues for the first time that Duke Energy's sales of securities are not connected with its trade or business. (Respondent's Brief at 25.) This argument is not only incorrect, but also inconsistent with the Department's lawyers' previous statements. (R. pp. 1030-1033.)¹⁰ Indeed, the record demonstrates that Duke Energy's treasury department was an integral part of the company's primary business operations. (R. p. 3002, lines 5-15; R. pp. 8213-8214, 8215 ¶¶ 11, 17.) If Duke Energy's treasury department fails to precisely coordinate Duke

⁹ The Department's reasoning is also based on the mistaken presumption that the inclusion of the principal in the apportionment formula always results in distortion. (Respondent's Brief at 32.) As discussed throughout this brief, the determination of distortion is a factual inquiry that must be made on a case-by-case basis.

¹⁰ In order for the Department to claim that Duke Energy's sales of securities are unrelated to its primary operations, it would have essentially had to claim that proceeds from such sales constituted non-business income and were allocable, and not subject to apportionment. S.C. Code Ann. §§ 12-6-2230 and 12-6-2220(5). It is uncontested that all business income must be included in the factor. S.C. Code Ann. §§ 12-6-2280 and 12-6-2295(A). The Department has not made such a claim in the course of this controversy. Additionally, by conceding that some portion of the receipts from Duke Energy's sales of securities are includable in the apportionment formula, the Department concedes that receipts from such transactions are business income subject to apportionment.

Energy's cash needs, the activities of the entire company could grind to a halt. (R. p.

3010, lines 7-19; R. pp. 8213-8214, 8215 ¶¶ 11, 17.) Furthermore, the Department

previously acknowledged that the income from the sale of securities is related to Duke

Energy's primary operations and is in fact business income. (R. p. 173.)

F. The Department erroneously disregards South Carolina's definitions of "gross receipts" and "sales" in other contexts.

The South Carolina Supreme Court and the Department have broadly construed the definition of "gross receipts" in the past. *Duke Power Co. v. S.C. Tax Comm'n*, 292 S.C. 64, 66, 354 S.E.2d 902, 903 (1987). Even though the Department argues that the definition of "gross" in the license tax context should not be controlling for the Gross Receipts Issue, the entire thrust of its argument with respect to the Electricity Issue is that the Supreme Court's holdings in the manufacturer's tax context should apply.¹¹

The Department claims that Duke Energy cites to only one case, *Travelscape*, to support its contention that cases and rulings in other contexts define "gross receipts" to include principal. (Respondent's Brief at 32.) In fact, Duke Energy's Brief cites to several authorities that distinguish between gross and net receipts. (Appellant's Brief at 25-26.) The South Carolina Code itself contains 85 uses of "gross" for tax purposes, including gross receipts, gross income, gross wages, gross estate, and gross proceeds. (R. pp. 411-412; R. pp. 679-727.) These statutes uniformly have been interpreted by the Department to mean "gross" and not "net."¹²

G. The Department ignores the predominant number and more recent decisions of other state courts that have ruled that gross receipts from

¹¹ (Respondent's Brief at 35; R. pp. 195-196 (citing *Columbia Ry., Gas & Elec. Co. v. Query*, 134 S.C. 319, 324, 132 S.E. 611 (1926)); *Duke Power Co. v. Bell*, 156 S.C. 299, 306, 152 S.E. 865, 868 (1930)).

¹² For example, S.C. Code Ann. § 12-36-90 imposes the sales tax on "[g]ross proceeds of sales." S.C. Code Ann. § 12-37-930 imposes a special depreciation rule for certain "gross cost of assets" located in this state. "Gross wages" means all wages, and not the net amount an employee receives after deductions.

sales of securities must be included in the sales or gross receipts apportionment factor.

In support of its position, the Department cites to a few older cases from other jurisdictions, with statutes substantially different from South Carolina's. However, the Department omits reference to *more recent* decisions, in jurisdictions where the applicable statute mirrors South Carolina's, which hold that "gross" means "gross."

For example, in a case dealing with the inclusion of receipts from sales of securities in the sales apportionment factor, the California Supreme Court stated:

We agree with Microsoft that . . . "[g]ross" implies the whole amount received, not just the amount received in excess of the purchase price. To only consider the net price difference as "gross receipts" is an awkward fit with the statutory language, at best.

Microsoft Corp. v. Franchise Tax Bd., 39 Cal. 4th 750, 759, 139 P.3d 1169, 1174 (2006).

In the most recent case on point, the California Court of Appeal held that the full sales price of future sales contracts were "gross receipts" to be included in the sales factor. *General Mills v. Franchise Tax Bd.*, 172 Cal. App. 4th 1535, 1543, 92 Cal. Rptr. 3d 208, 214 (Ct. App. 2009) ("'[g]ross' implies the whole amount received, not just the amount received in excess of the purchase price. . . . To the extent the language is ambiguous, we generally will prefer the interpretation favoring the taxpayer"). The California cases adopt the view espoused by other courts that the term "gross receipts" requires the inclusion of *all* receipts, including receipts from the sale of securities.¹³

¹³ For example, in *Sherwin-Williams Co. v. Dep't of Rev.*, 329 Or. 599, 996 P.2d 500 (Or. 2000), the Oregon Supreme Court affirmed the Oregon Tax Court's decision that the Department of Revenue erroneously included in the sales factor only net income rather than gross receipts from the disposition of investment securities. Other courts have likewise held that the gross receipts rather than the net income from the sale of intangibles should be included in the sales factor. *Western Elec. Co. v. Norberg*, AA No. 81-391 (R.I. Dist. Ct. 6th Div., Mar. 30, 1983), *cert. denied*, 461 A.2d 679 (R.I. 1983);

Moreover, the group of cases relied upon the Department to employ a statutory analysis that directly contravenes South Carolina law. (Respondent's Brief at 25.) The progenitor of this group of cases, *AT&T v. Director, Division of Taxation*, 194 N.J. Super. 168, 173, 476 A.2d 800, 802 (App. Div. 1984), premises its holding on the notion that interpreting New Jersey's receipts factor to include all receipts from short-term securities investments would produce "absurd results." The rest of the cases cited by the Department follow *AT&T* and reason similarly. In contrast, whether certain receipts constitute "gross receipts" or "total sales" under South Carolina's income apportionment regime does not first require, or permit, a consideration as to whether such a determination would produce an "absurd result." Indeed, the ALC and the Department themselves recognized the proper analysis required under South Carolina law during the summary judgment proceedings:

Court: Well, when you say it does not provide a reasonable basis, is that analysis more one that should be made in the *second stage* of -- by this case or is that one that is more -- I know you are going to say "yes," so it's *more proper in determining what the statute says*.

....

Because if it does result in something that's absurd, then you would find that apportionment -- the standard apportionment formula is one that should not be used and it would invoke the statute to allow you to use the more appropriate formula, is that not

Mr. Greene: If -- yeah. If you -- for instance, if you reach that conclusion, that gross receipts from these types of transactions, the return of somebody's principal within 30 days is a gross receipt, it has to be added to the apportionment basis, we would go to *the next step*.

United States Steel Corp. v. Wisconsin Dep't of Rev., No. I-6578 (Wis. Tax App. Comm'n May 9, 1985); *Illinois Tool Works, Inc. v. Lindley*, 70 Ohio St.2d 175, 436 N.E.2d 220 (1982); *AT&T v. Dep't of Rev.*, 15 OTR 202, 2000 WL 1279835 (Or. T.C. 2000); *Pennzoil Co. v. Dep't of Rev.*, 15 OTR 101, 2000 WL 1025573 (Or. T.C. 2000); *AT&T v. State Tax Appeal Bd.*, 241 Mont. 440, 787 P.2d 754 (1990); *Mead Corp. v. Dep't of Rev.*, No. 00 CH 01854 (Ill. Cir. Ct. Feb. 5, 2002).

(R. p. 2936, lines 17-23; R. p. 2938, lines 15-18; R. p. 2938, line 23-p. 2939, line 11 (emphasis added).) That “second stage” or “next step” was not yet before the ALC as the ALC only needed to first determine “what the statute says” – i.e., whether, based on the plain language of the apportionment statutes, Duke Energy’s receipts from sales of securities constitute “gross receipts” or “total sales.”

Moreover, other state courts that have considered the “gross receipts” issue more recently have specifically rejected the “absurd results” line of cases for two reasons:

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

Microsoft Corp., 39 Cal. 4th at 763, 139 P.3d at 1176; accord *Sherwin-Williams Co. v. Johnson*, 989 S.W.2d 710, 715 (Tenn. Ct. App. 1998). These courts have found that where the statutory language is plain and clear, “[a]n absurd result is not necessary for, in spite of the plain language of [the sales factor statute], the commissioner may opt for a different scheme of assessment whenever the resulting apportionment does not fairly represent the taxpayer’s business in this state.” *Sherwin-Williams*, 989 S.W.2d at 715. In this case, the plain language of the apportionment statute requires that all gross receipts from Duke Energy’s sales of investment securities be included in the gross-receipts apportionment factor. The Department may not disregard the plain, unambiguous words of the statute.

H. The Department improperly interprets the standard apportionment formula by looking to whether the inclusion of gross receipts in the factor results in distortion.

The Department is incorrect in using distortion principles to interpret the meaning of "gross receipts." The only issue before the ALC was whether, as a matter of law, the gross receipts from the sales of securities should be included in the standard apportionment formula. (R. p. 50; R. p. 409.) Whether the inclusion of the principal in the apportionment formula results in distortion is an entirely separate and inherently factual question, to be addressed only after the standard apportionment formula results have been determined. The Court must first apply the plain language of South Carolina's apportionment provisions – including a calculation of the sales factor. (See Appellant's Brief at 26-32.) Distortion is determined only after the apportionment results are calculated and was a factual question not properly before the ALC. See *CarMax Auto Superstores West Coast, Inc. v. S.C. Dep't of Rev.*, 397 S.C. 604, 611, 725 S.E.2d 711, 714 (Ct. App. 2012).

III. THE DEPARTMENT MISINTERPRETS SOUTH CAROLINA LAW, WHICH TREATS MANUFACTURERS AS PERSONS DEALING IN TANGIBLE PERSONAL PROPERTY, AND IGNORES THE RECORD, WHICH ESTABLISHES THAT DUKE ENERGY IS A SERVICE PROVIDER.

A. The Department fails to recognize that taxpayers primarily engaged in the business of manufacturing are only those dealing in tangible personal property.

The Department concedes in its brief that Duke Energy's principal business is the provision of electricity. (Respondent's Brief at 33.) The Department claims that Duke Energy is a manufacturer because "[m]anufacturing is, in short, a process" and the "[s]ubstantial evidence supports the ALC's determination that producing electricity is manufacturing based on the common understanding of that term." (Respondent's Brief at 37-38.) The Department's theory is flawed because it misapplies South Carolina law.

For South Carolina income tax apportionment purposes, South Carolina courts and the Department have consistently viewed “manufacturers” as “taxpayers whose principal business in South Carolina is dealing in *tangible personal property*.” *Media Gen. Commc’ns, Inc. v. S.C. Dep’t of Rev.*, 2009 S.C. Tax LEXIS 56, at *48, *58 (S.C. Admin. L. Ct. May 4, 2009) (emphasis added), *upheld on appeal*, 388 S.C. 138, 694 S.E.2d 525 (2010); S.C. Rev. Proc. No. 09-1, 2009 S.C. Tax LEXIS 84, at *2-3 (S.C. Dep’t of Rev. Jan. 13, 2009). (*See also* Appellant’s Brief at 34-35.)

Indeed, persons whose principal business in the State was dealing in tangible personal property and persons who were service providers are two distinct categories of taxpayers, subject to entirely different income apportionment regimes: persons dealing in tangible property were required to apportion their income based on the multi-factor apportionment formula pursuant to S.C. Code Ann. § 12-6-2250 (applicable for tax years after 1995), S.C. Code Ann. § 12-7-1140 (applicable to tax years prior to 1996); and all other taxpayers (including service providers) must apportion their income based on a single-factor gross-receipts apportionment formula pursuant to S.C. Code Ann. § 12-6-2290 (applicable for tax years after 1995), S.C. Code Ann. § 12-7-1190 (applicable to tax years prior to 1996). Thus, the Department’s contention that “the question in this case is whether the process of generating electricity is manufacturing, not whether electricity is tangible personal property” (Respondent’s Brief at 37), is erroneous because it fails to recognize the distinction between sellers of tangible personal property and sellers of services. If a taxpayer’s end product is a service, it simply cannot be a manufacturer for corporate income tax purposes. (Respondent’s Brief at 37.)

The Department’s mischaracterization of Duke Energy as a manufacturer is

premised on two *non-income-tax* judicial decisions concerning the former Manufacturer's Tax Act and an out-of-context property tax opinion issued by the South Carolina Attorney General. (Respondent's Brief at 35-37, 46-47.) Simultaneously, however, the Department attempts to minimize the significance of *Consolidated Hydro S.E., Inc. v. South Carolina Department of Revenue & Taxation*, No-ALJ-17-0634, 1996 WL 909155 (S.C. Admin. L.J. Div. May 13, 1996), where the ALC held that the provision of electricity is not tangible personal property and instead constitutes a service for license tax purposes. (Respondent's Brief at 42.)¹⁴ The Department's reliance on the property tax and Manufacturer's Act decisions, while attempting to dismiss a license tax case that is exactly on point, makes little sense and is disingenuous at best.

Furthermore, unlike the Manufacturer's Tax Act at issue in those cases, the term "manufacturing" used in the income apportionment tax statutes presupposes a taxpayer dealing in tangible personal property and requires an examination of a taxpayer's activities to make such a determination. Notably, the courts in those cases did not perform such an examination and instead, relied on a single statement in the company's charter.¹⁵ Therefore, those cases are unpersuasive.

¹⁴ Furthermore, the Department fails to recognize that other states, including South Carolina's sister state North Carolina, treat the provision of electricity as a service. *See, e.g., Request for Private Letter Ruling-Nexus Issues* (N.C. Dep't of Rev. Feb. 9, 2007) ("For corporate income tax purposes, North Carolina does not consider the sale of electricity as the sale of tangible personal property.") The Department states that "numerous" other courts have held that electricity is tangible and cites to several non-tax cases. (Respondent's Brief at 43.) The Department fails to recognize, however, that numerous courts have also held that the sale of electricity is a service or not a "product." *See Buckeye Union Fire Ins. Co. v. Detroit Edison Co.*, 38 Mich. App. 325, 196 N.W. 2d 316 (1972); *Williams v. Detroit Edison Co.*, 63 Mich. App. 559, 234 N.W. 2d 702 (1975); *Navarro Cnty. Electric Coop., Inc. v. Prince*, 640 S.W. 2d 398 (Tex. App. 1982); *Otte v. Dayton Power & Light Co.*, 37 Ohio St 3d 33, 523 N.E. 2d 835 (1988).

¹⁵ The Department introduced a copy of Duke Energy's 1977 Restated Charter into evidence presumably because the Charter mentions the word "manufacture." The Charter also authorizes Duke Energy to: (a) "[D]eal in ... electrical and other power for the generation, distribution and supply of electricity for light, heat and power, and for any other uses and purposes"; (i) "Produce, purchase, sell and deal in farm and dairy products and the various materials entering into or used in the production thereof"; (q) "[C]arry on and conduct the business of storage, cold storage, refrigeration, freezing, and icemaking . . ."; (t) "[D]o all

The Department also attempts to confuse this Court with regard to the significance of the definition of "tangible personal property" set forth in S.C. Code Ann. § 12-36-60 for South Carolina sales tax purposes. First, while the ALC appeared to apply, as it must, the definition of "tangible property" for South Carolina income tax purposes, contrary to the Department's contention (Respondent's Brief at 41), the ALC construed the meaning of that term by expressly relying on the definition of "tangible personal property" for sales tax purposes. Specifically, as fully discussed in Duke Energy's Brief (Appellant's Brief at 36), the ALC reasoned that the first sentence of the sales and use tax definition of "tangible personal property" "*coincides* with the general understanding of the term 'corporeal' included in the definition of 'tangible property' [for income tax purposes" (R. pp. 142-143 (emphasis added).) The ALC then summarily concluded that "according to the plain and ordinary meaning [of the income tax definition] which is *supported* by the general [sales and use tax] definition of tangible personal property given the first sentence of Section 12-36-60, I conclude that electricity is tangible personal property." (*Id.*) (Emphasis added).

The ALC failed to recognize that the first sentence of the sales and use tax definition has no mention of the term "electricity." (*See* Appellant's Brief at 36.) It is the second sentence of that definition that specifically states that, for sales and use tax purposes, the term "tangible personal property" "*also includes services and intangibles, including . . . sales of electricity.*" *See, e.g.,* S.C. Code Ann. § 12-36-60 (emphasis

and everything . . . which shall at any time appear conducive or expedient for the protection or benefit of the Corporation" The record contains no evidence that would indicate that Duke Energy deals in dairy products or conducts the business of icemaking. And simply because Duke Energy's Restated Charter used the term "manufacture" in 1977 in reference to a business activity, does not mean that Duke Energy's principal business is manufacturing for purposes of corporate income tax apportionment. Indeed, Duke Energy refers to itself as a service provider in numerous other documents it files with state and federal agencies. (Appellant's Brief at 44-46.)

added); (*see also* Appellant's Brief at 35-36). Thus, recognizing that the ordinary understanding of the term, as reflected in the first sentence of the definition, does not include services and intangibles, the South Carolina Legislature included additional language reflecting the Legislature's decision to treat services or intangibles such as electricity as tangible personal property *for South Carolina sales and use tax purposes*. Comparing the income tax definition of "tangible property" and the sales tax definition of "tangible personal property," it is clear that the Legislature did not make the same decision to treat electricity as tangible property for South Carolina *income tax purposes*. Therefore, it is the Department that "misses the mark" (Respondent's Brief at 41) in reading the ALC's Amended Order and Duke Energy's Brief.

B. The Department's claim of the existence of an alleged "long-standing policy" of treating electric service providers as manufacturers is false.

The Department has not cited, as it cannot, to a single decision, ruling, regulation, or other document issued by the Department that establishes its purported "long-standing administrative policy that electric utilities are manufacturers." (Respondent's Brief at 46.) Indeed, no such guidance exists. The *only* evidence presented by the Department in support of its so-called "long-standing" policy is a corporation manual that was never, and is still not, made available to the public or otherwise distributed outside of the Department, and that cites to no authority in support for such a "policy." (Appellant's Brief at 43-44.)¹⁶

The Department claims that this Court should nevertheless afford deference to its "secret" policy. South Carolina's highest court has expressly opined that because an agency guideline "has not been formally adopted as a regulation, *it does not have the*

¹⁶ In fact, the corporation manual contains inconsistencies that even the Department's witness was not able to explain. (R. p. 2622, lines 6-10.)

force and effect of law and is entitled to no deference.” Doe v. S.C. Dep’t of Health & Human Servs., 398 S.C. 62, 68, 727 S.E.2d 605, 608 (2011) (emphasis added); *see also*

S.C. Tax Comm’n Dec. 93-78, 1993 S.C. Tax LEXIS 140 (July 29, 1993) (“rejecting taxpayer’s use of long-standing agency interpretation because “[w]e do not believe there are any ‘generally accepted consolidation’ rules which exist *if they are not codified*” (emphasis added)). (*See also* Appellant’s Brief at 43-44.) Therefore, ALC’s decision affording deference to the Department’s “secret” policy stands alone in this regard and should be overturned.¹⁷

In an apparent attempt to suggest some culpable responsibility, the Department claims that “for 23 years, Duke Energy filed its returns using the multi-factor apportionment formula,” it must have known of the Department’s “secret” policy. (Respondent’s Brief at 47-48.) This unfounded and uncalled for allegation is not true and makes little sense. First, there is nothing in the record that suggests, even remotely, that Duke Energy was aware that the Department’s so-called “policy” existed. Furthermore, multi-state taxpayers, such as Duke Energy, file numerous state tax returns every year, often more than once a year. It is not uncommon for such taxpayers to make errors in filing their tax returns. Indeed, it is for that reason that state laws permit state revenue agencies to review a taxpayer’s tax returns and make corrections by issuing assessments, or afford taxpayers with the opportunity to correct any errors by filing refund claims. In fact, Duke Energy’s witness testified under oath that Duke Energy filed its original tax returns for the Tax Periods at Issue by erroneously apportioning its income based on the

¹⁷ The Department misleadingly asserts that Duke Energy did not appeal the ALC’s finding that the Department had a long-standing administrative policy that electric utilities are manufacturers. (Respondent’s Brief at 46.) To the contrary, Duke Energy’s Brief specifically states that “[t]he ALC erred in holding that the Department has a ‘long-standing policy’ of treating electric service providers as manufacturers” and details the basis for that assertion. (Appellant’s Brief at 43.)

multi-factor apportionment formula, an error which Duke Energy later corrected.

C. The Department ignores the record, which establishes that Duke Energy is a service provider.

The extensive evidence presented at trial establishes that Duke Energy is not a manufacturer or manufacturing is not its primary business because Duke Energy does not deal in tangible personal property. (Appellant's Brief at 38-40, 44-46.) Duke Energy's expert witness Professor Ioannis Papapolymerou – a distinguished professor of electrical engineering at the Georgia Institute of Technology, who has won numerous prestigious awards and frequently performs work for the U.S. Department of Defense – testified extensively that electricity lacks physical characteristics, is not an object, and has no substance, physical shape or form, weight, height, volume, or other dimension typically attributable to tangible property. (Appellant's Brief at 7-10, 38.)¹⁸ Moreover, in responding to the question of whether electricity is a service, the Department's own expert testified "[i]f [electrical energy] were provided on a flat-fee basis, you could consider it a service." (R. p. 2764, line 25-p. 2765, line 3.)¹⁹

The Department mistakenly assumes that because an "electric charge" is "associated with electricity," an electric charge is electricity. (Respondent's Brief at 40-41.) To the contrary, the evidence in the record clearly establishes that electricity is *not*

¹⁸ Again, the Department attempts to confuse this Court by claiming that Duke Energy did not appeal from the ALC's factual ruling that electricity is a "physical product with physical characteristics." (Appellant's Brief at 38-39.) This assertion is false as Duke Energy's Brief specifically states that "the ALC erroneously held that electricity is tangible personal property because: it 'is a physical product' with 'physical characteristics.'" (Appellant's Brief at 39.) Further, the Department's argument that Duke Energy did not preserve its claim that "tangible personal property" is ambiguous for review is also without merit. (Respondent's Brief at 42, n.37.) This exact issue was raised in Duke Energy's Pre-Trial Brief (R. p. 1190) and contrary to the Department's assertion, Duke Energy was not required to request a reconsideration of the ALC's ruling on this issue in a Motion for Reconsideration. A Motion for Reconsideration is not necessary to preserve issues that have been ruled upon at trial. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76-77, 497 S.E.2d 731, 734 (1998).

¹⁹ When asked whether electricity provided on a flat-fee basis is any different scientifically than the electricity provided on a per kilowatt hour basis, the Department's expert opined "all kilowatt hours are the same." (R. p. 2765, lines 4-13.)

an electric charge; rather, an electric charge is the source of the electromagnetic field. (R. pp. 2639-2640, 2644; Appellant's Brief at 9-10.)

Contrary to the Department's contention, Duke Energy does not "process electrons" or "goods and materials." (Respondent's Brief at 34, 46.) The electrons, which already reside in the power lines, simply facilitate the propagation of electricity. (Appellant's Brief at 8.) All Duke Energy does is provide an electromagnetic field – a force field - that lacks physical characteristics, cannot be created or destroyed, and is neither a matter nor a material. (Appellant's Brief at 7-10, 38.)²⁰

The Department mistakenly focuses on the ALC's finding that electricity is a product. (Respondent's Brief at 38.)²¹ It is unclear from the Department's Brief or the ALC's Order what is meant by the term "product." In any event, as stated in Duke Energy's Brief, the ALC's reference to electricity as a product is improper and completely irrelevant because the term "product" is not found in the income tax definition of "tangible property," and the Department has not otherwise introduced any credible evidence that electricity is a "product." (Appellant's Brief at 40.)

Contrary to the Department's contention, the extensive evidence presented at trial establishes that the provision of electric service is Duke Energy's primary and principal business because Duke Energy derives its principal receipts from sales of services, i.e., electricity. (Appellant's Brief at 45-46.)²²

²⁰ The Department erroneously contends that Duke Energy makes a conclusory statement regarding operation of a generation does not involve processing of goods and materials. (Respondent's Brief at 49, n.41.) Indeed, in its Brief, Duke Energy explained that there was extensive evidence in the record that showed that a generator simply caused the flow of an electromagnetic field, or electricity (Appellant's Brief at 8, 46.)

²¹ Contrary to the Department's assertion, Duke Energy did appeal from the ALC's finding in this regard. (Respondent's Brief at 39; Appellant's Brief at 40.)

²² Once again, the Department attempts to distract the Court by claiming that Duke Energy was required to introduce NAICS codes into evidence. (Respondent's Brief at 44, n.39.) This contention is incorrect

CONCLUSION

For the reasons set forth above and in its Brief, Duke Energy respectfully requests
that this Court reverse the ALC and grant the relief requested in Duke Energy's Brief.

Respectfully submitted,



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because the Court is able to take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *S.C. Dep't of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 466 (Ct. App. 2009). Furthermore, Duke Energy's witness Cooper Monroe, who has prepared or reviewed Duke Energy's federal tax returns for twenty-four years, testified that the NACIS (formerly SIC) codes that exist today are substantially the same as the ones in effect during the Tax Periods at Issue. (R. p. 2474, line 15-p. 2475, line 25.)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Administrative Law Judge

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

Duke Energy Corporation Appellant,

South Carolina Department of Revenue Respondent.

AMICUS CURIAE BRIEF ON BEHALF OF
THE SOUTH CAROLINA STATE CHAMBER OF COMMERCE

RECEIVED

JAN 10 2014

SC Court of Appeals

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I. STATEMENTS OF IDENTITY AND INTEREST OF AMICUS CURIAE

The South Carolina State Chamber of Commerce (the "Chamber") is a tax-exempt organization under section 501(c)(6) of the Internal Revenue Code organized to further the common interests of South Carolina businesses. The Chamber is a leading advocacy organization for business in the state, including the advocacy of a balanced and predictable tax and spending system. The Chamber strives to create prosperity for the state's citizens through increased economic productivity and competition and to promote the positive impact of a successful business community, in both the private and public sectors, on citizens of this state.

The Chamber is a nonprofit, nonpartisan organization which represents businesses, industries, professions, and associations throughout the State. The Chamber aims to serve South Carolina's broad based business interests using a unified voice. Specifically, the Chamber protects South Carolina's businesses by identifying and addressing issues facing businesses, lobbying at both the state and federal level, providing management training and program development, offering employer benefits programs, seeking a balance between environmental responsibility and economic success, addressing education policy to ensure a work force for the future, and tendering meaningful business communications.

II. INTRODUCTION & FACTUAL BACKGROUND

A. The Determination Letter

The genesis of this contested case proceeding is a Department Determination letter dated February 4, 2010 issued by the Department to the Appellant, Duke Energy Corporation ("Duke"), relating to Duke's request for a refund for Tax Years 1978 through 2001. The Chamber of Commerce is not a party to this action. The sole participation herein of *amicus curiae* is for the limited purpose of providing information and analysis for the Court of one of the

defenses raised by the Department in its Determination Letter, specifically that Duke's request for a refund was not "timely." The Department's position on this issue and assertion of the statute of limitations as a defense is entirely contradictory to the practices and procedures implemented by the Department and its predecessors for decades.

B. The Department's Conduct: The Waivers

As acknowledged by the Department in its Determination Letter, Duke and the Department entered into numerous written agreements furnished by the Department entitled "Consent to Extend the Time to Assess Tax" during the time periods at issue in this proceeding – viz. 1978-2001 (the "Waivers"). These agreements specifically set out the years and tax return types subject to the agreement and further specifically state that the agreement "extends the time for mailing a notice of assessment or refund" during the stated time period. The Waivers are issued on the Department's letterhead, with information pre-filled in by the Department, and signed by the Department prior to delivery to Duke.

C. The Department's Defense: The Waivers Do Not Mean What They Say

According to the Department's Determination Letter, despite the clear written language of the Waivers executed between the Department and Duke, the agreements do not operate to extend the time to file a refund claim but rather only benefit the Department by extending the time to assess taxes. The Determination Letter notes that each of the several agreements executed between Duke and the Department provide, in relevant part, that the written 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]." Determination Letter at 9 (emphasis added).

In the Determination Letter, the Department first argues – incredibly – that the Code provisions cited to in the Waivers only allow the extension of time to assess taxes and do not allow the extension of time to file a refund claim. *Id.* The Department additionally argues –

even more incredibly – that prior to the passage of the Revenue Procedures Act in 1995, the Department had no authority to extend time to file a refund, only for the assessment of taxes, thus regardless of either party's intention or belief, the agreements cannot operate to alter the period in which the taxpayer can file a claim for refund. *Id.* The Department's arguments are without merit.

D. The Department's Actions: Effects and Consequences

The Department's position that the Waivers were merely a one-sided agreement to extend the time to assess the tax, and not intended to extend the time for a taxpayer to claim a refund, is a novel argument. The entire taxpaying community has proceeded with the understanding that these form waivers drafted and issued solely at the Department's behest applied equally to extend the time to assess the tax, as well as to claim a refund. This understanding clearly reflects the language of the waivers, which on their face provide that the waivers extend the time for refunds. By claiming that the statute of limitations bars Duke's claims for refund in this contested case, the Department has revoked its promises to the taxpayers and has jeopardized its working relationship with the state's business communities.

The Department proclaims that it is "instrumental in bringing new businesses and encouraging existing businesses to expand within South Carolina." S.C. Dep't of Rev. Annual Accountability Report 2008-2009 at 2 (Sept. 15, 2009). The Department acknowledges that by administering most of the tax credit programs in this state, the Department is closely involved in enhancing economic development in this state. *Id.*

The Department's primary purpose, of course, is to collect state tax revenues, which account for approximately 91% of the state's total revenues. *Id.* at 1. As part of its ongoing process to improve organizational information and efficiency, the Department highlights the key partners and suppliers of information regarding tax revenues and information, the citizens of

South Carolina, and specifically the Chamber. *Id.* at 13.

The Department's laudable involvement with business development in this state, however, will be severely affected by the Department's decision to fleece the state's taxpayers of the right to a closed, legislatively determined period of time for the assessment of taxes. Relying on the Department's promises that the statute of limitations will be equally regarded as extended for both assessments and refunds, taxpayers have been willing to extend the state's power to assess taxes and increase its tax collections. The Department's newly-professed position that the waivers only operate in its favor, and not the taxpayer's, belies the long-standing cooperation with the business community necessary to foster fair, efficient, and enhanced tax and business operations alike. The Department's position is not only incorrect at law, as discussed below, but also extinguishes any expectation by the business community that taxpayers will receive fair and impartial tax administration in the state of South Carolina.

III. DISCUSSION & ANALYSIS

The Department alleges that Duke is not entitled to any refund on several of its claims because the statute of limitations has expired as to a number of years that are in fact explicitly included in the Waivers. By executing the Waivers, however, the Department has waived its right to assert the defense of statute of limitations as to the refund claims subject to the written Waivers and is barred from asserting that Duke's refund claims are untimely.

A. Extensions of Time to Assess Tax or Claim a Refund

The three-year statute of limitations applies to the assessment of taxes, and the Department is precluded from assessing taxes after that time. S.C. Code Ann. § 12-54-85(A) (Supp. 2012). However, the Department may assess taxes after that time if the taxpayer consents to an extension prior to the time that the original assessment period has passed. § 12-54-85(C)(4).

A taxpayer generally may file a claim for a tax refund within the later of three years from the time a tax return was filed, or two years after the time the tax was paid. § 12-54-85(F)(1).

However, the Department may extend the time to file a claim for tax refund. *See* § 12-60-40 (authorizing extension of time limitations under Title 12 of the South Carolina Code).

B. Statute of Limitations

1. *The Department's Authority Regarding FS-43*

Both the ALC (by Order dated Aug. 9, 2012) and the Department agree that the DOR Form FS-43 executed on Dec. 19, 1997 for the tax year ending 1994 "effectively extended the period for filing a refund claim." ALC Order at p. 4.

The ALC Order agreed that the current version of the FS-43 – which the DOR now agrees extends the time to filing a refund claim – is virtually identical to the prior version which Duke repeatedly signed. *Id.* at p. 12. (The *only* difference is that instead of reference to "Section 12-54-80" the form now refers to "Section 12-54-85(C)(5).")

Indeed the ALC Order is largely premised on the General Assembly's adoption of the Revenue Procedure Act, specifically section 12-60-40 "which allows the Department to grant extensions of *any* tax-related limitations." *Id.* (Emphasis added)

The ALC Order concurred: "Thus, even if Form FS-43 inferred that a taxpayer has the right to extend the time frame to request for refund, the Department cannot exceed its statutory authority based upon that form." *Id.*

This, of course, begs the question of what statutory authority did the Department possess to promulgate and request the execution of the Form FS-43 prior to the Revenue Procedures Act?

The Form FS-43 answers that in part. It references Section 12-54-80 which explicitly allows the DOR and the taxpayer to extend the time for the mailing of a notice of assessment. The ALC places great significance on the failure of Section 12-54-80 to include the word

"refund." The prior form FS-43 explicitly includes the word "refund." And the ALC Order "nevertheless recognizes the **application** of section 12-54-80 could result in a refund of taxes paid by the taxpayer...." *Id.* at 7 (emphasis in original).

What other powers did the former Tax Commission possess? As the ALC Order notes, "section 12-54-30 provided in relevant part that: 'If the commission discovers on examination of a return *or otherwise* that the tax penalty or interest paid by a person is in excess of the amount legally due, the commission may order a refund or give credit for the overpayment.'" ALC Order at p. 9 (emphasis added).

Section 12-54-30 has no statute of limitations whatsoever (unlike the former pay the taxes under protest and file a law suit within 30 days statutes, Sections 12-47-210 and 12-47-220). The ALC Order concedes as much: "Thus, Section 12-54-30 allowed the Department to grant relief to a taxpayer if discovered as overpayment on examination of a return or otherwise, even if a claim for refund would be untimely." *Id.* at 10.

Both the statute and the ALC Order reference a refund based upon an examination of a return "*or otherwise*." What is "*or otherwise*?" Would it not include the filing of an amended return?

And wouldn't an "examination of a return" possibly include an amended return?

The ALC Order accordingly finds that the Tax Commission had the authority to issue an actual refund on (1) an untimely filed return (2) where no return was even filed, or (3) "*otherwise*" – but had no authority to extend the deadline for filing an amended return?

It seems incredible – even nonsensical – that the Tax Commission had the power to grant a tax refund for a late filed return but didn't have the power to waive the statute of limitations for when the amended return should be filed.

And this was the exact position of the two former Chief Auditors for the Department of Revenue (Marvin Davant and Robbie Anderson) who testified (via affidavit) that the Department has taken the position since the 1960's that the FS-43 worked both ways. Specifically both testified that prior to the Revenue Procedures Act the execution of the FS-43 extended the time for a taxpayer to file an amended return.

2. Waiver of Statute of Limitations

The statute of limitations is a procedural device that, unlike a jurisdictional limitation, may be waived by the parties. See *Langley v. Pierce*, 313 S.C. 401, 403-04, 438 S.E. 2d 242, 243 (1993); *Case v. Hermitage Cotton Mills*, 236 S.C. 285, 287, 113 S.E. 2d 794, 795 (1960). The statute of limitations defense can be waived by parties to a tax refund claim. See *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 439-40, 661 S.E. 2d 73, 80-81 (2008). A party who waives the statute of limitations is barred from raising the statute as a defense. *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 525-26, 443 S.E. 2d 539, 540 (1994). Waiver may be shown by words or conduct and may result from an express agreement, from failure to claim the defense, or by any action or inaction manifestly inconsistent with an intention to insist on the statute. *Mende v. Conway Hosp., Inc.*, 304 S.C. 313, 315, 404 S.E. 2d 33, 34 (1991). Under the rules of construction applicable to contracts, a written agreement to waive the statute of limitations must be "construed liberally and interpreted strongly in favor of the non-drafting party." *S. Atl. Fin. Serv., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E. 2d 27, 29 (2003).

3. Construction and Interpretation of Waivers

The Consent Agreements executed between the Department and Duke are express agreements subject to review and enforcement by the Court. In *Ripley v. Commissioner of Internal Revenue*, 103 F.3d 332 (4th Cir. 1996), the Fourth Circuit Court of Appeals specifically

addressed the principles of law applicable to the interpretation of Internal Revenue Service ("IRS") Form 872, a form waiver that, similar to the Department's form waiver, FS-43, extends the time to assess additional tax. At issue in *Ripley* was whether the IRS timely had assessed gift taxes against donees of property where the donor had executed a Form 872, described by the Fourth Circuit as "a document developed by the IRS to solicit a taxpayer's agreement to extend the time in which the Service may assess a tax." *Id.* at 334. In determining how to construe or interpret the IRS's form waiver, the Fourth Circuit noted that a Form 872 is not a contract, but rather a waiver of a limitations period. *Id.* at 337 (internal citations omitted). If the taxpayer, however, qualifies the waiver of the statutory limitations period on specified conditions, the conditions must be satisfied for the waiver to be upheld. *See id.*

The Fourth Circuit further stated as follows:

[T]hough a Form 872 is a waiver of the applicable limitations period, not a contract, many courts have recognized that principles of contractual interpretation must be utilized in construing them. Consequently, because the IRS drafted the Form 872, including the language specifying the date of termination of the extension agreement, to the extent that the language is ambiguous it is construed against the IRS.

Id. at 337 (internal citations omitted).

The principles of contractual interpretation, therefore, should be applied when construing or interpreting the Department's form waiver, FS-43. Contract principles are significant because by statute the parties must agree to an extension of time to assess a tax in writing. *Grunwald v. Comm'r*, 86 T.C. 85, 89 (1986).

The cardinal rule of contract interpretation is to ascertain and give legal effect to the intentions of the parties as determined by the contract language. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2003). If the terms of a contract are clear and unambiguous, a court

must enforce the contract according to its terms regardless of its wisdom or folly. *S. Atl. Fin. Srvs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003).

Where a language in a contract is ambiguous, it is well settled that any ambiguity must be construed liberally and interpreted strongly against the drafting party and in favor of the non-drafting party. *Id.*; see also *Mid-Continent Refrigerator Co. v. Way*, 263 S.C. 101, 105, 208 S.E.2d 31, 33 (1974) (stating that it is elementary that any ambiguities or conflicts in a contract prepared by and printed on the forms of the drafting party must be construed favorably to the non-drafting party); *Springs & Davenport, Inc. v. AAG, Inc.*, 385 S.C. 320, 326, 683 S.E.2d 814, 817 (Ct. App. 2009) (noting that any doubt about the construction of a written instrument must be resolved against the drafter and in favor of the party to whom it was delivered). A contract is ambiguous if it can be understood in more than one way or is unclear because it expresses its purpose in an indefinite matter. *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 205, 687 S.E. 2d 714, 718 (Ct. App. 2009).

The reason for this rule of strict construction against the drafting party is that the party who prepared the contract or is responsible for its language is in the stronger position to avoid confusion in meaning, and thus must bear responsibility for any ambiguity and suffer from its shortcomings. *Myrtle Beach Lumber Co. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981); see also *Williams v. Teran, Inc.*, 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) ("The rule of law is that where the contract is susceptible of more than one interpretation, a doubt shall be resolved against the party whose business it was to speak without ambiguity").

Moreover, this rule of strict construction against the drafting party applies with particular force in cases involving a contract of adhesion. *S. Atl. Fin. Srvs., Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002), *aff'd as modified*, 356 S.C. 444, 590 S.E.2d 27

(2003). A contract of adhesion is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not subject to negotiation. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007).

Under these well-settled rules of contractual interpretation and construction, the plain language of the Consent Agreements should control, and, even if the language is reasonably susceptible to more than one interpretation, any ambiguity should be liberally and strongly construed against the Department as the drafting party. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778; *S. Atl. Fin. Servs.*, 356 S.C. at 447, 590 S.E.2d at 29 (2003); *see also Ripley*, 103 F.3d at 337 (holding that ambiguous language in a form waiver should be construed in favor of the taxpayer and against the government as the drafting party).

C. The Department Has Validly Waived the Statute of Limitations and Extended the Time to Claim a Refund.

In denying Duke's refund claims, the Department claims that the Waivers were not "intended" to extend the time to file refund claims. The Waivers are official documents, FS-43, drafted solely by the Department and issued to taxpayers in an attempt to obtain consent to extend the time to assess additional taxes. The Waivers clearly provide that the agreements extend the time for assessment *or* refund. Furthermore, the Waivers should be strongly construed against the Department as the drafting party and in favor of Duke to equally apply to extend the time to assess a tax and claim a refund. *See, e.g., United States v. Hodgekins*, 28 F.3d 610, 614 (7th Cir. 1994) ("The IRS is an arm of government with authority to subject citizens to the burdens of litigation. With this authority comes a responsibility to be careful. The IRS cannot – as it did with [the taxpayer] – compel a party to give up the protection afforded by the statute of limitations, based on a representation that it would only seek to reopen a claim under a limited condition, and then try to ignore the condition, or substitute a different condition."); *Grunwald v.*

Comm'r, 86 T.C. 85, 89 (1986) ("A deal is after all a deal, and fairness dictates that both parties adhere to the provisions of the [Waiver] document they both voluntarily signed."). To hold otherwise would put Duke, and countless other taxpayers, at an unfair advantage from cooperating with the Department and agreeing to a waiver that the Department subsequently can claim operates only in its favor.

The Tax Court has eloquently stated the importance of equitable application of the income tax laws to both the government and the taxpayer, which reasoning applies equally here:

The nature of our income tax system is one of self assessment. Its very foundations rest upon the continued goodwill and cooperation of our citizens in voluntarily disclosing their taxable income. Such cooperation will not long be forthcoming if the tax laws are not administered in an equitable and evenhanded manner. . . . As Justice Douglas said in his Concurring Opinion in *Commissioner v. Lester*, 366 U.S. 299, 306 (1961):

* * * In an early income tax case, Mr. Justice Holmes said 'Men must turn square corners when they deal with the Government.' *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143. The revenue laws have become so complicated and intricate that I think the Government in moving against the citizen should also turn square corners.

Newman v. Comm'r, T.C. Memo. 1974-45.

The Department's longstanding position is to treat the Waivers as extending both the time for assessment and for the taxpayer to file a refund. In South Carolina Revenue Procedural Bulletin #00-3, the Department of Revenue explicitly states that "[c]onsistent with its longstanding administrative position," if a taxpayer agrees to the Department's request to extend the time limitations on assessments, the Department will consider the time for a taxpayer to file a refund claim to be similarly extended. It is clear that the Department intended, and has always intended, for the Waivers to extend the time for Duke to claim a tax refund. The Department is therefore bound to allow Duke to file a claim for refund within the period of time

stated in the Waivers.

I. Waiver of Statute of Limitations

Contrary to the Department's assertions, the Department was also authorized to waive the statute of limitations for filing a refund claim prior to enactment of S.C. Code Ann. § 12-60-40 in 1995. The South Carolina Supreme Court has abolished the doctrine of sovereign immunity, and thus the Department at all times has been authorized to waive the statute of limitations defense, even without explicit legislative authority to do so. See *McCall v. Batson*, 285 S.C. 243, 329 S.E. 2d 741 (1985). The Waivers, therefore, are a valid waiver of the statute of limitations defense to Duke's refund claims, and the Department is barred from raising the defense that the claims are untimely.

As discussed above, the statute of limitations is a procedural defense that may be waived by any party, including the Department, by express or implied agreement. See, e.g., *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 440, 661 S.E.2d 73, 80 (2008) (discussing waiver of statute of limitations with respect to tax refund claim); *Mende v. Conway Hosp., Inc.*, 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991) (stating that waiver of statute of limitations defense may be express or implied). Under South Carolina law, the statute of limitations is not a jurisdictional requirement for Duke to bring a tax refund claim, but rather is a procedural limitation that may be waived by the Department. See *Goff v. Mills*, 279 S.C. 382, 388, 308 S.E.2d, 778, 781 (1983) (noting that the imposition of a statute of limitations is not a jurisdictional question).

In contrast, under federal law a statute of limitations for suits against the state is considered to be jurisdictional in nature, and therefore may not be waived by officers or agents of the state without express legislative authority to do so. See *United States v. Dalm*, 494 U.S. 596, 608, 110 S. Ct. 1361, 1368 (1990) (noting that the state is immune from suit except to the

extent to it has consented to be sued, and the terms of its consent define the court's jurisdiction to entertain the suit). The United States Supreme Court has stated this antiquated rule of sovereign immunity as follows:

The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions has no application to suits in the court of claims against the United States. An individual may waive such a defense, either expressly or by failing to plead the statute, but the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the court of claims. Since the government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the court of claims for the amount of a claim which the record or evidence shows to be barred by the statute would be erroneous.

Finn v. United States, 123 U.S. 227, 232-33, 8 S.Ct. 82, 85 (1887).

Federal courts have extended the principles of sovereign immunity to tax refund claims and held that filing a timely refund claim with the Internal Revenue Service is a jurisdictional prerequisite to maintaining a tax refund suit. *Angle v. United States*, 996 F.2d 252 (10th Cir. 1993) (citing *United States v. Dalm*, 494 U.S. 596, 601-02, 110 S.Ct. 1361, 1364-65 (1990)). As a result, the Internal Revenue Service may not waive the statute of limitations applicable to tax refund claims except as authorized by statute. *See id.*

Early case law in South Carolina similarly applied the principles of sovereign immunity to tax refund claims. In *Argent Lumber*, the South Carolina Supreme Court held that in the absence of express statutory authority to waive the statute of limitations, an agent of the tax commission could not alter, amend, or change the statutory limitations period applicable to tax refund claims. *Argent Lumber Co. v. Query*, 178 S.C. 1, 182 S.E. 93, 95 (1935); see also *Monarch Mills v. S.C. Tax Comm'n*, 149 S.C. 219, 146 S.E. 870, 872 (1929) (holding that even if

a state permits itself to be sued for a tax refund, it is not liable for interest unless a statute specifically so provides). The inability of the tax commission's agent to waive the statute of limitations was based on sovereign immunity protecting the state from suit in the absence of a statute waiving immunity.

The South Carolina Supreme Court, however, subsequently abolished the doctrine of sovereign immunity and expressly overruled the principles stated in *Argent Lumber*. *McCall v. Batson*, 285 S.C. 243, 246-47, 250, 329 S.E.2d 741, 742-744 (1985). The South Carolina Supreme Court ruled that sovereign immunity does not apply to any case filed after July 1, 1986. *Id.*, 285 S.C. at 246, 329 S.E.2d at 743. After that time, therefore, the Department could waive the statute of limitations as a defense to an untimely filed claim.

The *McCall* decision, moreover, allows a taxpayer to enforce a waiver of the statute of limitations made by the Department. In *Argent Lumber*, the tax commission's agent orally agreed to wait a final determination by federal tax authorities, and that adjustments to the taxpayer's return would be made thereafter even though the limitations period on refunds would have passed. *Argent Lumber*, 178 S.C. 1, 182 S.E. at 95. The South Carolina Supreme Court stated that although the tax commission had the discretionary authority, by statute, to grant a refund even though the statute of limitations for filing a refund claim had passed, the taxpayer could not enforce the exercise of this discretion because of sovereign immunity prevented the state from being sued without its consent. *Id.* Because *McCall* expressly overruled *Argent Lumber* on these grounds, a taxpayer is entitled to enforce the Department's decision to exercise its discretion to issue a refund although the limitations period on filing refund claims has passed pursuant to S.C. Code Ann. § 12-54-30 (prior to repeal in 1995) and S.C. Code Ann. § 12-60-470(G) (after enactment of the Revenue Procedures Act in 1995). *McCall* would not permit a

taxpayer to sue the Department to exercise its discretion, e.g., to execute a Waiver and agree to consider an otherwise untimely refund claim, because the exercise of discretion includes the right to be wrong. *McCall*, 285 S.C. at 245, 329 S.E.2d at 742. However, after the Department has *actually exercised* this discretion by signing a Waiver and agreeing to extend the time for refund claims in exchange for consent to extend the time for assessment, sovereign immunity no longer protects the Department from a taxpayer's suit to enforce the terms of the Waiver.

Because sovereign immunity no longer applies to treat the statute of limitations as a jurisdictional bar to a tax refund claim, the Department, like any other party, has been fully capable of waiving the statute of limitations and its right to raise the statute as a defense to a tax refund claim. In addition, because sovereign immunity no longer bars a taxpayer from bringing suit to enforce the Department's proper exercise of its authority to grant untimely refund claims, the Department may be held to the terms of the Waiver. As of July 1, 1986, therefore, the Department has been authorized to waive its right to raise the statute of limitations defense to Duke's tax refund claims with respect to any and all tax years in question, and Duke is entitled to enforce this waiver by filing its refund claim.

Consistent with its right to waive the statute of limitations, prior to the enactment of § 12-60-40 the Department repeatedly induced Duke to consent to the extension of time to assess tax in an otherwise closed year in exchange for waiving the right to argue that a refund claim filed within the same time period was untimely. The Department's intention to waive the statute of limitations defense with respect to the years at issue is evident not only from the course of dealing between the Department and Duke, but also from the Department's repeated inclusion of the years in question in the Consent Agreements. The Department, therefore, has validly waived the right to raise the statute of limitations as a defense and is precluded from denying the refund.

claims solely on the basis that Duke's claims for refund were not timely filed.

2. Extension of Limitations Period

In addition, Duke's refund claims are timely because they were filed within the time stated in the Waivers. Pursuant to S.C. Code Ann. § 12-60-40, the Department has actually extended the time for Duke to file the claims. Section 12-60-40 authorizes the Department to extend any time limitations provided under Title 12 of the South Carolina Code, including the time to file a claim for a tax refund. Unlike an extension of time to assess a tax, however, the extension of time to claim a tax refund is not required to be granted prior to expiration of the original filing period nor consented to in writing by the taxpayer to be valid. *Compare* S.C. Code Ann. § 12-54-85(C)(4) (Supp. 2012) *with* S.C. Code Ann. § 12-54-85(F)(1) (Supp. 2012).

Because no time limitations are placed on the Department's ability to extend the time to file refund claims, the Waivers were not required to be executed by the Department prior to the time that the original limitations period had run. Therefore, the Waivers validly extend the time to claim a refund, and Duke's claims were timely filed for all years in question.

D. The Department is Equitably Estopped From Raising the Statute of Limitations Defense.

The Department also should be barred from raising the statute of limitations as a defense to Duke's refund claims under the doctrine of equitable estoppel. The elements of equitable estoppel as to the party to be estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E. 2d 110, 114 (2001). A governmental entity is not shielded from the doctrine of equitable estoppel where its agents act within the property scope of their authority. *Quail Hill v. County of Richland*, 387 S.C. 223, 236,

692 S.E. 2d 499, 506. The party asserting estoppel against a governmental entity must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) justifiable reliance upon the government's conduct; and (3) prejudicial change in position. *Am. Legion Post 15 v. Horry County*, 381 S.C. 576, 584, 674 S.E. 2d 181, 185 (Ct. App. 2009).

The Department's use of Waivers like those at issue in this case has been widespread for many years. The purpose of the extension of the statute of limitation by agreement has been as much for the convenience of the Department and its staff, as for the taxpaying entity. South Carolina is not alone in states employing these written agreements for both assessments and refunds. For the Department to now argue that those Waivers are not enforceable pursuant to their clear terms is fundamentally unfair to both Duke in this action and the countless other taxpayers and taxpaying entities who rightfully relied on the statements of Department staff in entering those agreements. *See Heckler v. Community Health Servs. Of Crawford County, Inc.*, 462 U.S. 51, 60-61, 104 S. Ct. 2218, 2224 (1984) (commenting on the possibility of "cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government"); *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government"); *Menges v. Dentler*, 33 Pa. 495, 500 (1859) ("Men naturally trust in their government, and ought to do so, and they ought not to suffer for it"); *see also United States v. Ganz*, 806 F. Supp. 1567, 1575 (1992) ("As the trustee of the people, the government is held to a higher standard in carrying out our common duties, including the prosecution of crimes. This higher standard requires the sovereign to perform its contractual duties with a sharpened sense of good faith and fair dealing.").

Neither Duke nor any of the other taxpayers who have executed similar Waivers purporting to extend the time limitations for both tax assessments and refunds claims knew or could have known that the Department would refuse to honor the agreements as written and instead claim that only the Department benefitted from the agreements with the extension of time to assess taxes, and no such benefit would be recognized for the extension of time to file refund claims. Also evident is that Duke and other taxpayers would not have knowingly entered into these one-sided written agreements with no benefit to be conferred on the taxpayer in return. Where the very delay relied upon in asserting a statute of limitations defense was induced by the defending party, the defendant may be estopped from asserting the defense. *See Am. Legion Post 15 v. Horry County*, 381 S.C. 576, 584, 674 S.E.2d 181, 184 (Ct. App. 2009). The prejudice and fundamental unfairness to Duke and other similarly situated taxpayers is obvious from the nature and very fact of these proceedings.

E. The Statute of Limitations has been Equitably Tolled by the Department's Conduct.

The statute of limitations for Duke to file the tax refund claims at issue should also be equitably tolled by the Department's conduct. "Equitable tolling is a judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). Tolling of a statute of limitations allows for courts of equity to "serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits." *Id.* In *Hooper*, the plaintiff was unable to effect service on the defendant prior to the expiration of the statute of limitations because the defendant corporation did not have a valid registered agent listed with the Secretary of State. *Id.*; see also *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2008). The Court of Appeals had refused to equitably toll the statute

of limitations and dismissed the lawsuit, holding that equitable tolling was "reserved for extraordinary circumstances." *Hooper*, 377 S.C. at 230, 659 S.E.2d at 219. The Supreme Court reversed the Court of Appeals, holding that equitable tolling did not require extraordinary circumstances to warrant application. *Hooper*, 386 S.C. at 114-120, 687 S.E.2d at 32-34. "Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness." *Id.* (internal quotations omitted).

In this case, justice and fundamental fairness demands that the Department be required to honor the Waivers of their own creation, which expressly allow the extension both of the time to assess taxes as well as the time to file a claim for refund. The Department has induced taxpayers to enter into agreements to extend the time to assess a tax – the relinquishment of a right that results in enormous benefit and revenue to the Department – by promising the taxpayer an equal opportunity to claim a refund during the extended time period. Justice demands that parties who voluntarily enter into written agreements to their own advantage be bound by the express terms of that agreement, even where one party is the State of South Carolina. To allow otherwise is to work a fundamental unfairness on every taxpaying entity who has been deceived by the actions of the Department.

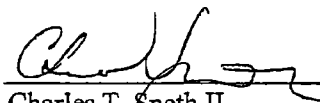
IV. CONCLUSION

For the foregoing reasons, this Court should deny the Department's defense that the refund claims are not 'timely' and find that the Consent to Extend Time to Assess Tax agreements were valid and enforceable as to the extension of time for the assessment of taxes as well as the claim for refund. The Department's position is not only incorrect at law, but also jeopardizes the ongoing, working relationship with the business community and taxpayers of this state and the state's ability to collect additional revenues through the taxpayer's voluntary waiver

of the time to assess taxes.

RESPECTFULLY SUBMITTED,

January 10, 2014
Columbia, South Carolina



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph K. Anderson, III
Chief Administrative Law Judge

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

Duke Energy Corporation, ... Appellant,

v.

South Carolina Department of Revenue, ... Respondent.

AMICUS CURIAE BRIEF ON BEHALF OF THE SOUTH CAROLINA
MANUFACTURERS ALLIANCE ("SCMA")

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SC Court of Appeals

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I. STATEMENTS OF IDENTITY AND INTEREST OF AMICUS CURIAE

The South Carolina Manufacturers Alliance (the "Alliance") is a tax-exempt organization

under section 501(c)(6) of the Internal Revenue Code and is the manufacturing industry's association in South Carolina, serving as its government liaison. The Alliance strives to preserve and promote the economic health of manufacturing industries in the state by seeking positive action in state government, as well as to educate public officials and the general public on issues of importance to manufacturing industries. The Alliance emphasizes that maintaining strong manufacturing industries in the state will foster and promote the strength of South Carolina's economy. In 2009, the manufacturing sector accounted for approximately 12% of the state's total employment.¹

The Alliance is a non-profit, bipartisan organization that has been in existence for 109 years. It serves as the manufacturing industry's trade organization in South Carolina. The goal of the organization is to be the voice of manufacturers to the state's legislative and regulatory branches of government, as well as preserving and promoting South Carolina's widely respected business climate. It also provides a variety of educational forums.

Manufacturing employment (while down from historical figures) still constitutes 13% of total state employment in South Carolina,² and manufacturers pay 20.9% of all state wages. Manufacturers pay average annual wages of \$47,073 versus the South Carolina state average of \$37,752. Manufacturing wages range from \$135,148 in aircraft manufacturing, \$83,980 in nuclear power generation to \$37,336 in textiles.³ By contrast, retail trade pays an average wage

¹ S.C. Comptroller General's Office, "Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2009" at 8.

² Miley, Gallo & Associates, LLC, *The Economic Impact of Manufacturing in South Carolina* 3 (Dec. 2009), available at http://myscma.com/public_docs/ManufacturingReport_Final.pdf.

³ *Id.* at 9, tbl. 7.

of \$23,862, with food services paying \$14,357 and grocery stores \$21,001.⁴ Manufacturing directly creates and supports 256,000 jobs in South Carolina and indirectly another 328,000.⁵

Manufacturers also pay some 25% of all property taxes in South Carolina (including both traditional property taxes as well as fee-in-lieu).⁶ In some counties manufacturers constitute more than 50% of the property tax base.

A recent study indicates that South Carolina's economy ranks 11th in the nation in being dependent on the manufacturing sector.⁷ According to another study, since January 2010, manufacturers have invested more than \$7 billion in new projects in South Carolina and have created more than 21,000 jobs.⁸ This represents a greater than 10 percent employment gain — one of the best in the country.⁹ And in January 2013, South Carolina was recognized by IBM-Plant Location International as the top state for jobs linked to foreign investment.

II. INTRODUCTION & FACTUAL BACKGROUND

A. Department's Denial of Appellant's Refund Claims

This contested case follows the Department's denial of the refund requests of Appellant, Duke Energy Corporation (the "Appellant"), for 1978–2001 in a final determination letter (the "Determination Letter") issued on February 4, 2010. Although the Alliance is not a party to the action, it offers this brief as an *amicus curiae* for the limited purpose of providing the Court with information and analysis of the Department's assertion that the Appellant's claims for refund were untimely. The Department's equivocal position on the waiver and its decision to raise the

⁴ *Id.* at 9, tbl. 7.

⁵ *Id.* at 13.

⁶ *Id.* at 11, tbl. 8.

⁷ G. Scott Thomas, *Indiana Leads More on Manufacturing than any Other State*, Charlotte Business Journal (July 18, 2011, 1:00 AM), available at <http://www.bizjournals.com/bizjournals/on-numbers/scott-thomas/2011/07/indiana-leads-heavily-on-manufacturing.html>.

⁸ Mark Crawford, *The States Leading the U.S. Manufacturing Resurgence* (Winter 2013), available at <http://www.areadevelopment.com/regionalreports/q1-2013/states-leading-us-manufacturing-resurgence-2665542.shtml>.

⁹ *Id.*

statute of limitations as a defense is contrary to its long-standing position – and all taxpayers' understanding – that the waiver operates not only as an extension of time for the Department to assess a tax, but also for the taxpayer to claim a tax refund.

The Administrative Law Court Order Granting Summary Judgment in Part and Denying Summary Judgment in Part dated August 9, 2012 (hereinafter "ALC Order") found that "the Duke audit was extended a number of times, over a period of years, due to the pending results of an audit of Duke Energy by the Internal Revenue Service (IRS), and also due to health issues experienced by the Department's auditor and changes in the Department's personnel." ALC Order at 2. The ALC Order found that the extensions were approved by the DOR through the executions of DOR Forms FS-43. *Id.* The first Form FS-43 was executed in August 1988 and additional FS-43 were periodically executed until June 2002. *Id.* The Department issued the waiver on its letterhead to the taxpayer, and asks that the taxpayer sign the FS-43 waiver to extend the time for assessment or refund of the taxes and for the years entered on the form by the Department. Each of the waivers executed by the Appellant and the Department provide that the form "extends the time for mailing the notice of assessment or refund of the above tax" to the time indicated in the agreement.

Note that this form FS-43 was drafted by the Department. In many cases the form is executed at the request of the Department. The DOR typically asks for the execution of the waiver to give it time to complete an audit before the statute of limitations runs on a period under audit. (Presumably thousands of waivers have been executed by taxpayers and the Department.)

Despite the clear language of the waivers and the Department's longstanding position, in the Determination Letter the Department claims that the waivers only extend the time to assess a tax, not for a taxpayer to file a refund. The Department additionally argues – incredibly – that

even if the waiver was intended to equally apply to refunds, the Department did not have the authority to extend the period to file a refund claim until a legislative change which occurred in 1995, the adoption of the Revenue Procedures Act. The Department's arguments are contrary to the law, as well as to the longstanding position of the Department with respect to waivers.

To the SCMA's knowledge, prior to this action, the Department had never alerted taxpayers that the waiver did not go both ways, i.e., allow refund claims during the pendency of an audit. To the contrary, as seen below, the Department explicitly provided in Policy Documents that the execution of a waiver did allow for the filing of refund claims.

In addition, the Department had never alerted taxpayers prior to the instant action that it had no authority prior to 1995 to execute such waivers.

B. The Department's Mission & Taxpayers' Rights

The Department's stated mission is "to administer the revenue and regulatory laws of this state in a manner deserving the highest degree of public confidence in our integrity, effectiveness, and fairness." S.C. Dep't of Rev. Annual Accountability Report 2008-2009 at 1 (Sept. 15, 2009). To accomplish this mission, the Department declares it will "[a]dminister revenue and regulatory laws in a fair and impartial manner." *Id.* This reinforces the taxpayers' right to receive fair administration under the tax laws and reliance on its express, lawful agreements with the Department.

The South Carolina Taxpayers' Bill of Rights requires that the Department publish brief but comprehensive statements in simple, nontechnical language to explain the procedures, remedies, and rights and obligations of both the department and the taxpayer. S.C. Code Ann. § 12-58-60 (Supp. 2009). This codifies the taxpayer's right to receive and rely on forms, statements and written materials from the Department in plain, easy-to-understand language.

C. The Department's Advantage

The ability to assess additional tax with the taxpayer's voluntary consent beyond the legislatively prescribed period is of enormous benefit to the Department. In fiscal year 2005-2006 alone, South Carolina's actual revenue included over \$131.8 million of increased enforced tax collections." S.C. Budget & Control Bd. Historical Analysis, Bd. of Econ. Advisors Rev. Estimate Analysis at 9 (Dec. 7, 2009) (available at <http://www.budget.sc.gov/OSB-historical.phtm>). The Department, therefore, has a compelling reason to induce taxpayers to waive the statute of limitations and extend the time for the Department to assess additional tax. (Of course, perhaps the most common reason why a waiver was executed was to give the Department additional time to complete an audit. Frequently this is a convenience to the taxpayer as well.)

Until now, taxpayers have agreed to cooperate with the Department and extend the time to assess a tax based in part on the understanding that the Department would extend the same courtesy and extend the time to claim a refund. By suddenly denying the Appellant's refund claims on the basis that they are untimely, the Department has attempted to unilaterally construe the waivers as operating solely to the Department's benefit at the taxpayer's expense. Despite the Department's underhanded attempt to negate the clear intent and application of the waivers, the waivers validly extend the time for the Appellant, and other taxpayers, to claim a tax refund.

III. DISCUSSION & ANALYSIS

In the Determination Letter, the Department has denied the Appellant's refund claims and asserted that many of the claims are barred by the statute of limitations. However, by entering into the waivers, the Department should be viewed as validly waiving the statute of limitations and extending the time for Appellant to file the refund claims for the tax years at issue, and the Appellant's refund claims are, therefore, timely.

A. Statute of Limitations

It is well established under South Carolina law that the statute of limitations is not a jurisdictional requirement, and therefore may be waived by either party to an action. *See Langley v. Pierce*, 313 S.C. 401, 438 S.E. 2d 243 (1993); *Case v. Hermitage Cotton Mills*, 236 S.C. 285, 113 S.E. 2d 794 (1960). The statute of limitations defense can be waived by parties to a tax refund claim. *See Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 661 S.E. 2d 73 (2008).

Waiver of the statute of limitations defense may be shown by a party's words or conduct through express agreement, failure to claim the defense, or any action or inaction manifestly inconsistent with an intention to raise the statute as a defense. *Anonymous Taxpayer*, 377 S.C. at 440, 661 S.E.2d at 80. Under the rules of construction, written waivers of the statute of limitations should be construed and interpreted strongly against the drafting party and liberally in favor of the non-drafting party. *S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 590 S.E. 2d 27, 29 (2003).

B. Analysis

Since the time that the Supreme Court abolished sovereign immunity in 1985, the Department, like any other party, has had the authority to waive the procedural defense of the statute of limitations. *McCall v. Batson*, 285 S.C. 243, 329 S.E. 2d 741 (1985) (abolishing doctrine of sovereign immunity).

Each of the waivers executed by the Appellant and the Department on FS-43 provide that the form "extends the time for mailing the notice of assessment or refund of the above tax" to the time indicated in the agreement. Clearly, the waivers are intended to extend the time to claim a tax refund, as well as to assess the tax.

Moreover, when a taxpayer enters into the FS-43 form waiver, the Department's own position is how to treat the time to file a refund claim as extended to the same extent as the time for assessment. The Department has stated that "[c]onsistent with *its longstanding administrative position*, . . . [i]f the taxpayer agrees to the Department's request that a waiver of the time limitations on assessments be extended, . . . the Department will also consider the time within which a taxpayer may file a claim for refund to be extended until the agreed upon date." S.C. Rev. Procedural Bulletin #00-3 (Emphasis added). While this Revenue Procedural Bulletin was issued after passage of the Revenue Procedures Act, the language of the FS-43 remained almost identical to the FS-43 form which Duke first executed in 1988. See ALC Order at 12. This statement is binding on the Department, and has not been revoked, superseded, or amended in any way by a subsequent agency publication.

Attached hereto as Exhibits A & B are affidavits submitted to the ALC from Robert Anderson and Marvin Davant. Anderson worked at the Department from 1975 until his retirement in 2008 as Senior Administrator. Davant worked at the Department for 37 years until he retired as Director of Field Services Division in 2001. The two men worked at the Department for a total of some 70 years and retired while serving in the very top ranks of the Department. Davant said the Department had used the FS-43 since at least the 1960's. Both men testified via affidavit that the FS-43 went both ways, i.e. allowed the taxpayer to file a refund claim as well as allowing the Department to issue a proposed assessment after the statute of limitations had run. Both men testified this was the Department's practice both before and after the passage of the Revenue Procedures Act.

Specifically, Davant stated:

14. To the best of my knowledge, information and belief, the Department historically intended, believed and

understood that Form FS-43 not only extended the time to assess additional tax, but also authorized or extended the time for a taxpayer to file a claim for refund within the time stated in the Form FS-43.

15. Prior to enactment of the South Carolina Revenue Procedures Act in 1995, the Department believed that after the execution of the FS-43 by the DOR and the taxpayer that it was authorized and permitted to issue refunds of overpaid tax even if a claim for refund by the taxpayer would not otherwise be timely under the applicable statutory limitations period for filing a refund claim and regardless of whether the period of time initially prescribed for filing a claim for refund had expired.

16. Prior to enactment of the South Carolina Revenue Procedures Act, it was my intent, belief and understanding as Director of Field Services that an executed Form FS-43 constituted the Department's agreement to issue a refund - whether resulting from a review of the taxpayer's records commenced by the Department's on its own initiative, upon consideration of a claim for refund filed by the taxpayer prior to the time stated in the Form FS-43, or otherwise - pursuant to its authority to issue refunds of overpaid tax even if a claim for refund would otherwise be untimely.

17. After enactment of the South Carolina Revenue Procedures Act, there was no difference in how Form FS-43 was interpreted by Department, and the content of the form remained the same.

Anderson similarly stated:

10. To encourage a taxpayer's agreement to extend the time to assess additional tax, the Department intended that Form FS-43 similarly extend the time for a taxpayer to file a refund claim with the Department or for the Department to grant a refund.

13. By executing Form FS-43, the Department believed that it was exercising its discretionary authority to grant a refund upon examination of a taxpayer's return or otherwise, including the taxpayer's filing a refund claim with the Department within the period of time stated in the FS-43, in exchange for the taxpayer's consent to extend the period of time to assess additional tax.

It has been stated that "[m]en must turn square corners when they deal with the government." *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143, 41 S. Ct. 55, 56 (1920). This statement equally applies to require the state and its agencies, including the Department, to turn square corners when dealing with taxpayers. See *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229, 82 S. Ct. 289, 301 (1961) (Black, J., dissenting) ("It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government."); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387-388, 68 S. Ct. 1, 4 (1947) (Jackson, J., dissenting) ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street."); *Title Ins. Co. of Minn. v. S.B.E.*, 4 Cal. 4th 715, 730, 842 P.d 121 (1992) ("Men must turn square corners when they deal with the government; it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens."); *W.V. Pangborne & Co. v. N.J. Dept. of Transp.*, 116 N.J. 543, 561, 562 A.2d 222, 231 (1989) ("[W]e have insisted that in the exercise of statutory responsibilities, government must 'turn square corners' rather than exploit litigational or bargaining advantages that might otherwise be available to private citizens."); *SALJ Realty Inc. v. Town of Kearny*, 8 N.J. Tax 191, 197 (1986) ("If . . . 'Men must turn square corners when they deal with the government,' it behooves government to behave with corresponding rectitude toward its citizens.").

Even assuming that the Department had not waived the statute of limitations to file a refund claim, justice and equity requires that the Department be barred from raising the statute of limitations defense under the doctrines of equitable estoppel or equitably tolling. For equitable estoppel to apply, there must be conduct by the party to be estopped which amounts to a false

representation or concealment of material facts, the intention that such conduct be acted upon by the other party, and actual or constructive knowledge of the trust facts. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E. 2d 110, 114 (2001). A party asserting estoppel against a government agency must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) justifiable reliance on the government's conduct; and (3) prejudicial change in position. *Am. Legion Post 15 v. Horry County*, 381 S.C. 576, 584, 674 S.E. 2d 181, 185 (Ct. App. 2009).

It is clear that equitable estoppel should apply to prevent the Department from raising the statute of limitations as a defense to the Appellant's refund claims. The Appellant, as well as every other taxpayer that has cooperated with the Department and entered into the waivers, was completely unaware that the Department would later claim that the waivers did not operate to extend the time for filing a refund claim. The Appellant and other taxpayers have justifiably relied on the statements and written agreements of the Department providing that a waiver operated equally to extend the time to assess a tax and to claim a refund. Lastly, the Appellant and other taxpayers have encountered a prejudicial change in position because the Department now says that counter to the plain language of the waivers and its binding, published position, the waivers do not operate to extend the time to claim a tax refund. The facts of this contested case and the actions of the Department clearly show that it should be estopped from claiming the statute of limitations as a defense to the Appellant's refund claims.

Justice also demands that the statute of limitations also should be equitably tolled. Courts may invoke the doctrine of equitable tolling to suspend or extend the statute of limitations to ensure fundamental practicality and fairness. *Hooper v. Ebenezer Senior Serv. and Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). The Department has repeatedly stated that if a

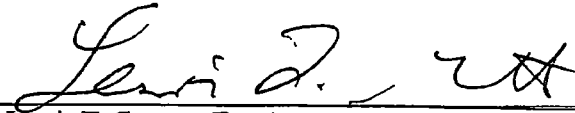
taxpayer consents to an extension of time to assess a tax, the Department will likewise consider the time to file a refund claim to be similarly extended. S.C. Rev. Procedural Bulletin #00-3;

S.C. Rev. Proc. #95-5 (superseded by S.C. Rev. Procedural Bulletin #00-3). The waivers clearly state that the agreement extends the time for the taxpayer to claim a refund, and the Department has never given any indication that it would refuse to honor its agreement to extend limitations period for refund claims. Fundamental practicality and fairness requires that the statute of limitations for filing a refund claim be equitably tolled to prevent the Department from soliciting taxpayer consent to extend the time to assess a tax through false and deceptive conduct indicating that the time to file a refund claim would be similarly extended. Even more to the point in this context is the United States Supreme Court's reminder that "[g]reat nations, like great men, should keep their word." *C.I.A. v. Sims*, 471 U.S. 159, 175, 105 S. Ct. 1881, 1891 n. 20 (1985) (internal quotations omitted).

IV. CONCLUSION

In conclusion, the Department's argument that the Appellant's refund claims are barred in whole or in part by the statute of limitations is without merit and should be denied. The Department validly entered into the waivers to extend the time for the Appellant to file the refund claims at law, and the Department cannot now make a blanket assertion that the waivers only operate in favor of the Department, and against the taxpayer. This is particularly true where the Department, utilizing virtually the identical form, now concedes the waiver goes both directions. Justice and equity demand that the Department be held accountable for its agreements and course of dealing with the taxpayers of this state, and that the waivers extending the time to assess a tax be found equally valid to extend the time to claim a tax refund.

RESPECTFULLY SUBMITTED,

A handwritten signature in cursive script, appearing to read "Lewis F. Gossett", followed by a stylized mark that looks like "rth".

Lewis F. Gossett, Esquire
President and Attorney for *Amicus Curiae*,
South Carolina Manufacturers Alliance

January 10, 2014
Columbia, South Carolina

EXHIBIT A

AFFIDAVIT OF ROBERT ANDERSON

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation)

Petitioner,)

vs.)

South Carolina Department of Revenue,)

Respondent.)

Docket No. 10-ALJ-17-0270-CC

**AFFIDAVIT OF
ROBERT K. ANDERSON**

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

PERSONALLY APPEARED BEFORE ME, Robert K. Anderson, who first being
duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) years old.
2. I was employed by the South Carolina Department of Revenue (formerly known as the South Carolina Tax Commission) (hereinafter referred to as the "Department") from 1975 until I retired in 2008.
3. While employed with the Department, I served in various positions beginning with an entry-level position with the Audit Division, then was promoted to Regional Manager, then Manager of Audits, then Administrator of Field and Office Operations, and finally was employed as Senior Administrator until the time of my retirement.
4. Since the time I served as Manager of Audits, I had the primary responsibility and authority for executing Form FS-43, Consent to Extend the Time to Assess Tax.
5. In many cases, the authority to issue and execute Form FS-43 was delegated to the auditors auditing a taxpayer's file.

6. Form FS-43 was regularly and commonly used during my employment with the Department, and the Department typically was the party who requested that the form be executed.

7. Form FS-43 is an official document issued by the Department when agreeing to extend the time to assess additional tax or issue a refund with a taxpayer. I do not know when Form FS-43 was first promulgated, but it was many years, if not decades, ago.

8. The use of Form FS-43 was common knowledge within all levels of the Department. To my knowledge, the Department had a process for approving all forms and I assume the Form FS-43 went through such approval process.

9. The Department issued Form FS-43 to obtain the taxpayer's written consent to extend the time to assess or refund additional tax.

10. To encourage a taxpayer's agreement to extend the time to assess additional tax, the Department intended that Form FS-43 similarly extend the time for a taxpayer to file a refund claim with the Department or for the Department to grant a refund.

11. The Department did not issue any other form document or other writing to obtain a taxpayer's consent to extend the statute of limitations.

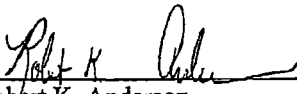
12. The Department had several revised versions of Form FS-43, all of which were intended to extend the time for the taxpayer to file a claim for refund during the waiver period.

13. By executing Form FS-43, the Department believed that it was exercising its discretionary authority to grant a refund upon examination of a taxpayer's return or otherwise, including the taxpayer's filing a refund claim with the Department within the period of time stated in the FS-43, in exchange for the taxpayer's consent to extend the period of time to assess additional tax.

14. I am not aware of any conflicts or controversy either within the Department or
~~with taxpayers regarding the wording of Form FS-43. To my knowledge, the Department has~~
never refused to honor a valid refund claim filed during the time period covered by Form FS-43.

15. The multiple execution of the Form FS-43s in the Duke Energy Corporation
Audits over a long period of years was principally requested by the DOR auditor assigned to the
file.

FURTHER AFFIANT SAYETH NOT.


Robert K. Anderson

SWORN and subscribed to before me
this 17th day of May, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 5/7/22

EXHIBIT B

AFFIDAVIT OF MARTIN DAVANT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation)

Petitioner,)

vs.)

South Carolina Department of Revenue,)

Respondent.)

Docket No. 10-ALJ-17-0270-CC

**AFFIDAVIT OF
MARVIN N. DAVANT**

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

PERSONALLY APPEARED BEFORE ME, Marvin N. Davant, who first being
duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) years old.
2. I was employed by the South Carolina Department of Revenue (formerly known as the South Carolina Tax Commission) (hereinafter referred to as the "Department") for thirty-seven (37) years beginning in 1964 as an auditor with the Estate & Gift Division, an assistant director of the Estate & Gift Division and then the combined Estate & Gift and Income Tax Divisions, and as Director, Field Services Division, until my retirement in 2001. After I retired, I acted as a consultant to the Director of the Department.
3. The Department authorized the Director of its Field Services Division to fill out, execute and issue Form FS-43 to taxpayers.
4. In the performance of my services as Director, I was authorized to issue and execute, and did routinely issue and execute, the Department's Form FS-43, Consent to Extend the Time to Assess Tax.

5. Form FS-43 was a commonly utilized form, to such extent that I, with approval of the Department, allowed my audit deputy to sign the form in the interests of time.

6. It was common practice for the Department to seek an extension of time to make an assessment and request that taxpayer's sign Form FS-43. For example, if auditors were on a short time frame to audit a file, they would request that the taxpayers sign Form FS-43 as an agreement with the Department to extend the time for both assessments and refunds.

7. The Department promulgated and issued Form FS-43 as an official Department form document. To the best of my knowledge, information and belief, the Department has utilized this form since at least the 1960s, as the form was in use prior to the time I became employed with the Department.

8. Form FS-43 was an official form issued by the Department and provided to the Field Services Division for use in its operations.

9. To the best of my knowledge, information and belief, the Department did not issue forms that had not been properly reviewed or approved.

10. The Department's forms identified which division used the form by including the division's name or initial on the form.

11. To the best of my knowledge, information and belief, no individual division of the Department promulgated its own forms, and every form used by any division was an official form provided to it by the Department.

12. The Field Services Division did not review or question Form FS-43 because it was instructed to use the form by the Department.

13. To the best of my knowledge, information and belief, the use of Form FS-43 by the Department was never questioned.

14. To the best of my knowledge, information and belief, the Department historically intended, believed and understood that Form FS-43 not only extended the time to assess additional tax, but also authorized or extended the time for a taxpayer to file a claim for refund within the time stated in the Form FS-43.

15. Prior to enactment of the South Carolina Revenue Procedures Act in 1995, the Department believed that after the execution of the FS-43 by the DOR and the taxpayer that it was authorized and permitted to issue refunds of overpaid tax even if a claim for refund by the taxpayer would not otherwise be timely under the applicable statutory limitations period for filing a refund claim and regardless of whether the period of time initially prescribed for filing a claim for refund had expired.

16. Prior to enactment of the South Carolina Revenue Procedures Act, it was my intent, belief and understanding as Director of Field Services that an executed Form FS-43 constituted the Department's agreement to issue a refund – whether resulting from a review of the taxpayer's records commenced by the Department's on its own initiative, upon consideration of a claim for refund filed by the taxpayer prior to the time stated in the Form FS-43, or otherwise – pursuant to its authority to issue refunds of overpaid tax even if a claim for refund would otherwise be untimely.

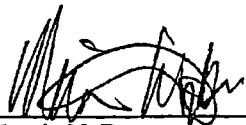
17. After enactment of the South Carolina Revenue Procedures Act, there was no difference in how Form FS-43 was interpreted by Department, and the content of the form remained the same.

18. To the best of my knowledge, information and belief, I had the same authority to sign Form FS-43 before and after enactment of the South Carolina Revenue Procedures Act.

19. Both before and after enactment of the South Carolina Revenue Procedures Act, the purpose of Form FS-43 was to allow the Department and the taxpayer by agreement to extend the time for assessment or refund, whether discovered on audit or a refund claim filed by the taxpayer. The form was specifically used for purposes of recording the agreement to extend the time limitations for both the Department and the taxpayer.

20. It was my intent, belief and understanding as Director of Field Services that a refund claim filed after the statute of limitations had expired would be treated differently than a refund claim filed during the extended period of time agreed to by the Department and the taxpayer by executing Form FS-43. The Department would not consider a refund claim filed in the former situation, but would, in accordance with its agreement, in the latter.

FURTHER AFFIANT SAYETH NOT.



Marvin N. Davant

SWORN and subscribed to before me
this 16th day of May, 2012.

Margie W. Rish (L.S.)
Notary Public for South Carolina
My Commission Expires: 11-4-2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Duke Energy Corporation, Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2012-213180

Appeal from the Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 5274
Heard February 18, 2014 – Filed October 8, 2014

AFFIRMED

Eric S. Tresh and Maria M. Todorova, both of Atlanta, GA, and Jeffrey A. Friedman, of Washington, DC, all of Sutherland Asbill & Brennan, LLP, and Burnet Rhett Maybank, III and Tanya Amber Gee, Nexsen Pruet, LLC, both of Columbia, for Appellant.

Tracey Colton Green, John Marion S. Hoefer, and John William Roberts, Willoughby & Hoefer, PA, all of Columbia, Jonathon Abraham Gutting, Young Clement Rivers, LLP, of Charleston, Milton Gary Kimpson, of Columbia, and Harry A. Hancock, of Bordentown, NJ, for Respondent.

FEW, C.J.: This appeal arises from Duke Energy Corporation's claims to the South Carolina Department of Revenue for corporate income tax refunds totaling

\$126,240,645, plus interest, for tax years 1978 to 2001. We affirm the denial of Duke Energy's refund claims.

I. Facts and Procedural History

Duke Energy generates electricity and sells it to customers. Because it does business in North Carolina and South Carolina, Duke Energy must apportion its income between these states to determine the income tax due to each state. *See* S.C. Code Ann. § 12-6-2210(B) (2014) ("If a taxpayer is transacting or conducting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State.").¹ A taxpayer's income is apportioned using a formula—a fraction—in which the numerator represents the business the taxpayer did in the applicable tax year in this state, and the denominator indicates the total business the taxpayer did in all states. The South Carolina Income Tax Act provides two formulas: (1) the formula applicable to "manufacturers," which contains three factors in both the numerator and the denominator—property, sales, and payroll, S.C. Code Ann. § 12-6-2252 (2014);² and (2) the formula applicable to all other taxpayers, which contains only one factor—sales, S.C. Code Ann. § 12-6-

¹ This section was enacted in 1995. Act No. 76, 1995 S.C. Acts 460. Prior to tax year 1996, the apportionment of a taxpayer's income between states was governed by the predecessor to section 12-6-2210—South Carolina Code section 12-7-250 (1976), which was located in Article 9 of the now-repealed Chapter 7 of Title 12 in the Income Tax Act of 1926. *See* Act No. 76, 1995 S.C. Acts 536 (stating "this act is effective for taxable years beginning after 1995"); Act No. 76, 1995 S.C. Acts 535 (repealing "Chapter[] 7 . . . of Title 12 of the 1976 Code"). The wording of the former and current versions of the section differs slightly, but the effect of the sections is the same.

² Section 12-6-2252 applies to more than just manufacturers, as we discuss in section III of this opinion. Section 12-6-2252 was enacted in 2007. Its language, however, is identical to the predecessors that apply to this case: (1) former section 12-7-1140 (1976), which applied to tax years 1978 to 1995; and (2) former section 12-6-2250 (2000), which applied to tax years 1996 to 2001. Section 12-7-1140 was repealed and section 12-6-2250 was enacted in 1995. Act No. 76, 1995 S.C. Acts 461, 535. Section 12-6-2250 was repealed in 2007 when section 12-6-2252 was enacted. Act No. 110, 2007 S.C. Acts 590, 595.

2290 (2014).³ In either formula, the business of the taxpayer in this state is converted to a fraction of its total business, which becomes the "base" upon which the taxpayer's state income tax is calculated.

Duke Energy filed timely income tax returns for each of the tax years at issue—1978 to 2001. In December 2002, Duke Energy filed amended tax returns for each of these years. Duke Energy sought to have its South Carolina income tax recalculated and requested refunds in the amount of \$126,240,645, plus interest. In February 2003, the department denied the requests. In March 2003, Duke Energy appealed this decision to the department's Office of Appeals. The department did not act on the appeal until February 2010—almost seven years—when it issued a "determination" denying the appeal.

Duke Energy filed a contested case in the administrative law court ("ALC"). The ALC faced three primary issues: (1) whether Duke Energy's refund claims were timely, (2) which apportionment formula Duke Energy was required to use, which we refer to as the "manufacturing" issue, and (3) whether Duke Energy could include in the denominator of the applicable formula its gross receipts from sales of certain short-term investments, which we refer to as the "gross receipts" issue. The department moved for summary judgment on all three issues, and Duke Energy moved for summary judgment on the gross receipts issue. The ALC granted partial summary judgment to the department, ruling Duke Energy's refund claims were untimely for tax years 1978 to 1993,⁴ and Duke Energy may not include gross receipts in the denominator of the applicable apportionment formula. The ALC then conducted a trial on the question of which formula Duke Energy must use and ruled for the department, finding Duke Energy must use the formula set forth in section 12-6-2252.

³ Section 12-6-2290 was enacted in 1995, *see* Act No. 76, 1995 S.C. Acts 464, and amended in 2007, *see* Act No. 110, 2007 S.C. Acts 594, 595. The predecessor to section 12-6-2290 was South Carolina Code section 12-7-1190 (1976), which was effective in all tax years before 1996. Section 12-7-1190 was repealed when section 12-6-2290 was enacted in 1995. Act No. 76, 1995 S.C. Acts 535.

⁴ The department concedes Duke Energy's refund requests for tax years 1994 to 2001 were timely due to the enactment of South Carolina Code subsection 12-60-470(A) (2014). Act No. 60, 1995 S.C. Acts 375-76.

We find the ALC properly granted summary judgment to the department because it correctly determined Duke Energy may not include its gross receipts from sales of short-term investments. We also affirm the ALC's ruling that Duke Energy must use the apportionment formula in section 12-6-2252. ~~Because our resolution of~~ these issues is dispositive of this appeal, we do not reach the timeliness of Duke Energy's refund claims. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining an appellate court need not address remaining issues when the court's resolution of the issues it does address are dispositive of the appeal).

II. Standard of Review

We review the ALC's decision under subsection 1-23-610(B) of the South Carolina Code (Supp. 2013). The gross receipts issue is a pure question of law that the parties presented to the ALC on cross motions for summary judgment. Thus, we review the ALC's decision as to that issue under subsections 1-23-610(B)(a), (c), and (d). See *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 244, 711 S.E.2d 908, 910 (2011) ("Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law."); *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012) ("[T]he parties filed cross motions for summary judgment, thereby indicating the parties' belief that further development of the facts was unnecessary."); *id.* ("[C]ross motions for summary judgments . . . authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." (alteration in original) (citation omitted)); *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011) ("Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law.").

As to the manufacturing issue, the ALC decided the question after a trial. Both parties, as well as the ALC, address the question as one of fact. However, we find the manufacturing issue to be primarily one of statutory interpretation in which the facts are undisputed. To this extent, we review the ALC's ruling as a question of law under subsections 1-23-610(B)(a), (c), and (d). *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (stating "questions of statutory interpretation are questions of law"); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (stating "the proper interpretation of a statute is a question of law"). However, we review under a different standard the ALC's ruling that Duke Energy's "manufacturing" business is its "principal" business in South Carolina. In making this ruling, the ALC resolved

a factual dispute as to the appropriate inferences that should be drawn from undisputed facts. Therefore, we review this ruling as a factual determination under subsection 1-23-610(B)(e) and must determine if it is "clearly erroneous in view of the reliable, probative, and substantial evidence." *See ESA Servs., LLC v. S.C. Dep't of Revenue*, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011) (stating "as to [the ALC's] findings of fact, we may reverse or modify decisions that . . . are clearly erroneous in view of the substantial evidence"); *Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control*, 372 S.C. 351, 358, 641 S.E.2d 763, 766-67 (Ct. App. 2007) (stating "we may not substitute our judgment for that of the AL[C] as to the weight of the evidence on questions of fact unless the AL[C]'s findings are clearly erroneous in view of the reliable, probative and substantial evidence").

III. The Manufacturing Issue

The central question regarding the manufacturing issue is whether the predecessors to section 12-6-2252 apply to Duke Energy. Section 12-6-2252 reads:

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, ...

If Duke Energy's principal business is considered "manufacturing," section 12-6-2252 applies and Duke Energy must use an apportionment formula based on three factors—property, sales, and payroll. If, however, its principal business is not manufacturing, or does not otherwise fall under section 12-6-2252, then section 12-6-2290 and its predecessors apply, which permits Duke Energy to use a formula based only on sales.

Both parties agree Duke Energy's business in South Carolina is the production and delivery of electrical power to homes and businesses. The ALC stated the parties stipulated "[Duke Energy] is, and was during the 1978-2001 tax periods, engaged in the generation, transmission, distribution, and sale of electricity." Duke Energy characterizes its business as "the provision of electric service to its customers," while the department characterizes it as "the generation, transmission, distribution, and sale of electricity," and simply "providing electricity." Each of these variations accurately describes Duke Energy's business, and there is no dispute as to what Duke Energy does. The only dispute is how Duke Energy's business

should be classified under the state tax laws—particularly under sections 12-6-2252 and 12-6-2290, and their predecessors.

"Manufacturing" is not defined in the tax code. We find, however, Duke Energy's undisputed activity meets the plain and ordinary meaning of the word. See *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011) ("When faced with an undefined statutory term, the Court must interpret the term in accordance with its usual and customary meaning."). According to Webster's New Collegiate Dictionary, "manufacture" is defined as "to make into a product suitable for use," and "to produce according to an organized plan and with division of labor." *Webster's New Collegiate Dictionary* 695 (spec. ed. 1981). The ALC defined manufacturing as "the process of making wares by hand or by machinery especially when carried on systematically with division of labor," "productive industry using mechanical power and machinery," and "the act or process of producing something."

The ALC discussed the nature of Duke Energy's business, stating,

Duke Energy operates plants in both South Carolina and North Carolina to produce electricity. In South Carolina, Duke Energy has two nuclear power plants, four coal power plants, three hydroelectric power plants, and several oil or gas power plants. The electricity that is produced and consumed by its customers is created at Duke Energy generation facilities. A generator is a "mechanical device" that uses mechanical energy to produce electric energy or, as it is more commonly known, electricity. Generators have been used to produce electricity in substantially the same manner for over 100 years. Many, though not all, of Duke Energy's generation facilities use a turbine driven by steam power to turn the generator. Although the sources or inputs (e.g., coal, uranium, water) used at these different types of generation facilities may vary, all use a generator to produce electricity. The result, however, is the same: Duke Energy employs a mechanical device to produce and generate electricity using a process that has not changed significantly since the early 20th century.

As described by the ALC, Duke Energy utilizes mechanical power, usually to generate steam, which is then used to create electricity. We find Duke Energy's business fits the definitions of "manufacture" stated above. Although Duke Energy would disagree with the word "create," it is undisputed that Duke Energy generates electricity, or an electrical charge, that did not previously exist. As the ALC stated, "No matter what moniker [is] used to describe the product produced by Duke Energy, the electric current that generates that field, or even the field itself, is produced through a mechanical process run by Duke Energy." We therefore hold that what Duke Energy does to generate electricity is "manufacturing" as that term is used in section 12-6-2252.

Our conclusion is supported by previous decisions of our supreme court, in which the court defined "manufacturer" and "manufactory" and held Duke Energy and other electric utilities to be manufacturers, for purposes of the tax code. In *Columbia Railway, Gas & Electric Co. v. Query*, 134 S.C. 319, 132 S.E. 611 (1926), an electric company challenged a tax assessed against it under the "Manufacturer's Tax Act." 134 S.C. at 321, 132 S.E. at 612. The circuit court upheld the tax assessment, and on appeal, "the single question [was] whether the plaintiff is 'engaged in the business of manufacturing,' with reference to its gas and power business." *Id.* The supreme court affirmed, stating, "We do not think that there is any doubt that the appellant is engaged in the business of manufacturing gas and electricity" 134 S.C. at 324, 132 S.E. at 612. Duke Energy argues the *Columbia Railway* decision is distinguishable because it was "issued in other contexts more than eighty years ago" and "under a different set of tax statutes." We disagree and find *Columbia Railway* is controlling.

In *Duke Power Co. v. Bell*, 156 S.C. 299, 152 S.E. 865 (1930), our supreme court made a specific determination that Duke Energy is a manufacturer. 156 S.C. at 304-06, 152 S.E. at 868. Relying on *Columbia Railway*, the *Bell* court addressed whether a state law that exempted "manufactories" from county taxes applied to an electric power plant acquired by Duke Energy. 156 S.C. at 304-05, 152 S.E. at 867-68. The court explained the power plant constituted a "manufactory," stating,

The word "manufactory" means, primarily, a physical plant, or a place or building, where manufacturing is carried on. If a company engaged in the generation of electricity is a "manufacturer" for the purposes of a statute imposing a tax, the plant or structure wherein the process of generating such electricity is carried on is a *manufactory* for the purposes of a tax exempting statute.

156 S.C. at 306, 152 S.E. at 868. *Bell* is important for two reasons: (1) it applied directly to Duke Energy, and (2) the court relied on *Columbia Railway* in a different context of tax law.

Because we find Duke Energy is a "manufacturer" of electricity, we need look no further than the introductory words of section 12-6-2252—"A taxpayer whose principal business in this State is (i) manufacturing"—to determine it applies to Duke Energy. Duke Energy argues, however, section 12-6-2252 is inapplicable because it does not manufacture anything "tangible," and the terms of section 12-6-2252 apply only if the taxpayer manufactures something tangible. Duke Energy points to the "goods and materials" language of section 12-6-2252 to argue it applies only to taxpayers whose business is "manufacturing . . . goods and materials." Thus, Duke Energy contends the statute does not apply to it unless electricity is physical or tangible.

We do not believe the outcome of this appeal should turn on whether electricity is "tangible." First, as we previously explained, our supreme court has ruled the production of electricity is manufacturing, and Duke Energy is a manufacturer. *See Bell*, 156 S.C. at 306, 152 S.E. at 868; *Columbia Railway*, 134 S.C. at 324, 132 S.E. at 612. Those rulings are not distinguishable, and therefore binding on us. Second, the word "manufacturing" in subsection 12-6-2252(A) stands alone. Duke Energy argues the phrase "goods and materials within this State" and the words "tangible personal property" in subsection 12-6-2252(A) modify "manufacturing" so that the statute applies only when the taxpayer manufactures a tangible good or product. We read "goods and materials within this State" to modify only "collecting, buying, assembling, or processing." Further, we find the words "tangible personal property" in subsection (A)(ii) should not be read to modify the word "manufacturing" in subsection (A)(i).

Duke Energy and the department extensively address in their briefs the question of whether electricity is "tangible personal property" under section 12-6-2252, and the ALC went to great lengths to justify its conclusion that "[e]lectricity is a physical product with physical characteristics." Given our conclusion regarding this issue, however, we reject Duke Energy's argument that the intangible quality of electricity renders section 12-6-2252 inapplicable.

We also base our holding on the intent of the Legislature in drafting section 12-6-2252. Subsection 12-6-2210(B) provides "the South Carolina income tax is [to be] imposed upon a base which reasonably represents the proportion of the trade or

business carried on within this State." Section 12-6-2252 contemplates that, for some businesses, considering sales alone will not yield an allocation of income between states that "reasonably represents the proportion of the trade or business carried on within this State." § 12-6-2210(B). This is true of businesses that sell in other states a high percentage of the product they manufacture in this state. Those businesses have a more significant presence in South Carolina—i.e. "the proportion of the trade or business carried on within this State"—than their sales here reflect. Under that circumstance, the Legislature indicated its intent to consider capital investment and employment in this state, in addition to sales. Applied to this situation, we hold the Legislature intended a taxpayer like Duke Energy, whose business depends on significant capital investment and employment, to apportion "the trade or business [it] carrie[s] on within this State" using the multi-factor apportionment formula. In this case, calculating the apportionment based on sales alone would not reasonably represent the taxpayer's business because Duke Energy has significant capital investment and employment in South Carolina. Thus, for the same reasons the Legislature drafted section 12-6-2252 to apply to any manufacturer, the section applies to Duke Energy.

Duke Energy also argues it provides a "service" under section 12-6-2290, and thus it should have its income tax apportioned according to the formula in that section. We agree the usual and customary meaning of "service" includes selling electricity. In its order, the ALC initially began its discussion of the manufacturing issue by referring to Duke Energy's "service" of electricity:

The metered *service* plan is based on usage, ...
Regardless of the *service* plan, a portion of each Duke
Energy customer's *service* charge recovers Duke Energy's
costs associated with maintaining the infrastructure that
Duke Energy uses *to provide electric service*.

(emphasis added). Additionally, the department's own expert witness testified Duke's provision of electricity on a flat-fee basis is a service. Thus, Duke Energy is fairly characterized as a "manufacturer" that provides electric "service." We do not believe, however, that Duke Energy's provision of electric service changes its status as a manufacturer or the applicability of section 12-6-2252.

Sections 12-6-2252 and 12-6-2290 require the court to focus on the taxpayer's "principal" business. Duke Energy argues we should determine which component of Duke Energy's business is manufacturing and which is service, and from that conclude Duke Energy's "principal business in this State" is providing a service.

We disagree for the reasons explained above—Duke Energy is a manufacturer and section 12-6-2252 applies to manufacturers. Even if we were to accept Duke Energy's argument, however, we must affirm. The ALC found, "After considering the evidence in the record and the pertinent legal authorities, . . . Duke Energy has failed to establish by the preponderance of the evidence that its principal business in South Carolina is not manufacturing" The ALC's finding is supported by substantial evidence, the most important of which is (1) Duke Energy's charter, which states it is a "manufacturer," and (2) Duke Energy's designation of itself as a manufacturer in its original tax return for each of the tax years applicable to this appeal. *See Comm'rs of Pub. Works*, 372 S.C. at 358, 641 S.E.2d at 766-67 (Ct. App. 2007) ("[W]e may not substitute our judgment for that of the AL[C] as to the weight of the evidence on questions of fact unless the AL[C]'s findings are clearly erroneous in view of the reliable, probative and substantial evidence.").

IV. The Gross-Receipts Issue

Regardless of which formula is used to apportion a taxpayer's income between states, the formula contains a variable in its denominator for the taxpayer's sales from all states in which it does business. Under either formula, the larger the denominator, the less income tax the taxpayer owes in this state.

For the multi-factor formula in section 12-6-2252, which we hold is applicable to Duke Energy, the "sales factor" is defined as "a fraction in which the numerator is the total sales of the taxpayer in this State during the taxable year and the denominator is the total sales of the taxpayer everywhere during the taxable year." S.C. Code Ann. § 12-6-2280(A) (2014).⁵ Duke Energy takes the position the denominator should include gross-receipts from the sale of short-term investment instruments that Duke Energy purchases from other entities. The department disagrees, arguing the denominator should include only the smaller net receipts. The definition of "sales" in section 12-6-2280 does not include the term "gross

⁵ Section 12-6-2280 was enacted in 1995 and amended in 2007. Act No. 76, 1995 S.C. Acts 463; Act No. 110, 2007 S.C. Acts 593; *see also* Act No. 116, 2007 S.C. Acts 739 (duplicate of Act 110 in amending this section). Prior to tax year 1996, former South Carolina Code section 12-7-1170 (1976) provided that the sales factor consists of "[t]he ratio of sales made by such taxpayer during the income year which are attributable to this State to the total sales made by such taxpayer everywhere"

receipts." However, the definition does include "sales of intangible personal property."⁶

To understand whether Duke Energy's gross receipts from sales of short-term investments should be included in the formula, it is helpful to examine the investment transactions at issue. According to Sherwood L. Love, Duke Energy's Assistant Treasurer and General Manager of Long Term Investments, Duke Energy maintained a Cash Management Group within its treasury department that "provide[d] required liquidity support for Duke[s] commercial paper programs . . . for the short-term funding of additional electric generation, transmission and distribution facilities[.]" The Cash Management Group carried out this objective by "invest[ing] Duke[s] excess operating cash in various short-term marketable securities." These securities included municipal bonds, loan repurchase agreements, commercial paper, U.S. Treasury securities, and agency securities. According to Mr. Love, Duke Energy made these short-term investments "[p]retty much every day," and Duke Energy "typically [left] investments like this outstanding for [less] than 30 days."

Mr. Love provided the details of one particular transaction, which we find useful to illustrate how the transactions worked in general. This representative transaction consisted of the following actions taken by Duke Energy: (1) investing \$14,982,900 in a short-term instrument on August 7, 1996, (2) selling the instrument eight days later on August 15, (3) collecting \$17,100 in interest, and then immediately reinvesting the total \$15,000,000 in another short-term instrument. This transaction demonstrates that Duke Energy's argument is contrary to the legislative intent of the apportionment statutes.

Under Duke Energy's theory, the transaction described above yields a \$15 million dollar receipt that Duke Energy may use in the denominator of the apportionment formula. However, if Duke Energy decided to sell the instrument on August 10, immediately reinvest the money, and sell the second instrument on August 15, its "gross receipt" would be \$30 million. If Duke Energy sold and reinvested the money on August 9, August 11, August 13, and August 15—a scenario Mr. Love testified was entirely reasonable—Duke Energy's "gross receipt" would be \$60 million. These slight variations on this representative transaction illustrate that

⁶ The definition of "sales" in section 12-6-2280 is essentially the same as the definition in former section 12-7-1170, applicable before tax year 1996. The words are arranged differently, but the concept is the same.

allowing Duke Energy to include its gross receipts from short-term investment instruments would artificially reduce the "base which reasonably represents the proportion of the trade or business carried on within this State," *see* § 12-6-2210(B), by artificially inflating the denominator of the formula.

The ALC focused on the fact that the return of the principal from this and other similar transactions is not part of Duke Energy's "gross income." We find, however, the issue does not depend on the difference between "gross" and "net" receipts. Instead, the issue turns on whether the return of the principal of these investments is properly characterized as a "receipt" in the first place. Stated another way, the issue is whether the receipt Duke Energy received from these transactions is the total amount, including principal and return on investment, or just the return.

Generally, a "receipt" is "something received," *Webster's, supra*, at 956, and usually refers to money. In the business context, "receipt" means money the business receives for its products or services—for what it does in its business.⁷ Duke Energy is in the business of selling electricity, which includes the sale of electricity itself on a wholesale or retail basis or the sale of capital it uses to conduct its business, such as a power plant. The money it takes in from such a sale is properly considered a "receipt." When Duke Energy invests the proceeds of its business in a short-term financial instrument and sells the investment for a profit, the profit generated may be considered a receipt. However, the principal of the investment is its own money—not money it received for its products or services. Thus, the return of the principal is not a receipt.

We affirm the ALC's determination that Duke Energy may not include gross receipts from the sale of short-term investments in the denominator of the formula used to apportion its income.

V. Conclusion

We find the ALC correctly ruled (1) Duke Energy is a "manufacturer" and thus must apportion its South Carolina income using the formula in section 12-6-2252; and (2) its gross receipts from sales of short-term investments in other states may

⁷ Duke Energy recites a similar definition from a decision of the tax commission: "gross receipts is a broad term which includes all proceeds received by the entity so long as such receipts resulted from any part of its business."

not be included in the denominator of the formula. Because our conclusions as to these two issues resolve the appeal, we need not address the timeliness of Duke Energy's refund claims. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598. We **AFFIRM.**

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT **SC Court of Appeals**

Ralph K. Anderson III, Administrative Law Judge

Appellate Case No. 2012-213180

Duke Energy Corporation..... Appellant,

v.

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

APPELLANT DUKE ENERGY CORPORATION'S PETITION FOR REHEARING

INTRODUCTION

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Duke Energy Corporation ("Duke Energy") seeks rehearing of the Court's opinion in the above-captioned case filed on October 8, 2014. As explained below, the Court overlooked and misapprehended several things when it ruled that, as a matter of law, (1) Duke Energy is a manufacturer ("Manufacturing Issue"), and (2) Duke Energy is not permitted to include all receipts from its sales of securities in the denominator of its apportionment formula ("Gross Receipts Issue"). Because of those oversights and misapprehensions, the Court should also reconsider Duke Energy's argument that its refund claims for South Carolina corporate income taxes for the period of 1978 to 1993 are timely ("Timeliness Issue").

ARGUMENT

I. Manufacturing Issue

The Court concluded that the issue of whether Duke Energy was required to apportion its income under the multi-factor apportionment formula set forth in S.C. Code Ann. § 12-6-2252 or the single-factor apportionment formula set forth in § 12-6-2290 was “primarily one of statutory interpretation in which the facts are undisputed.” *Duke Energy Corp. v. S.C. Dep’t of Rev.*, Op. No. 5274 (S.C. Ct. App. filed Oct. 8, 2014, Shearouse Adv. Sh. No. 40 at 50). The Court found that Duke Energy is a manufacturer. In so holding, the Court made a number of critical errors that warrant rehearing of its decision.

1. **The Court overlooked and did not apply the long-standing principle that in case of doubt, tax statutes must be construed in favor of the taxpayer.**

The Court overlooked and failed to apply the long-standing principle that “[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt.” *Alltel Commc’ns, Inc. v. S.C. Dep’t of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012), (citing *S.C. Nat’l Bank v. S.C. Tax Comm’n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989)). “[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor.” *Id.*

The Court held that the Manufacturing Issue turns on the meaning of the term “manufacturing” as used in S.C. Code Ann. § 12-6-2252. *Duke Energy Corp.*, Op. No. 5274 at 51. The Court acknowledged that the term is not defined in the tax code, yet, in its view, the term had a “plain and ordinary meaning” based on the term’s definition in the Webster’s New Collegiate Dictionary. *Id.* at 52.

The Court's reasoning overlooks and/or misapprehends both South Carolina precedent and the long-standing policy of the Department of Revenue. As discussed in more detail in Duke Energy's Initial Brief, South Carolina courts and the Department have always viewed manufacturers as persons dealing in tangible personal property. (App. Initial Brief at 34-35.) Moreover, utilities, such as Duke Energy, and manufacturers are two separate and distinct categories for purposes of the North American Industry Classification System, which determines the Principal Business Activity Code that Duke energy must list on its Federal and South Carolina income tax returns. (App. Initial Brief at 4.) During the tax years at issue in this case, Duke Energy included the code for the electric power generation, transmission and distribution utilities category. (*Id.*) Therefore, the use of the term "manufacturing" for South Carolina income apportionment purposes is not "plain and ordinary" and any ambiguity should have been construed in favor of Duke Energy.

Therefore, construing the term "manufacturing" in favor of Duke Energy, and given South Carolina precedent and administrative guidance that manufacturers are persons dealing in tangible personal property, the court erroneously concluded that Duke Energy is a manufacturer.

Additionally, the Court erroneously relied on, and misapplied, S.C. Code § 12-6-2210(B) because the record contains no evidence that apportioning Duke Energy's income to South Carolina based on the single-factor formula does not "reasonably represent the proportion of the trade or business carried on within this State." *Duke Energy Corp.*, Op. No. 5274 at 55. See *CarMax Auto Superstores West Coast, Inc. v. S.C. Dep't of Rev.*, 397 S.C. 604, 611, 725 S.E.2d 711, 714-715 (Ct. App. 2012).

2. The Court erred in concluding that Duke Energy is engaged in “manufacturing”

In concluding that Duke Energy is principally engaged in manufacturing, the Court committed a material factual error by overlooking the Department’s concession regarding this issue. The Court erroneously relied on the Administrative Law Court’s determination that Duke Energy “has failed to establish by the preponderance of the evidence that its principal business in South Carolina is not manufacturing.” *Duke Energy Corp.*, Op. No. 5274 at 56. To the contrary, the Department itself has conceded that Duke Energy’s principal business in the State is the provision of Electricity. (Respondent’s Brief at 33.)

In addition, Duke Energy has never “agree[d]” that its business in South Carolina is the “production of electrical power.” *Id.* at 51. Duke Energy’s primary business in South Carolina is the provision of electric service to its customers. (App. Initial Brief at 4.) The Court was also incorrect in concluding that Duke Energy “creates” an electrical charge, despite expert testimony in the record to the contrary. (App. Initial Brief. at 8.)

II. Gross Receipts Issue

The Court held that proceeds from Duke Energy’s sales of securities do not constitute “receipts.” *Id.* at 59. In so holding, the Court, incorrectly applied South Carolina tax statutes and South Carolina’s rules of statutory interpretation. *Id.* at 56-59.

The single-factor apportionment formula is based on “total gross receipts.” *See, e.g.*, S.C. Code Ann. § 12-6-2290 (applicable for tax years beginning after 1995) (emphasis added); former S.C. Code Ann. § 12-7-1190 (applicable for tax years prior to 1996) (emphasis added). The multi-factor formula, which the Court believes applies to Duke Energy, makes no reference to “receipts,” and instead is based on “total sales.” S.C. Code Ann. § 12-6-2280 (for tax years after 1995); former S.C. Code Ann. § 12-7-1170 (for tax years prior to 1996). Neither term is defined.

In either case, however, all proceeds must be included – the total gross receipts under the single-factor method, and the total sales under the multi-factor method. Neither statute suggests that

anything less than the total proceeds should be included. *Beach v. Livingston*, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1996) (“The language of a tax statute must be given its plain ordinary meaning in the absence of an ambiguity therein. . . . [I]f a legislative intent is clearly apparent from the language of the statute there is no occasion for resort to the rule of statutory construction.”); *Duke Power Co. v. S.C. Tax Comm’n*, 292 S.C. 64, 66, 354 S.E.2d 902, 903 (1987) (“The . . . language [of the statute] clearly states that the license fee on power companies, such as Duke, is based on entire gross receipts and not just receipts from customer charges.”); (see also App. Initial Brief at 22-24.)

Even if those terms were deemed ambiguous, the Court must construe them in favor of Duke Energy. *Alltel Commc’ns, Inc. v. S.C. Dep’t of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012) (“[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor.”).

In the Court’s view, Duke Energy’s receipts other than the “return on investment” are not “receipts” because those receipts are Duke Energy’s “own money – not money it received for its products or services.” *Duke Energy Corp.*, Op. No. 5274 at 59. However, the undisputed evidence in the record demonstrates that Duke Energy’s purchases and sales of short-term securities are sales and not recoveries of principle. (App. Reply Brief at 7.) All receipts from Duke Energy’s sales of securities are business receipts from activities conducted in its ordinary course of business. Therefore, the Court’s finding was erroneous.

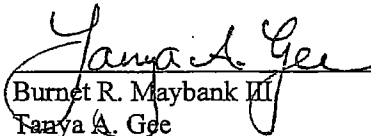
III. Timeliness Issue

The Court erred in failing to address the Timeliness Issue because of its rulings on the Manufacturing and Gross Receipts Issues, as discussed above.

CONCLUSION

For all of the above reasons, Appellant requests that Duke Energy's Petition for Rehearing be granted and that the Court rehear and amend its decision.

Respectfully submitted this 22nd day of October 2014.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

Appellate Case No. 2012-213180

Duke Energy Corporation, ...Appellant,

v.

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

Return to Petition for Rehearing

Duke Energy is not entitled to rehearing of Opinion No. 5274 (Shearouse Adv. Sh. No. 40) because it does not identify anything that this Court did not consider in rendering its decision.

I. Duke Energy's self-characterization of its business as "not manufacturing" does not merit rehearing on the Manufacturing Issue.

Rehearing should be denied for the Manufacturing Issue because, as this Court correctly recognized, the South Carolina Supreme Court already has held that electric utilities in general, and Duke Energy in particular, are manufacturers for purposes of the tax code. *See Op. at 53-54 (citing Columbia Railway, Gas & Electric Co. v. Query, 134 S.C. 319, 132 S.E. 611 (1926) & Duke Power Co. v. Bell, 156 S.C. 299, 152 S.E. 865 (1930))*. Instead of discussing or analyzing these precedential holdings, Duke Energy repeats the argument

that single-factor apportionment is required because it identifies its electric business as a service. But Duke Energy never met its burden to establish any basis for determining that its principal business in South Carolina is other than manufacturing electricity and the ALC's finding in that regard is supported by substantial evidence. Op. at 56. Duke Energy's superficial argument that the Department conceded otherwise is unhelpful and fails to address the substance of the Department's arguments, the ALC's determination, or this Court's Opinion. And Duke Energy's resort to ambiguity as a basis for rehearing is misplaced because, as reflected in this Court's opinion, there is nothing ambiguous about the plain and ordinary meaning of the word "manufacturing" in the context of this case and the *Columbia Railway* and *Duke Power* decisions.

II. Rehearing of the Gross Receipts Issue is not merited because the return of invested principal is not part of the apportionment formula.

Duke Energy's request for this Court to change its mind does not merit rehearing of the Gross Receipts Issue. See *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("The purpose of a petition for rehearing is not to...have the case tried in appellate court a second time."). In essence, Duke Energy's argument is that the Court erred by viewing the short-term investment transactions for what they were: a very typical investment transaction involving a recovery of invested principal. The Court correctly held that, based on the true nature of these transactions, including the recovered principal in the apportionment formula would be contrary to the plain meaning

and purpose of the apportionment statutes. Op. at 58-59. Duke Energy seeks to evade this result by resorting to claims of ambiguity, but the plain meaning of the apportionment statutes is not rendered ambiguous merely because Duke Energy disagrees with the Court's ruling. See *Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461, 119 S. Ct. 1411, 1425 (1999) (Thomas, J., concurring) ("A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong.").

Conclusion

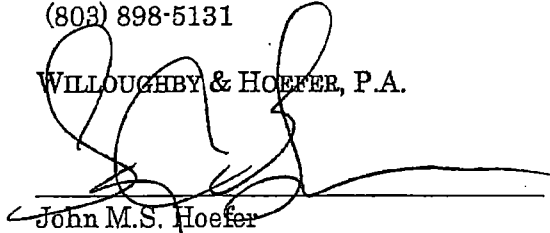
The petition for rehearing should be denied for all issues.

Respectfully submitted,

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November 3, 2014

The South Carolina Court of Appeals
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Duke Energy Corporation, Appellant,

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v.

NEXSEN PRUET, LLC
COLUMBIA

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2012-213180

ORDER

After careful consideration of the Appellant's petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John C. Cannon, Jr. C.J.

Paul G. Short, Jr. J.

John D. Deather J.

Columbia, South Carolina

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