

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.

NOTICE OF APPEAL

Duke Energy Corporation (hereinafter "Appellant") hereby appeals the following orders of the Honorable Ralph K. Anderson III of the Administrative Law Court ("ALC"): (1) Amended Final Order and Decision filed on December 4, 2012 ("Final Order"), a copy of which is attached hereto as Exhibit A; and (2) the ALC's Reconsideration Order filed on December 4, 2012, a copy of which is attached hereto as Exhibit B.

Thus, pursuant to ALC Rule 29(D)(4), this Notice of Appeal is timely filed within 30 days of the deemed denial of the Motion for Reconsideration.

RESPECTFULLY SUBMITTED,



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PROOF OF SERVICE

This is to certify that the foregoing Appellant's Notice of Appeal was sent via US
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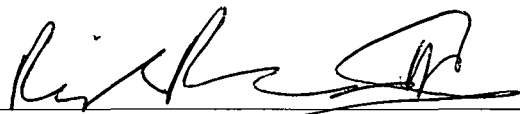

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EXHIBIT A

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,)	
)	Docket No. 10-ALJ-17-0270-CC
Petitioner,)	
)	
vs.)	AMENDED FINAL ORDER AND DECISION
)	
South Carolina Department of Revenue,)	
)	
Respondent.)	
_____)	

Appearances:

For the Petitioner: Burnet R. Maybank, III, Esq.; Eric S. Tresh, Esq.; Jeffrey A. Friedman, Esq.; and Maria M. Todorova, Esq.

For the Respondent: Tracey C. Green, Esq.; John W. Roberts, Esq.; Harry Hancock, Esq.; and J. Abraham Gutting, Esq.

STATEMENT OF THE CASE

This matter comes before the Administrative Law Court (ALC or Court) following Duke Energy Corporation's (Duke Energy) request for a contested case hearing under S.C. Code Ann. § 12-60-460 (Supp. 2006). Duke Energy is contesting the Determination of the South Carolina Department of Revenue (Department) denying Duke Energy's claim for a refund of South Carolina corporate income taxes for the tax years 1994 through 2001 (Tax Periods at Issue).¹ Duke Energy asserts that it is a service provider and thus is required to apportion its income to South Carolina on the basis of the single-factor gross-receipts apportionment formula. A hearing was held before this Court on September 5 and 6, 2012.

On November 2, 2012, this Court entered its Final Order and Decision denying Duke Energy's claims for refund of corporate income taxes for the Tax Periods at Issue and affirming the Department's Determination that Duke Energy cannot apportion its income based on the single-factor gross-receipts apportionment method. Duke Energy filed its Motion for Reconsideration of the Court's Final Order and Decision on November 13. On November 15,

¹ Duke Energy originally sought refunds for the tax years 1978 through 2001. On October 11, 2012, this Court ruled that Duke Energy's refund claims for the tax years 1978 through 1993 are untimely. Thus, Duke Energy's refund claims for 1978-1993 are not before the Court at this time.

FILED

December 4, 2012

SC ADMIN. LAW COURT

2012, the Department informed the Court that it was not going to file a response to Duke Energy's Motion for Reconsideration. After careful consideration of the arguments made by Duke Energy, the Court has amended its November 2, 2012 Final Order and Decision accordingly below.

LEGAL ISSUES RAISED

The following issue is raised in this proceeding: Whether Duke Energy, based on its activities within the State of South Carolina, falls under Section 12-6-2250 as a "manufactur[er]" or some other category listed in 12-6-2250, or whether Duke Energy is required to apportion its income to South Carolina based on the single-factor gross-receipts apportionment formula pursuant to Section 12-6-2290.²

STIPULATIONS OF FACT

At the hearing into this matter and pursuant to ALC Rule 25(C), the parties entered the following written stipulations of fact into the Record:

Preliminary Definitions

1. "Gross-receipts apportionment formula" refers to South Carolina's method of income apportionment prescribed under S.C. Code Ann. § 12-6-2290 and former S.C. Code Ann. § 12-7-1190.
2. "Multi-factor apportionment formula" refers to South Carolina's method of income apportionment prescribed under S.C. Code Ann. § 12-6-2250 and former S.C. Code Ann. § 12-7-1140.

² In my Amended Order Granting Summary Judgment in Part and Denying Summary Judgment in Part, I stated the issue presently before the Court as follows: "whether 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 services, 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 . . ." This statement of the issue contains the conclusory phrase "is a seller of services, or otherwise falls under none of the above categories." This phrase erroneously presupposes that a seller of services could not be included in Section 12-6-2250. However, as will be discussed in more detail later, sales of electricity, though considered a service for certain tax purposes, has also been considered "tangible personal property," for those same tax purposes. Therefore, electricity could be considered a service and still be tangible personal property under Section 12-6-2250. The error of excluding "seller of services" from Section 12-6-2250 in the statement of the issue, however, did not affect the need to have a hearing on the present issue because there is a genuine issue of material fact as to the nature of Duke Energy's status for purposes of Sections 12-6-2250, -2290 based on its business activities.

3. "Petitioner" means Duke Energy Corporation (formerly known as Duke Power Company) and any predecessor or successor and any other entity owned by Duke Energy Corporation.
4. "Respondent" means the South Carolina Department of Revenue.
5. "1978-2001 tax periods" means the Petitioner's tax years 1978 through 2001, all of which were reported on a calendar-year basis.

The Parties

6. Respondent is an administrative Cabinet-level agency of the State of South Carolina responsible for administering and enforcing the State's revenue laws.
7. Petitioner is, and was during the 1978-2001 tax periods, engaged in the generation, transmission, distribution, and sale of electricity in portions of North Carolina and South Carolina.
8. The Parties stipulated to Petitioner's restated corporate charters filed with the North Carolina Secretary of State on July 26, 1977, October 6, 1993, and June 18, 1997.
9. The Parties stipulated to Petitioner's Form 10-Ks for the 1978-2001 tax periods.
10. During the 1978-2001 tax periods, Petitioner was regulated by the South Carolina Public Service Commission (Commission) as an "electric utility" pursuant to Title 58-27-10(7).

Procedural History

11. Petitioner timely filed its South Carolina corporate income tax returns (including license tax returns) for the 1978-2001 tax periods.
12. On its originally-filed South Carolina corporate income tax returns for the tax periods 1978-2001, Petitioner filed using the multi-factor apportionment formula.
13. On December 12, 2002, Petitioner filed South Carolina amended corporate income tax returns for the 1978-2001 tax periods seeking a refund of corporate income taxes plus applicable interest ("1978-2001 Refund Claims").
14. The Parties stipulated to Petitioner's South Carolina amended corporate income tax returns filed on December 12, 2002 for the 1978-2001 tax periods.
15. The 1978-2001 Refund Claims reflected use of the gross-receipts apportionment formula to apportion Petitioner's income to South Carolina.
16. On February 12, 2003, Respondent denied Petitioner's 1978-2001 Refund Claims.

17. On March 13, 2003, Petitioner timely appealed from the denial of its 1978-2001 Refund Claims.
18. On February 4, 2010, Respondent issued a Determination denying Petitioner's refund claims for tax periods 1978-2001.
19. On March 3, 2010, Petitioner timely filed a Request for Contested Case Hearing with the Clerk's Office of the South Carolina Administrative Law Court in Columbia, South Carolina contesting the Determination.
20. Petitioner and Respondent timely filed their Prehearing Statements and Amended Prehearing Statements.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following additional findings of fact by a preponderance of the evidence:

Duke Energy Business Operations

Duke Energy is engaged in the business of generation, transmission, distribution, and sale of electricity in portions of both North Carolina and South Carolina. Duke Energy owns and operates generation, transmission, and distribution assets in South Carolina and North Carolina. Clearly, providing electricity is Duke Energy's "primary business."

Duke Energy sells electricity on both a metered and flat-fee basis. Under the flat-fee plan, Duke Energy provides electricity for outdoor lighting at a fixed price.³ 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 usage during the billing period. 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. This charge is known as a capacity charge and is billed to the customer as part of the monthly service charge, even if the customer does not use electricity in a given month. Nevertheless, however the profits from the flat-rate or capacity charges are perceived, those

³ Although Duke Energy introduced evidence regarding the fact that it charges a flat fee for outdoor lighting, that does not negate the fact that the vast majority of the electricity delivered by Duke Energy is sold based on quantity consumed. Moreover, the time period for which outdoor lighting operates is controlled by use of a photocell, and Duke Energy has information to make estimates regarding variables in the timing to determine a pricing for the outdoor lighting.

charges were not a significant portion of Duke Energy's profit from the sale of electricity during the Tax Periods at Issue.⁴

Production of Electricity

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.⁵ 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.

Duke Energy nonetheless offered evidence that the production of electricity does not create anything. Rather, Duke Energy avers it is doing nothing more than providing access to "the electromagnetic field." However, Duke Energy produces that electromagnetic field. Duke Energy's own witness testified that, "in layman's terms," electromagnetic field is electric current," and that any electromagnetic field results from the electric current created by the generator. No matter what moniker 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.

Distribution and Sale of the Electricity

The process by which Duke Energy generates or produces electricity does not end at the generator. The generator is obviously connected to the transmission and distribution network.

⁴ Mr. Dhiaa Jamil did testify that a portion of a customer's bill is a flat fee for a capacity charge, but he also testified that he did not know the rate or level at which that fee is imposed—other than that it is less than \$100—and, in fact, ultimately testified "that's really not my area." The Court concludes that this testimony does not assist Duke Energy in meeting its burden of proof.

⁵ Duke Energy also produces electricity using natural gas, wind, and solar. Duke Energy also occasionally purchases electricity from other electric utilities. However, these methods of producing or acquiring electricity appear to be less significant than the methods indicated above.

That network consists of transmission and distribution lines, which are conductors made of copper, towers and poles, and transformers. During the transmission and distribution process, the transformers process the electricity by “stepping up” and “stepping down” the voltage of the electricity. By “stepping up” the voltage, Duke Energy is able to transmit the electrical current at a low current. The “step up” process is done in order to efficiently deliver electricity by reducing line loss, which is the loss to Duke Energy of a quantity of electricity as heat during the transmission and distribution processes.

Ultimately, electricity must be delivered at the specified voltage so that it can be used by customers in their homes and businesses. Typically, electricity is not usable by a customer unless it is at 120 volts, although sometimes it is delivered at 220 volts. Whatever the required voltage, it is necessary to ensure that the electricity delivered to a customer is “stepped down” to the usable voltage, a process that is done close to where the electricity is eventually used by the customer.

Most customers of Duke Energy obtain the electricity after it passes through a meter. More specifically, by activating a switch, which creates a load and completes a circuit, the electricity passes through the customer’s meter and operates the device. Duke Energy measures the amount of electricity consumed by each customer (usually in term of kilowatts) and then charges the consumer for the quantity used/consumed.⁶ Moreover, electricity is not a useable product unless it is delivered to customers at precise specifications. Prior to delivery of the electricity to the consumer through the meter, the electric utility owns the electricity, which is not delivered for sale until it is processed into a form usable by a consumer. This typically occurs closer to the customer’s business or home.

Duke Energy compared the provision of electricity to the provision of telecommunication services—both cellular and landline. However, unlike Duke Energy, telecommunication companies do not generate electricity but, instead, only use electricity purchased from electric utilities. Furthermore, Duke Energy delivers to its customers a quantifiable product that is produced by Duke Energy. In contrast, telecommunications companies transmit communications or intelligence produced or created by one customer to another through a system operated by

⁶ Aside from the fact that electricity is measured by quantity, the nature of electricity, as a product, is further demonstrated by the fact that electric current is a flow of charges or charged particles, the rate of which is measured in amperes.

electricity purchased from utilities like Duke Energy. Additionally, cellular telephone providers use radio technology to transfer information between two locations. The frequencies and strengths of telecommunications waves are vastly different than the frequencies and strengths of electricity.

In sum, the generation, transmission, and distribution processes are interconnected. Duke Energy cannot produce or deliver electricity to consumers in the absence of any one of these parts, each of which provide an essential aspect of Duke Energy's process for producing, transmitting, and delivering electricity to customers. Moreover, Duke Energy presented no evidence that supports separating its electric transmission and distribution processes from its generation processes and, in fact, described the whole process as a "very elaborate system." Indeed, Mr. Jamil testified that each of the processes employed by Duke Energy is "used to produce electricity."⁷

Physical Nature of Electricity

Electricity is a physical product with physical characteristics. Regarding whether electricity may be sensed by humans, I do not find that the testimony presented by either party was probative as expert testimony. In other words, there was no evidence that the witnesses possessed "knowledge, skill, experience, training, or education" regarding the effect of electrical stimulation upon the human physiology justifying this Court to accept their opinion as expert testimony. Nevertheless, based upon the evidence, I find that it is possible to feel electricity, and thus electricity can be touched. Though Duke Energy presented valid instances in which a person may not feel electricity, that does not discount the instances when it can be felt.

Moreover, even if I were to find Duke Energy's evidence regarding this matter to be probative, I am unconvinced. Duke Energy's expert witness, Mr. Ioannis Papapolymerou, explained that a human cannot feel electricity but only the impact of the electricity. Though I find the proposed nuances between the feeling of an object itself and the feeling of the impact from the object to be the makings of an interesting theoretical debate, I find no considerable distinction between the two and therefore find that electricity can be felt by humans.

⁷ Additionally, Duke Energy introduced an exhibit listing the "Functions" of Duke Energy as "Production," "Transmissions," and "Distribution."

Electricity can also be stored. Concerning this issue, Duke Energy characterized an electric charge as the source of electricity and as the physical property that is stored. The electrical charge is nonetheless a component of what is produced by Duke Energy.

In sum, Duke Energy takes raw materials (e.g., coal, uranium, water), uses those materials to power mechanical devices to produce a form of electricity that is usable and consumed by the public. Although electricity is unique, it is a tangible product with identifiable physical characteristics that may be created, measured, felt, stored, and consumed, and an electric utility may exercise ownership rights over it.

Department's Policy History

The Department and the Commission have a longstanding interpretation that electric utilities should be characterized as manufacturers for purposes of corporate income tax apportionment. Though the Department's policy was never set forth in any public document, it was memorialized in the foreign corporation training manual used by the Department's auditors. Joseph Southard, a retired auditor for the Department with over 25 years of experience, who conducted audits of several electric utilities, including Duke Energy, explained that the Department's policy was that electric utilities were manufacturers for purposes of the apportionment statutes.

The Department also applied this policy consistently, and Duke Energy offered nothing to show otherwise. No other electric utilities challenged that position before Duke Energy filed its amended returns. In fact, Duke Energy filed its returns using the multi-factor apportionment formula for at least 23 years before filing the amended returns and challenging the policy in 2002.

CONCLUSIONS OF LAW

In determining the income tax due from Duke Energy, the Department apportioned Duke Energy's South Carolina income using the multi-factor apportionment formula of Section 12-6-2250. The Department argues that Duke Energy's principal business in South Carolina is manufacturing and that Section 12-6-2250 should therefore apply. Duke Energy, however, contends that its principal business in South Carolina is the provision of service to customers and that Section 12-6-2290 should thus apply.

Burden of Proof

Because Duke Energy is challenging a determination by the Department that it must apportion its income under section 12-6-2250, it has the burden of proof. See SCALCR 29(B); Ford v. Atl. Coast Line R. Co., 169 S.C. 41, 168 S.E. 143, 167 (1932) (“The general rule is, in the absence of valid statutory enactment to the contrary, that the burden of proof rests upon him who has the affirmative of the issue and does not shift to the defendant even when aided, in the first instance, by a rebuttable presumption.”); see also Anonymous v. State Bd. of Med. Exam’rs, 329 S.C. 371, 496 S.E.2d 17 (1998). This burden requires Duke Energy to prove that the Department’s determination is wrong by a preponderance of the evidence. See, e.g., Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 346, 415 S.E.2d 384, 388 (1992) (“Findings of fact based upon a ‘preponderance’ of the evidence are those supported by the greatest ‘weight, amount, credibility or truth’ as reflected by the whole of the evidence before the court, or ‘evidence which convinces as to its truth.’”).

Apportionment of Income

The method of apportionment that a taxpayer must use depends upon the nature of the taxpayer’s business in this State. Section 12-6-2250⁸ requires a taxpayer to apportion its multi-state income using the property, payroll, and sales factors if the taxpayer falls within the following definition:

A taxpayer 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

S.C. Code Ann. § 12-6-2250.⁹ On the other hand, “[i]f the principal profits or income of a taxpayer are derived from sources other than those described in Section 12-6-2250,” the taxpayer is required to use the single-factor gross-receipts apportionment formula. S.C. Code Ann. § 12-6-2290.¹⁰ Consequently, the issue that must be resolved for the Tax Periods at Issue is

⁸ Because the Tax Periods at Issue cover multiple years (1994-2001), a parenthetical date will not be used for the statutory citations.

⁹ Section 12-6-2250 during the Tax Periods at Issue required that the sales factor be double-weighted in calculation of the apportionment formula. This section was previously designated as section 12-7-1140, which was repealed in 1995. Prior to June 12, 1995, section 12-7-1140 provided a three-factor formula without the double-weighted sales factor.

¹⁰ Like section 12-6-2250, the predecessor of section 12-6-2290, S.C. Code § 12-7-1190, was repealed in 1995, but the language remained substantially the same. Section 12-6-2290 also excludes sources described in section

whether the Department erroneously determined that Duke Energy must apportion its income pursuant to Section 12-6-2250. After considering the evidence in the record and the pertinent legal authorities, I conclude that Duke Energy has failed to establish by the preponderance of the evidence that its principal business in South Carolina is not manufacturing or some other activity falling under Section 12-6-2250.

Agency Deference

The Department contends that in determining this issue the ALC must give its construction of Section 12-6-2250 deference. “An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons. . . .” Media Gen. Commc’ns, Inc., and Media Gen. Broad. of S.C. Holdings, Inc. v. S.C. Dep’t of Revenue, 388 S.C. 138, 149, 694 S.E.2d 525, 531 (2010) (citing Etiwan Fertilizer Co. v. S.C. Tax Comm’n, 217 S.C. 354, 360, 60 S.E.2d 682, 684 (1950)). In Etiwan, the Court further explained that: “[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.” Etiwan, 217 S.C. at 359, 60 S.E.2d at 684. If the Department is entitled to deference, it is Duke Energy’s burden to prove that the Department’s policy is “arbitrary, discriminatory or unreasonable.” Colonial Life & Acc. Ins. Co. v. S. Carolina Tax Comm’n, 248 S.C. 334, 339, 149 S.E.2d 777, 780 (1966) (“The Commission has the power and duty . . . to prescribe a method for arriving at a tax base which reasonably represents the proportion of the trade or business carried on within this State. . . and its determination thereabout will not be overthrown by the courts except upon a showing, absent here, that it is arbitrary, discriminatory or unreasonable”) (internal quotation marks omitted); see also Vulcan, 342 S.C. at 496 , 536 S.E.2d at 900; Etiwan, 217 S.C. at 359, 60 S.E.2d at 684. For the reasons set forth below, Duke Energy did not meet its burden in this regard.

The record shows that the Department and the Commission consistently have characterized electric utilities as manufacturers for purposes of corporate income tax apportionment.¹¹ Duke Energy filed its returns using the multi-factor apportionment formula for

12-6-2310, but that statute references income earned by railroad companies, motor carriers, telephone service companies, pipeline companies, airline companies, and shipping lines, none of which are applicable in this case.

¹¹ Duke Energy asserts that there is an inconsistency in the Department’s audit manual in that service providers (those whose principal business is providing a service) have to apportion their income to South Carolina based on

at least 23 years before filing the amended returns and challenging the policy in 2002, which reflects that Duke Energy was aware of the policy. And although a Duke Energy witness, Cooper Monroe,¹² testified that the original returns were filed in error, he also acknowledged that Duke Energy and accounting firms “in [his] experience” apply a review process before a tax return is filed. This long period of time in which Duke Energy filed returns using the multi-factor apportionment formula leads to the conclusion that the returns were filed in accordance with the policies and filing requirements promulgated by the Department as understood by Duke Energy at the time the returns were originally filed.

Moreover, though the policy was not set forth in a publicly-issued advisory opinion, a decision of the Commission for property tax purposes supports the conclusion that the Department openly and consistently viewed electric utilities as manufacturers. In 1985, the 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 Ry. decision. S.C. Tax Comm’n Decision P-D-532, 1985 WL 192777 (Apr. 11, 1985) (citing Columbia Ry., Gas & Elec. Co. v. Query, 134 S.C. 319, 132 S.E. 611, 612 (1926)). Although this ruling was rendered in the context of property taxes, it reflects a public position that the Department consistently applied the Columbia Ry., supra, and Duke Power, infra, decisions and consistently determined that electric utilities are manufacturers. The consistency of this policy is further evidenced by the fact that in P-D-532, the Department gave the electric utility the benefit of being a manufacturer by determining that its property-tax assessment ratio should be 6% as opposed to the 10.5% applicable to the personal property of non-manufacturing entities.¹³ More importantly, the South Carolina Supreme Court’s decision in Columbia Ry., supra publicly reflects, in the context of a license tax imposed upon manufacturers’ gross receipts, the Department’s position that those engaged in the sale of electricity are manufacturers. See also

the single-factor gross-receipts apportionment method, while power companies must use the multi-factor apportionment formula. However, there is only an inconsistency if one adopts the premise that the generation, transmission, and distribution of electricity constitutes provision of service, or the premise that provision of service generates more profits or income than generation, transmission, and distribution of electricity, neither of which this Court adopts.

¹² Thomas Cooper Monroe, III is currently the Director of State and Local Tax for Duke Energy.

¹³ Also, in 1970, the South Carolina Attorney General opined that the South Carolina Electric & Gas Company was a manufacturer and that any plant it used to produce electricity was a manufactory eligible for property tax exemptions. 1970 S.C. Op. Att’y Gen. 154, Op. No. 2909, 1970 WL 12192 (June 2, 1970). The basis for this ruling was the Columbia Ry. and Duke Power decisions.

Duke Power Co. v. Bell, 156 S.C. 299, 152 S.E. 865 (1930) (recognizing the same position in the property-tax context). I find that though the notice to the General Assembly is traditionally given through a policy available to the public, the facts in this case meet the criteria envisioned in Etiwan. See also Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (“[T]here is a basic presumption that the legislature has knowledge of previous legislation **as well as of judicial decisions** construing that legislation when later statutes are enacted concerning related subjects.”) (emphasis added). Nevertheless, whether or not the Department’s position is given deference, I find that Duke Energy’s principal business is manufacturing for the reasons given below.

Manufacturing

Duke Energy must apportion its multi-state income for the Periods at Issue pursuant to Section 12-6-2250 unless Duke Energy proves that its principal business within this State is not (1) “manufacturing”; or (2) “any form of collecting, buying, assembling, or processing goods and materials within this State”; or (3) “selling, distributing, or dealing in tangible personal property.” Though Duke Energy suggests a contrary reading of this statute, the Legislature’s use of the disjunction “or” following “manufacturing” in Section 12-6-2295(a)’s phrase “manufacturing or any form of collecting, buying, assembling, or processing goods and materials within this State” demonstrates that the term “manufacturing” is not dependent on, or modified by, the clause “any form of collecting, buying, assembling, or processing goods and materials within this State.” Michau v. Georgetown County ex rel. S.C. Counties Workers Comp. Trust, 396 S.C. 589, 595, 723 S.E.2d 805, 808 (2012) (“[T]he ‘use of the word ‘or’ in a statute ‘is a disjunctive particle [sic] that marks an alternative.’”) (citing K & A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, 580, 682 S.E.2d 252, 261 (2009)). This conclusion is supported by the statutory history, which reflects that the apportionment statute, when adopted, addressed only corporations “engaged in the business of manufacturing,” 1927 S.C. Acts 1, No. 1, § 15(1),¹⁴ and that the latter clause of subsection (a) was added in 1946, 1946 S.C. Acts 1491, No. 553, § 3 (amending apportionment statute, then found in section 2451 of the 1942 Code, 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

¹⁴ This language remained the same in the apportionment statute enacted as Section 2451 in both the 1932 South Carolina Code of Laws and the 1942 South Carolina Code of Laws.

State.”) (emphasis added). Thus, inclusion of the phrase “or any form of collecting, buying, assembling, or processing goods and materials” after “manufacturing” in Section 12-6-2250(a) reflects that the Legislature intended to cover not just manufacturing but all activities that a business could perform in regards to goods or materials prior to making those goods or materials available to its customers. See Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993) (“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.”).

Here, there is no dispute regarding several of the elements of Section 12-6-2250. It is undisputed that Duke Energy is a taxpayer required to file corporate income tax returns in this State. Similarly, it is undisputed that Duke Energy has multi-state income that must be apportioned. See S.C. Code Ann. § 12-6-2210(b). There is also no disagreement that Duke Energy is engaged in the business of generation, transmission, distribution, and sale of electricity in portions of both North Carolina and South Carolina. Mr. Dhiaa Jamil¹⁵ testified that providing electricity is Duke Energy’s “primary business.” To conduct its primary business, Duke Energy operates generation plants in both South Carolina and North Carolina.

Because “manufacturing” is not defined in the apportionment statutes, this Court must interpret it in accord with its usual and customary meaning. E.g., Travelscape, LLC v. S.C. Dept. of Revenue, 391 S.C. 89, 99-100, 705 S.E.2d 28, 33-34 (2011). Merriam-Webster’s Dictionary presently defines “manufacture” as “the process of making wares by hand or by machinery especially when carried on systematically with division of labor.” It further defines the term to include “productive industry using mechanical power and machinery” and “the act or process of producing something.” See <<http://www.merriam-webster.com/dictionary/manufacture>> (accessed October 18, 2012); see also Jennings v. Jennings, No. 27177 (Oct. 18, 2012) (Hearn, J.) (referencing online Merriam-Webster’s Dictionary for definition of a word).¹⁶ And in 1939, in holding that the generation of

¹⁵ Dhiaa M. Jamil, P.E., currently is the Executive Vice President of Nuclear Generation and the Chief Nuclear Officer for Duke Energy.

¹⁶ It is also worth noting that the current Merriam-Webster’s definition of the term “ware,” a term included in the definition of “manufacturing,” includes manufactured goods. See <<http://www.merriam-webster.com/dictionary/ware>> (accessed October 18, 2012). Also, Merriam-Webster’s current definition of “good” includes “something that has economic utility or satisfies an economic want” and “something manufactured or produced for sale.” See <<http://www.merriam-webster.com/dictionary/good>> (accessed October 18, 2012). Thus, even if in Section 12-6-2250(a) “manufacturing” modified “goods,” the electricity that Duke Energy generates, transmits, and distributes would be in accord with the common understanding of the term

electricity is manufacturing, the Iowa Supreme Court referenced Webster’s definition of manufacturing, which was “to make by hand, by machinery, or by other agency; to work raw materials into forms for use; to produce mechanically.” Winterfield, 285 N.W. at 224-25. Applying this definition, the court held that generating electricity is manufacturing. Id.

Our Supreme Court has also held on two different occasions that an electric utility that generates electricity is engaged in manufacturing. In Columbia Ry., the South Carolina Supreme Court held that a company engaged in the business of generating electricity was properly considered a “manufacturer” for purposes of a statute that imposed a corporate license tax on the gross receipts of “a corporation engaged in the business of manufacturing.” 132 S.E. at 612 (“We do not think that there is any doubt that the appellant is engaged in the business of manufacturing gas and electricity . . .”); see also State v. Broad River Power Co., 157 S.C. 1, 153 S.E. 537, 539 (1929) (noting that the Columbia Railway company built “a large plant for the **manufacture** of gas and **electricity** for sale to the public generally”) (emphasis added).¹⁷ In a later case, reviewing a different statute, the Supreme Court held that Duke Power Co., a predecessor of Duke Energy, was entitled to claim a property tax 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, supra. The Court held that, based on Columbia Ry., Duke Power was engaged in manufacturing. Id., 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, the plan or structure wherein the process of generating such electricity is carried on is a manufactory for the purposes of a tax exempting statute.”). Thus, although Columbia Ry. considered the 1926 Manufacturer’s Tax Act, the Duke Power decision reflects that the Court’s holding that Duke Power was engaged in manufacturing was not limited to that statute.¹⁸

“manufactured good,” and would therefore still satisfy Section 12-6-2250(a) under that alternative interpretation of the statute. Furthermore, Duke Energy has failed to prove by the preponderance of the evidence that the electricity it produces is not a good or that it is not manufactured.

¹⁷ Notably, the 1927 Century Dictionary defined manufacture as “the making of goods or wares by ... machinery, esp. on a large scale”

¹⁸ When the holding of Columbia Ry. is considered in light of the pertinent language from the Manufacturer’s Tax Act at issue in that case, the application of that decision in this case becomes evident, especially in light of the absence of any distinction between Duke Energy’s business in this State versus its business in North Carolina. Specifically, the Manufacturer’s Tax Act provided 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 Ry. decision is based on a 1923 Act directed at manufacturers and uses the

The Supreme Court's determination that two different electric utilities were engaged in manufacturing for purposes of two different tax statutes certainly supports the conclusion that electric utilities are engaged in manufacturing for purposes of other tax statutes, including the apportionment statute. This is especially so given the Supreme Court's holding that "the legislative classification [of the apportionment statute] ... should be liberally construed in favor of the inclusion of business to which the formula is appropriate." Hertz Corp. v. S. C. Tax Comm'n, 246 S.C. 92, 96, 142 S.E.2d 445, 447 (1965) (holding that taxpayer involved in renting tangible personal property came within the predecessor to section 12-6-2250).¹⁹ The fact that the common definition of "manufacture" has remained constant from the time of the Columbia Railway and Duke Power decisions up to the present, and that definition is still applicable to Duke Energy's operations, further validates that Duke Energy is engaged in manufacturing electricity. In addition, Duke Energy generates, transmits, and distributes electricity in South Carolina using the same methods and principles employed during the era in which these cases were decided. Furthermore, Duke Energy's corporate charter for the Tax Periods at Issue retained the same language used in its original charter, which was considered pertinent by the Supreme Court. Compare Duke Power, 152 S.E. at 867 (referencing charter granting authorization to Duke Power Company to "manufacture, generate, buy, sell, accumulate, store,

same 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").

¹⁹ Although not binding here, courts in other states have held that generating or producing electricity is manufacturing, reflecting that a position such as that taken by the Department is reasonable. Some of these cases have cited Columbia Ry. and Duke Power as support for that holding. Curry v. Ala. Power Co., 8 So.2d 521, 525 (Ala. 1942) (citing Columbia Ry. and Duke Power decisions in holding that generating electricity is manufacturing); State ex rel. Winterfield v. Hardin County Rural Elec. Co-op., 285 N.W. 219, 226 (Iowa 1939) (citing Columbia Ry. and Duke Power and stating: "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"). Other states simply have held that generating electricity is manufacturing. E.g., Pub. Serv. Co. v. Dep't of Rev., 10CA1026, 2011 WL 4089971 (Colo. Ct. App. Sept. 15, 2011) (generating electricity is manufacturing); Davis v. Gulf Power Corp., 799 So. 2d 298, 301 (Fla. Dist. Ct. App. 2001) (generation of electricity is a manufacturing process and electricity is tangible personal property); Minn. Power & Light Co. v. Pers. Prop. Tax. Taxing Dist., City of Fraser, Sch. Dist. No. 695, 182 N.W.2d 685, 692 (Minn. 1970) (producing electricity is manufacturing); Bd. of Assessors of Holyoke v. State Tax Comm'n, 244 N.E.2d 287, 289 (Mass. 1969) (same); Morley v. Brown & Root, 239 S.W.2d 1012, 1015 (Ark. 1951); (same); City of Louisville ex rel. v. Howard, 208 S.W.2d 522, 526 (Ky. 1947) ("The generation of electricity is manufacturing."); 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"); see also Comm'r of Revenue v. Houghton Mifflin Co., 666 N.E.2d 491, 495 (Mass. 1996) (rejecting contention that process does not involve manufacturing merely because its inputs are not tangible).

transmit, furnish, and distribute electric current for light, heat, and power”) with Restated Arts. Inc. Duke Power Co. (October 6, 1993) (authorizing company “[t]o manufacture, generate, buy, sell, accumulate, store, transmit, furnish and distribute electric current for light, heat and power”) and Restated Arts. Inc. Duke Energy Corp. (June 18, 1997) (same). If the processes of generating, transmitting, and distributing electricity are, for the most part, the same today as those employed in 1926 and 1930, and if those processes constituted manufacturing for purposes of a tax statute during those years, then the generation of electricity constitutes manufacturing for purposes of a tax statute during the Tax Periods at Issue.²⁰ Duke Energy therefore is engaged in the business of manufacturing in this State for purposes of Section 12-6-2250.

Moreover, the evidence in this case establishes that Duke Energy is a manufacturer. As explained above, “manufacturing” is defined in Merriam-Webster’s online dictionary as “the process of **making wares** by hand or **by machinery especially when carried on systematically with division of labor.**” It further defines the term to include “**productive industry using mechanical power and machinery**” A “ware” is defined as “an “article of commerce.” The American Heritage College Dictionary 1521 (3d ed. 1993). Duke Energy’s witnesses repeatedly characterized its business as “producing” electricity.²¹ Electricity that is produced by Duke Energy and consumed by its customers is created at a generation facility.²² The process that

²⁰ Mr. Papapolymerou testified that although for the most part the process of generating electricity has not changed in the last one hundred years ago, Duke Energy has added renewable energies, developed solar panels, and developed more efficient wind generators. However, there is no evidence that these developments were implemented during the Tax Periods at Issue (1994-2001); and even had they been implemented during those periods, electricity was still being generated for the most part by the same processes that the Supreme Court has considered to be manufacturing. Mr. Jamil also testified that the basic generation process is the same today as it was in the early 20th century.

²¹ “Manufacturing,” as discussed previously, also includes “the act or process of producing something.” However, this definition, though accurate and applicable, describes manufacturing in its most general sense. The Court will use the other two definitions, as they are more specific.

²² Mr. Jamil testified that Duke Energy could provide electricity even without its generation assets. That is, Duke Energy apparently contends that it could sell electricity without producing it and, thus, that it is not a manufacturer for that reason. But the fact that an entity could resell a product to customers without actually manufacturing that product does not mean that the entity that did produce the product is not a manufacturer. And a determination of whether any entity that simply resells electricity is a manufacturer is beyond the scope of this proceeding.

In any event, the record does not support any characterization of Duke Energy as a mere reseller of electricity for the Tax Periods at Issue. The evidence reflects that Duke Energy generated virtually all of the electricity it sold during the Tax Periods at Issue. [Duke Energy 1994-2001 Forms 10-K (showing “Electric Energy Generated” as being nearly equal to “Electric Energy Sold” each year) [Pet’r Hr’g Exs. 49-B-17 through 49-B-24].] Mr. Monroe testified that Duke Energy generates most of the electricity that it sells. Thus, the fact that other utilities might simply resell electricity without generating it, and that Duke Energy **could** do the same thing, is immaterial because the record reflects that Duke Energy does generate electricity; and it is therefore a manufacturer.

occurs at a generation facility reflects that it is manufacturing. Each of these facilities contains at least one generator. A generator is a “fairly large machine” and “mechanical device” that uses mechanical energy to produce electric energy or, as it is more commonly known, electricity. The generator creates an electric current that is processed through the transmission and distribution systems. 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.²³ The result, however, is the same: Duke Energy employs a mechanical device to produce and generate electricity using the same process employed since the early 20th century. Thus, Duke Energy’s generation facilities are, as recognized by our Supreme Court, locations at which manufacturing occurs. See Duke Power, 152 S.E. at 868.

Furthermore, though they disagree as to the ultimate characterization of electricity production, Duke Energy and the Department seem to agree that Duke Energy’s generation, transmission, and distribution processes are interconnected. In other words, Duke Energy cannot generate electricity to deliver to consumers in the absence of any one of these parts.²⁴ The generator is connected to the transmission system, which is connected to the distribution system. As noted above, Duke Energy requires all three processes to provide electricity to its customers. Prior to distribution of the electricity to the consumer through the meter, the electric utility owns and continues to process the electricity, which is not in a form usable by a consumer prior to its distribution through the electric meter. Cf. Priest v. Brown, 302 S.C. 405, 411, 396 S.E.2d 638, 641 (Ct. App. 1990) (in affirming a trial court decision that strict liability was not applicable against electric utility for a person who was electrocuted and died after touching a downed distribution line, the court noted an affidavit that stating that “the electricity through these lines was of such a high voltage that it was not in a form immediately usable by a consumer” and held that the facts of this case alone suggest the electricity had not been placed into the stream of commerce . . .”).

In addition, though electricity is a unique product with unique characteristics required by consumers, it is clearly produced by Duke Energy and distributed in keeping the required needs

²³ The design of a turbine used in these generation facilities has not significantly changed since the early 20th century.

²⁴ Duke Energy sometimes provides to its customers electricity that it has purchased from other utilities. But most of the electricity that Duke Energy provides to its customers is generated by Duke Energy.

of the customers. Although there was testimony in the record regarding other forms of energy, such as kinetic and mechanical energy, those other energy forms are different than electricity or electric energy and do not meet the vast majority of consumer needs in homes and businesses. And this conclusion is not changed by the fact that electricity may exist in nature (e.g., a lightning strike is the effect of an electromagnetic field on air molecules), because that electricity is not usable by electric utilities or consumers in that form. 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”) (internal citations omitted).

The nature of electricity as a product produced by Duke Energy is further evidenced by the fact that Duke Energy does not have access to unlimited quantities of electricity because its ability to generate electricity is limited by the capacity of its generators. The fact that Duke Energy charges for electricity based on quantity, and cannot provide unlimited electricity, further supports the conclusion that generating electricity is manufacturing. Measuring electricity by quantity is the same as measuring any product by quantity, and the limitation on the quantity of electricity that can be produced is analogous to the limitation imposed on any manufacturer by the capacity of the machines employed in the manufacturing process.²⁵

In sum, the electricity consumed by Duke Energy’s customers is the product of Duke Energy’s generation of that electricity. Duke Energy employs an interconnected process of producing and delivering electricity that 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 amount of the product sold. A generator is analogous to any machine used by a manufacturer to produce a product for sale; the transmission and distribution systems are like the assembly line process used by a manufacturer to further refine and develop the product; and the customer is

²⁵ Interestingly, S.C. Code Ann. § 16-13-380 references the theft of electricity by any “person who . . . has no contract, agreement, license, or permission with or from any person authorized to **manufacture**, sell, or use **electricity** for the purpose of light, heat, or power.” S.C. Code Ann. § 16-13-380 (emphasis added); see also S.C. Code Ann. § 16-13-390 (prohibiting the wrongful use of electricity by a person who has a “contract, agreement, license or permission, oral or written, with or from any person authorized to **manufacture**, sell or use **electricity** for the purpose of light, heat or power.”) (emphasis added). Therefore, it is clear that the General Assembly understands that electricity can be manufactured.

charged by the quantity of the product consumed.²⁶ The fact that Duke Energy charges for electricity based on quantity, and cannot provide unlimited electricity, further supports the conclusion that generating electricity is manufacturing. Measuring electricity by quantity is the same as measuring any product by quantity, and the limitation on the quantity of electricity that can be produced is analogous to the limitation imposed on any manufacturer by the capacity of the machines employed in the manufacturing process.

Characterization of the Provision of Electricity as a Service

Duke Energy contends that its “principal business in South Carolina is the **provision** of electric service to its customers.” (Emphasis added). At the outset, Duke Energy cannot “provide” electric service without the existence of electricity, and the electricity that Duke Energy provides cannot exist without first being produced, or manufactured. As to “electric service,” the South Carolina Income Tax Act does not define the word “service.” And the usage of the word “service” in the South Carolina Income Tax Act does not provide any guidance as to the term’s meaning, as it is used in a variety of connotations.²⁷ Looking then to Merriam-Webster’s Dictionary, “service” is defined as “useful labor that does not produce a tangible commodity” or “a facility supplying some public demand.” Merriam-Webster Online Dictionary, www.merriam-webster.com (last visited October 18, 2012). Because this Court, for reasons that will be discussed more fully below, finds electricity to be a tangible commodity, Duke Energy has failed to demonstrate that its “provision” of electricity to customers is a service under the first definition. As to the second definition, Duke Energy is doubtless a service

²⁶ The Court recognizes that the transmission and distribution processes could be interpreted as being separate from manufacturing. Transmission of electricity, for instance, could fall under “processing” in Section 12-6-2250(a), because the electricity must be “stepped up” and “stepped down” in order to regulate the voltage so that line loss can be minimized. Also, for the electricity to be usable by the customers, it must be further manipulated to meet the specifications of the devices used by the customers. Likewise, distribution could be interpreted as “distributing . . . tangible personal property within this State,” under Section 12-6-2250(b). This interpretation would require a determination of electricity’s tangibility and whether electricity is “personal property.” The Court will explain in more detail later in the decision why electricity is tangible personal property. At any rate, because the generation, transmission, and distribution of electricity are equally-necessary components of the business of providing electric power, Duke Energy’s business activities seemingly could fall under Section 12-6-2250(a), or (a) and (b); but under either scenario, Duke Energy’s principal business involves activities that are covered in Section 12-6-2250, which is the issue here.

²⁷ See, e.g., S.C. Code Ann. §§ 12-6-550 (“service” in the context of providing of water supply and sewage disposal); 12-6-1120 (“service” in the context of the National Guard and Armed Forces reserve components); 12-6-1720(1)(b) (“service” in the context of apportionment of nonresident individuals, trusts, estates, or beneficiaries); 12-6-2850 (“services” in the context of foreign trading receipts); and 12-6-3450 (“services” in the context of an employee’s services for an employer in determining qualification for an income tax credit for persons terminated from employment as a result of the closing or realignment of a federal military installation).

because it is “a facility supplying some public demand.” However, there is nothing in this definition of service that includes or excludes manufacturing. In this case, though, Duke Energy supplies to its customers electricity that it has already manufactured, thus demonstrating that the two activities are separate.

Duke Energy nevertheless contends that it is not manufacturing because it is not creating anything and is doing nothing more than “provid[ing] access to the electromagnetic field.” However, Duke Energy fails to recognize that it produces/manufactures the product for which any service is provided. Electricity is a product that moves and is processed through the transmission and distribution systems and is delivered to the customer at the specifications required by that customer. Services are typically measured by the quantity of time provided, not by the quantity of the product consumed.²⁸ In fact, even Duke Energy recognizes that it is producing something. Not even Duke Energy’s own representations to the public refer to “providing access to the electromagnetic field.” Moreover, Duke Energy’s own witness testified that, “in layman’s terms,” electromagnetic field is electric current,” and that any electromagnetic field results from the oscillation of electrons caused by the electric charge created by the generator which moves in the form of a current.

Duke Energy also offered evidence that it charges a flat fee for outdoor lighting. That evidence does not negate the fact that the majority of the electricity delivered by Duke Energy is sold based on quantity consumed. Moreover, as Mr. Jamil testified, the time period for which outdoor lighting operates is controlled by use of a photocell, and Duke Energy is able to estimate the variables in the timing to determine a pricing for the outdoor lighting. Rather, as Mr. Monroe testified, Duke Energy sells electricity on a metered basis involving electricity flowing through a meter and the company “read[ing] the meter periodically and send[ing] a bill to the customer.” Thus, the majority of the electricity provided by Duke Energy is priced at some level based on quantity.

²⁸ Duke Energy further supported its services argument through testimony that it currently is classified as a utility, not a manufacturer, for purposes of the North American Industry Classification System (NAICS), and that it classifies itself as a utility when filing its federal income tax returns. However, the specific NAICS and federal income tax return instructions referenced by the witness pertained to years after the Tax Periods at Issue and, thus, do not assist in determining Duke Energy’s character for the Tax Periods at Issue. In any event, neither the NAICS nor the federal classification for data purposes answers the question of whether Duke Energy is a manufacturer for purposes of Section 12-6-2250. Similarly, Duke Energy’s references to itself as a provider of services in various publications do not resolve the question of whether it falls within Section 12-6-2250.

Duke Energy finally attempts to compare the above-described processes to the provision of telecommunication services—both cellular and landline—but that comparison is unconvincing. Unlike Duke Energy, telecommunication companies do not generate or produce electricity, but instead only use electricity purchased from electric utilities. Moreover, the evidence in the record demonstrates the differences between a telecommunication service and Duke Energy’s production and sale of electricity. First, Duke Energy delivers to its customers a quantifiable product that is produced by Duke Energy. In contrast, telecommunication companies transmit communication or intelligence from one customer to another through a system operated by electricity purchased from utilities like Duke Energy. In essence, the telecommunications company simply transports intelligence produced or created by one of its customers. The purpose of Duke Energy’s business is thus to generate and provide electric energy while the purpose of a telecommunication company’s business is to convey information. Because Duke Energy produces electricity for use by its customers at an appropriate specification, and telecommunications companies transport intelligence produced by its customers using electricity produced by an electric utility, I find that the purported comparison to a telecommunications company does not undermine the reasonableness of the Department’s policy that Duke Energy is a manufacturer.

Conclusion

In sum, to conclude that Duke Energy provides a service rather than manufactures electricity would require a determination that the term “manufacturing” in Section 12-6-2250 means something different than “producing” (or “generating,” for that matter), a term generally used synonymously with “manufacturing.” Moreover, a person or entity providing services is not commonly understood to be “producing” services, and it is not commonly said that a company which generates and sells electricity is merely providing a service by “provid[ing] access to the electromagnetic field.” This is especially so given that the electric current that generates that field, or even the field itself, is generated through an asset-intensive process maintained and operated by Duke Energy. Finally, though it is conceivable that the processes of transmitting and distributing are not part of manufacturing, Duke Energy presented no evidence that would support separation of its electric transmission and distribution processes from its generation process and, in fact, described the whole process as a “very elaborate system.” In short, as Mr. Jamil testified, “you need all three.” In any event, even if the Court were to draw

such a distinction, it would prove inconsequential to the outcome here because all three activities – generation, transmission, and distribution – fall under Section 12-6-2250.²⁹

Processing Goods and Materials within this State

Alternatively, the evidence reflects that Duke Energy comes within Section 12-6-2250 because its generation, transmission, and distribution of electricity constitutes “any form of . . . processing goods and materials within this state.” S.C. Code Ann. § 12-6-2250(a) (emphasis added). 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 Corp.*, 246 S.C. at 96, 142 S.E.2d at 447 (identifying “any form” in predecessor to section 12-6-2250 as “broad language”). The evidence introduced by both parties shows that generating electricity is a form of processing raw materials such as coal, water, or nuclear fuel. These items are goods and materials.³⁰ These goods are processed and used to create energy to turn a generator either directly or indirectly, which constitutes “any form” of processing of those inputs in the generation process and, thus, falls within the statute.

Selling, Distributing, or Dealing in Tangible Personal Property

Duke Energy also comes within Section 12-6-2250 because its business constitutes “selling, distributing, or dealing in tangible personal property.” Duke Energy, however, argues that it is a seller of services and therefore cannot be a seller, distributor, or dealer of tangible personal property. The premise of this argument is that electric service is not tangible personal

²⁹ Duke Energy also contends that electricity is not manufacturing because it is not tangible. Duke Energy’s conclusion is based upon two premises: 1) electricity is an intangible material and 2) the term “manufacturing” in Section 12-6-2250 is limited solely to tangible goods or materials. As to the first premise, this Court, for reasons discussed later in the text, finds that the electricity Duke Energy produces is tangible. The Court, therefore, need not address the remaining premise. However, even if this Court found that electricity was intangible, this would not necessarily prevent electricity from being a manufactured product. Merriam-Webster’s definition of “manufacture” includes “the process of making wares by machinery” See <<http://www.merriam-webster.com/dictionary/manufacture>> (accessed October 19, 2012). Merriam-Webster’s definition of “wares” includes “intangible items” that are “marketable commodit[ies].” See <<http://www.merriam-webster.com/dictionary/ware>> (accessed October 19, 2012). Adopting this view of electricity, the Massachusetts Supreme Court, in *Westinghouse Broad. Co., Inc. v. Comm’r of Revenue*, noted that the proposition that an electric power company “may not be denied manufacturing status merely because its end product is intangible” . . . “conformed to [its] view that the production of electricity may entail manufacture” 382 Mass. 354, 358, 416 N.E.2d 191, 193 (1981).

³⁰ Merriam-Webster’s definition of a “good” is “something that has economic utility or satisfies an economic want.” See <<http://www.merriam-webster.com/dictionary/good>> (accessed October 19, 2012). It defines “material” as “the elements, constituents, or substances of which something is composed or can be made.” See <<http://www.merriam-webster.com/dictionary/material>> (accessed October 19, 2012).

property. Duke Energy also argues that the definition of “tangible personal property” should not be taken from S.C. Code Ann. § 12-36-60, which sets forth the definition of “tangible personal property” for sales and use tax purposes. Rather, Duke Energy urges the Court to adopt the definition of “tangible property” set forth in the Income Tax Act, specifically S.C. Code Ann. § 12-6-30(11).

I agree that because “tangible personal property” in Section 12-6-2250(b) is part of the Income Tax Act, the definition for “tangible property” under the Income Tax Act must be used. S.C. Code Ann. § 12-6-30(11) defines “tangible property” as “includ[ing] . . . **corporeal personal property** but does not include money, bank deposits, shares of stock, bonds, credits, evidence of debt, chose in action, or evidence of an interest in property.” (Emphasis added). The primary purpose in interpreting statutes is to ascertain the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “[This Court] cannot construe a statute without regard to its plain and ordinary meaning, and this Court may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope.” Cain v. Nationwide Prop. And Cas. Ins. Co., 378 S.C. 25, 29, 661 S.E.2d 349, 352 (2008) (internal citation omitted). “Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Id. at 30, 661 S.E.2d at 352 (internal citation omitted).

In this case, it is clear that tangible personal property includes “corporeal personal property.” “Corporeal” is not a legal term of art in this case, and it is generally understood to mean “[o]f a material nature; tangible.”³¹ In further support of this plain understanding of the definition of “tangible property,” Section 12-36-60, which addresses “tangible personal property” for sales and use tax purposes, defines this term as “personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses.” This definition coincides with the general understanding of the term “corporeal” included in the definition of “tangible property” under Section 12-6-30(11).³²

³¹ The American Heritage College Dictionary 311 (3d ed. 1993). See also Black's Law Dictionary 394, 1336, 1592 (9th ed. 2009) (defining “corporeal” as “tangible”; “tangible” as “corporeal”; and “corporeal personal property” as “tangible personal property”).

³² The Court recognizes that Sections 12-6-30(11) and 12-36-60 differ with respect to their treatment of intangible personal property. Specifically, Section 12-36-60 includes as tangible personal property services and intangibles, whereas Section 12-6-30(11) excludes intangibles altogether; indeed, “intangible property” is separately defined under Section 12-6-30(12). However, the specific exclusions from tangible personal property (which are not at issue

Applying to the facts of this case the definition of tangible property found in Section 12-6-30(11), according to its plain and ordinary meaning which is supported by the general definition of tangible personal property given in the first sentence of Section 12-36-60, I conclude that electricity is tangible personal property. Electricity is a product delivered to customers at certain precise specifications. The evidence also established that electricity is a physical product with physical characteristics; that the electric charge associated with electricity is a physical property of matter; that it certainly is possible to feel electricity's impact in the body; that electricity can be moved, manipulated, and stored, characteristics further suggesting the tangible nature of electricity; that the electric charge, which Duke Energy witnesses testified is the source of electricity, can be stored; and that electricity is a fungible product that is sold in quantifiable amounts. Also, because the electricity sold, distributed, or dealt by Duke Energy is used by its customers in amounts, duration, and purposes chosen by its customers, i.e., it is under the customers' control after it is distributed to them, the electricity becomes personal property of the customers.

On one hand, Duke Energy does not wish to apply the definition of "tangible personal property" under Section 12-36-60; but nonetheless, Duke Energy wishes to use Section 12-36-60 to establish its sales of electricity as a service. It argues that if Section 12-36-60 applied, "the Department's view on the characterization of electricity based on the sales and use tax definition was long ago rejected by this Court in [Consolidated Hydro S.E., Inc. v. S.C. Dep't of Revenue & Taxation, No. 95-ALJ-17-0634, 1996 WL 909155 (S.C. Admin. L.J. Div. May 13, 1996) (Lee, A.L.J.).]" In that case, the taxpayer owned and operated several hydro-electric power generation facilities in South Carolina and was engaged in the business of production and sale of electricity. Citing the definition of "tangible personal property" set forth in S.C. Code Ann. § 12-36-60, relating to sales and use taxes, the company argued that it did not provide or sell a "service" and was therefore not subject to additional license taxes. The court in that case disagreed, concluding that "while electricity is included in [12-36-60] discussing the application of sales tax

here) are nearly identical in both definitions. Section 12-6-30(11) excludes from tangible property the following: "money, bank deposits, shares of stock, bonds, credits, evidences of debt, choses in action, or evidences of an interest in property." Similarly, Section 12-36-60 excludes from tangible personal property the following: "stocks, notes, bonds, mortgages, or other evidences of debt . . . [, and] transmission of computer database information by a cooperative service when the database information has been assembled by and for the exclusive use of the members of the cooperative service." Also, as discussed above, Section 12-36-60 provides a specific definition of "tangible personal property" that coincides with the general understanding of "corporeal personal property" included in the definition of "tangible property" under Section 12-6-30(11).

on the sale of tangible personal property, the sale of electricity is specifically recognized and defined as a service.”

First, that decision has **no precedential value** and is thus not binding on this Court.

Secondly, that decision merely concluded that the taxpayer was providing a service and was thus subject to a license fee under then-Section 12-19-110. However, Section 12-19-110 was imposed “[i]n addition to . . . all other license taxes and fees or taxes of whatever kind” Section 12-19-110 did not prevent the application to the taxpayer of any other tax laws, including those that implicated “tangible personal property.” Thus, even if this Court were to adopt the position that the sale of electricity was merely a service under the Sales and Use Tax Act, the sale of electricity would simply be a service that does not fall “within the meaning of the general definition” of “tangible personal property” set forth in the first sentence of Section 12-36-60, Consolidated Hydro *4. But the inquiry does not end there in this case. The sale of electricity, though a service, would still be considered tangible personal property, as set forth in the second sentence. As such, it would be subject to tax laws imposed by other statutes upon tangible personal property, just as it was subject to license fees imposed by other statutes upon services. Thus, even under Duke Energy’s theory, it would still be considered to be “selling, distributing, or dealing in tangible personal property within this State” for corporate income tax apportionment purposes under Section 12-6-2250.

Furthermore, as previously mentioned, Merriam-Webster’s Dictionary defines “service” as “useful labor that does not produce a tangible commodity” or “a facility supplying some public demand.” Merriam-Webster Online Dictionary, www.merriam-webster.com (last visited October 29, 2012). Because, for the reasons given above, I find that electricity is a tangible commodity manufactured by Duke Energy, Duke Energy has failed to demonstrate that its “provision” of electricity to customers is a service under the first definition. As to the second definition, Duke Energy is doubtless a service because it is “a facility supplying some public demand.” However, there is nothing in this definition of service that is determinative of tangibility or intangibility. Indeed, the actual provision of a product may be intangible, while the product itself is tangible.³³ This is evident with the sales or use tax definition of “tangible personal property” under Section 12-36-60, in which sales of electricity, though considered

³³ See, e.g., *Pub. Serv. Co. v. Dep’t of Revenue*, ---P.3d---, 2011 WL 4089971 (Colo. Ct. App. 2011) (“There is . . . Colorado authority that electricity is both a product and a service”).

services under that statute, are considered tangible personal property. See S.C. Code Ann. § 12-36-60 (“‘Tangible personal property’ . . . also includes . . . sales of electricity . . .”). Thus, even looking to the sales or use tax definition, and considering the sale of electricity to be a service, the sale of electricity would still be tangible personal property for tax purposes.³⁴

In sum, although it admittedly is unique, electricity is a tangible product with identifiable physical characteristics that may be created, measured, felt, stored, and consumed, and an electric utility may exercise ownership rights over it. And even if the Court were to consider the sale of electricity merely a service, it would still be considered tangible personal property for tax purposes. Therefore, Duke Energy also falls within Section 12-6-2250(b).

More-than-50-percent Test

Though Duke Energy, as the taxpayer, may engage in activities falling under Section 12-6-2250, Duke Energy may still apply the single-factor gross receipts apportionment method under Section 12-6-2290 if the principal amount of its profits or income is derived from activities other than those covered in Section 12-6-2250. However, Duke Energy, which was engaged in more than one line of business during the Tax Periods at Issue, has the burden of proving that its principal business in this State was not from manufacturing, or any form of collecting, buying, assembling, or processing goods and materials within this State, or from selling, distributing, or dealing in tangible personal property within this State. In making this “principal business” determination, South Carolina adopts a more-than-50-percent test. The Department’s longstanding policy provides:

[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.

³⁴ Duke Energy points out that several other states have treated the provision of electricity as something other than tangible personal property. These states would include: North Carolina, Oregon, California, and Massachusetts. However, this Court finds more persuasive the decisions of those states that hold that electricity is tangible personal property. See e.g., Exelon Corp. v. Dept’t of Revenue, 234 Ill.2d 266, 917 N.E.2d 899 (2009); Tucson Elec. Power Co. v. Ariz. Dep’t of Revenue, 170 Ariz. 145, 822 P.2d 498 (Ct. App. 1991). Moreover, Duke Energy acknowledges that other states, in contexts other than income tax, have ruled that the sale of electricity is the sale of tangible personal property. See, e.g., Davis v. Gulf Power Corp., 799 So. 2d 298, 301 (Fla. Dist. Ct. App. 2001) (property tax); Texas E. Transmission Corp. v. Benson, 480 S.W.2d 905, 908 (Tenn. 1972) (sales tax); S. Natural Gas Co. v. State, 261 Ala. 222, 73 So. 2d 731 (1953) (use tax).

Rev. Rul. No. RR-87-5 (S.C. Tax Comm'n Sept. 16, 1987). Thus, under the Department's policy, if more than 50 percent of a business's gross receipts are from providing services, then the business would be service-related and the taxpayer would be required to apportion its income to South Carolina using the single-factor gross-receipts apportionment method under S.C. Code Ann. § 12-6-2290. Otherwise, the business would have to apportion its income to South Carolina using the three-factor apportionment method under S.C. Code Ann. § 12-6-2250.

Here, Duke Energy presented testimony indicating that Duke Energy's principal business is the provision of electricity services because at all times during the Periods at Issue more than 50 percent Duke Energy's gross receipts were derived from the provision of electric services. However, in light of my findings that Duke Energy's generation, transmission, and distribution of electricity are activities falling within Section 12-6-2250, that electricity is tangible personal property, and that sales of electricity are sales of tangible personal property, I find Duke Energy's evidence insufficient to establish that more than 50 percent of Duke Energy's gross receipts were derived from activities not covered in Section 12-6-2250. Indeed, Duke Energy introduced no evidence supporting any breakdown of its gross receipts from manufacturing, services, and/or any other activity.

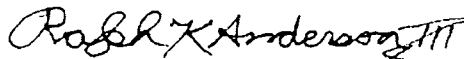
Conclusion

After considering the evidence in the record and the pertinent legal authorities, I conclude that Duke Energy failed to establish by the preponderance of the evidence that its principal business in South Carolina is not manufacturing. This Court thus rejects Duke Energy's attempt to use the single-factor apportionment formula for tax years 1994-2001 instead of the multi-factor apportionment formula it used in its original corporate income tax returns.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Duke Energy's claims for refunds with respect to its attempt to use the single-factor apportionment formula for the corporate income tax periods 1994-2001 are **DENIED** and the Department's Determination is **AFFIRMED**.

IT IS SO ORDERED.



Ralph K. Anderson, III
Chief Administrative Law Judge

December 4, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair

E. Harvin Belser Fair
Judicial Law Clerk

December 4, 2012
Columbia, South Carolina

EXHIBIT B

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,)	
)	Docket No. 10-ALJ-17-0270-CC
Petitioner,)	
)	
vs.)	RECONSIDERATION ORDER
)	
South Carolina Department of Revenue,)	
)	
Respondent.)	
_____)	

Appearances:

For the Petitioner: Burnet R. Maybank, III, Esq.; Eric S. Tresh, Esq.; Jeffrey A. Friedman, Esq.; and Maria M. Todorova, Esq.

For the Respondent: Tracey C. Green, Esq.; John W. Roberts, Esq.; Harry Hancock, Esq.; and J. Abraham Gutting, Esq.

This matter came before the Administrative Law Court (ALC or Court) following Duke Energy Corporation's (Duke Energy) request for a contested case hearing under S.C. Code Ann. § 12-60-460 (Supp. 2006). Duke Energy is contesting the Determination of the South Carolina Department of Revenue (Department) denying Duke Energy's claim for a refund of South Carolina corporate income taxes for the tax years 1994 through 2001 (Tax Periods at Issue).¹ A hearing was held before this Court on September 5 and 6, 2012. On November 2, 2012, this Court entered its Final Order and Decision (Final Decision) denying Duke Energy's claims for refund of corporate income taxes for the Tax Periods at Issue and affirming the Department's Determination that Duke Energy cannot apportion its income based on the single-factor gross-receipts apportionment method. Afterwards, Duke Energy filed a Motion for Reconsideration of the Court's Final Decision on November 13.

Some of Duke Energy's arguments warrant clarification or amendment of the original Final Decision. Accordingly, I am issuing an Amended Final Decision in this case addressing

¹ Duke Energy originally sought refunds for the tax years 1978 through 2001. On October 11, 2012, this Court ruled that Duke Energy's refund claims for the tax years 1978 through 1993 are untimely. Thus, Duke Energy's refund claims for 1978-1993 were not before the Court.

FILED

December 4, 2012

SC ADMIN. LAW COURT

those issues of whether Duke Energy can apportion its income based on the single-factor gross-receipts apportionment method. The remaining arguments will be addressed below.

DISCUSSION

Duke Energy's Motion for Reconsideration presented fifty instances in which they contend that this Court erred in the issuance of its Final Decision. Those arguments are addressed below in the numerical sequence in which they were presented.

1. Duke Energy contends that Court erred in finding that Duke Energy “**further**s its primary business by owning and operating transmission and distribution assets in South Carolina and North Carolina.” The Final Decision has been amended to address this issue.

2-4. Duke Energy contends that the Court improperly disregarded factual evidence that Duke Energy was subject to the regulation of its “rates and *services*” by the South Carolina Public Services Commission and the Federal Energy Regulatory Commission and its operations were characterized as a “franchise electric service business.” The Court clearly acknowledged in the Stipulations of Fact (stipulation 10, p. 3) that Petitioner was regulated by the South Carolina Public Service Commission (Commission) as an “electric utility” pursuant to S.C. Code Ann. § 58-27-10 (7). Though Section 58-27-10(7) does not refer to an “electric utility” as providing a “service, Section 58-27-10 (8) does set forth that:

The term “rate” means and includes every compensation, charge, toll, rental, and classification, or any of them, demanded, observed, charged, or collected by any electrical utility for any electric current or **service** offered by it to the public and any rules, regulations, practices, or contracts affecting any such compensation, charge, toll, rental, or classification.

The Court further recognizes that Duke Energy “services” are subject to the regulation of the Federal Energy Regulatory Commission. Nevertheless, as explained in the Court’s Decision, this “service” is that of “a facility supplying some public demand.” See e.g., Black River Elec. Co-op., Inc. v. Pub. Serv. Comm’n, 39 P.U.R.3d 232, 120 S.E.2d 6 (S.C. 1961) (“The purpose underlying Section 24-63 was to prevent competition between utilities rendering service of the same kind so as to eliminate waste incident to a duplication of facilities.”). Therefore, citation to the regulation of those bodies did not support Duke Energy’s contentions. It thus was not probative as to the nature of Duke Energy’s primary activities and thus its classification for corporation income tax purposes under either Section 12-6-2250 or -2290.

5. Duke Energy contends that the Court erred in finding that the profits from the flat-rate and capacity charges were not a significant portion of Duke Energy's profit from the sale of electricity. As the finder of fact, the Court simply does not find that the evidence established that these charges were a significant portion of Duke Energy's business. In fact, I find the evidence established otherwise. For instance, Mr. Robinson testified that a majority of an electric utility's, and thus Duke Energy's, product is not provided on a flat-fee basis. Tr. p. 393, lines 5-18. And Duke Energy's expert witness, Mr. Jamil, testified that though not always, Duke Energy typically provides electric service on a metered basis. Id. at 106, lines 22-23. He testified that he could not testify as to whether a flat fee for lighting generated a significant amount of Duke Energy's revenues. Id. at 175, lines 10-21.

As to the capacity charge, Mr. Jamil did testify that the capacity charge was a significant part of a customer's bill. However, he also testified that the amount of the charge depends on the customer's usage. Id. at 178, lines 18-19. He also testified that the amount of the charge would depend on the customer class. Id. at 179, lines 20-25 to p. 180, line 1. When asked about the capacity charge for a residence per month, Mr. Jamil testified that he did not have that information. Id. at 180, lines 8-12. Duke Energy has the burden of proving its case by a preponderance, or greater weight of the evidence, and merely stating that a capacity charge is a significant portion of a customer's bill (he did not testify that this charge was a significant portion of Duke Energy's receipts), is insufficient, especially in light of the fact that the witness admitted that the charge in relation to the bill was variable.

6. Duke Energy contends that the Court erred in finding that the process of generating electricity is the same process employed since the early 20th century. Duke Energy failed to set forth facts in the record to support this claim. See e.g., Campbell v. Carr, 361 S.C. 258, 603 S.E.2d 625 (Ct. App. 2004). Moreover, Duke Energy failed to explain the implication of the purported error upon the decision in this case. Furthermore, there is no evidence that the introduction of renewable energies, the use of solar panels, and the development of more efficient wind generators occurred during the Periods at Issue (1994-2001). Nevertheless, the following facts are cited as supporting the amended finding regarding this issue:

- Q: Now, a lot of your generation facilities use a turbine; is that correct?
A: (Nods head affirmatively.)
Q: Not all of them.

A: Many of them do.

Q: Many of them.

A: Yeah.

Q: And the design of a turbine used in one of these plants hasn't really changed since the early 20th century, has it?

A: Not significantly.

Q: And the generation process that we're discussing here today that Duke Energy makes available, that's not really changed much since the early 20th century, has it?

A: I mean, we've made it significantly more efficient, but

Q: Used technology --

A: Yeah.

Q: -- and things like that?

A: Different material --

Q: Is that correct?

A: Yeah.

Q: But the basic process is the same.

A: Basic process is the same

Tr. p. 169 line 25 to p. 170, line 24.

Q: And the process of generating electricity hasn't changed in the last hundred years.

A: For most of the part, no. However, we have added renewable energies. So in consideration of the environment, we have developed solar panels. We have also developed more efficient wind generators. Again, mainly to mitigate any environmental effects that we may have from traditional techniques.

Tr. p. 289 lines 11-19.

7-8. Duke Energy contends that the Court erred in finding that Duke Energy's generation and purchase of electricity using natural gas, wind and solar, "appear to be much less significant" than other methods. Duke Energy failed to explain the implication of the purported error upon the decision in this case. Furthermore, as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC v. S.C. Dep't of Health and Env'tl. Control, 392 S.C. 314, 324, 709 S.E.2d 626, 631 (2011) ("[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence"). Here, as the finder of fact, the Court simply does not find that the

evidence established that Duke Energy's generation of electricity based upon natural gas, wind, and solar was significant during the Tax Periods at Issue. See e.g., Tr. p. 117, line 10 to p. 118, line 1. Duke Energy also argues that the Court erred in finding that Duke Energy's purchase of electricity from other electric utilities "appear[s] to be much less significant." Duke Energy instead asserts that it presented evidence that purchasing electricity from other utilities is an integral and necessary part of its primary business. However, Duke Energy's own witness, Mr. Monroe, testified as follows:

Q: But Duke Energy generates most of its own electricity that it sells, doesn't it?

A: Yes.

Tr. p. 88, lines 9 -11.

9. Duke Energy contends that the Court improperly ignored that the Department had conceded, in its Determination denying Duke Energy's refund claims and in its Pre-Hearing Statement, that Duke Energy provides a service. The Administrative Law Court hears this case as the de novo finder of fact. Young v. S.C. Dept. of Health and Env'tl. Control, 383 S.C. 452, 680 S.E.2d 784 (Ct. App. 2009); Risher v. S.C. Dept. of Health and Env'tl. Control, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011), reh'g denied (July 21, 2011) ("The ALC, as the ultimate finder of fact in this action, was free to visit the Lot and draw its own conclusions therefrom."). The Court therefore makes its determination based upon its reasonable view of the facts. Furthermore, the Court is free to reach its own conclusions of law. As such, the Court in this case found, as set forth in its Final Decision, that Duke Energy's primary business is manufacturing and not providing a "service."

10. Duke Energy contends that the Court failed to consider the legislative history of Sections 12-6-2250 (and its predecessor Section 12-7-1120) and 12-6-2290 (and its predecessor Section 12-7-1190), as well as guidance issued by the Department on the same topic that the multi-factor apportionment formula is designed for taxpayers dealing in tangible personal property (such as manufacturers) whereas the single-factor gross-receipts formula is designed for taxpayers who do not deal in tangible personal property, such as service businesses. The Court simply disagrees with that assertion. The Court certainly made clear, as finder of fact and in its conclusions of law, that electricity is tangible personal property. Furthermore, there is evidence in the record that electricity is tangible. See e.g., Tr. p. 335, lines 19-21; p. 363, lines 3-7; p. 376, lines 12-23.

11. Duke Energy contends that the Court erred in disregarding the testimony of Duke Energy's expert witness, Dr. Papapolymerou, regarding whether one can feel electricity. First, Duke Energy carries the burden of proving that a person can not feel electricity, and as the finder of fact, the Court can choose to accept in part or in whole the testimony of expert witnesses. MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 (“[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence”). Second, there is evidence in the record that electricity can be touched and sensed. See e.g., Tr. p. 332, lines 19 - 25; p. 376, lines 12 - 23. Here, the Court did not find any of the witnesses credible as to the physiology of the human body with respect to the nervous system, but did determine that electricity can be sensed, touched, and therefore felt.

12-13. Duke Energy contends that the Court erred in finding that Duke Energy produces electrical charge. Duke Energy also contends that the Court failed to consider the parties' expert witnesses' testimony that Duke Energy does not create the electrons residing in the power lines, and that the provision of electricity is not the transfer of electrons to the customers. As the finder of fact, the Court can choose to accept in part or in whole the testimony of expert witnesses. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 (“[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence”). Moreover, the Court found that an electrical charge is a component of what is produced by Duke Energy. Dr. Papapolymerou testified that Duke Energy generates the electromagnetic field that causes the electrons to oscillate and thus the charges to flow, providing energy. See e.g., Tr. p. 285, lines 13 - 23; p. 288, line 13 to p. 289, line 3. Thus, electrical charge is a component of the energy generated by Duke Energy because the charges are manipulated by the magnetic field that is created and controlled by Duke Energy, which creates the energy that Duke Energy provides.

14. Duke Energy contends that the Court erred in making a factual finding that electricity can be created, felt, stored, or consumed and is a tangible product with identifiable physical characteristics. Duke Energy carries the burden of proving that a person can not feel electricity, and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 (“[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence”). Here, the answers above, and the Amended Final Decision on pp. 23-24, address the issues of whether electricity can be created, felt, or is tangible. Moreover,

“consumed,” as utilized in the Final Decision and Amended Final Decision, refers to the utilization of electricity as a customer. See Merriam-Webster Online Dictionary, www.merriam-webster.com (defining “consumed” as “to utilize as a customer”) (last visited November 20, 2012). The evidence also established that the source of electricity, an electrical charge, can be stored. See e.g., Tr. p. 121 line 24 to p. 122, line 10; p. 259 lines 19-25; p. 277, line 17 to p. 278, line 4; p. 299 lines 4-5.

15. Duke Energy contends that the Court erred in disregarding Duke Energy’s expert witness’s testimony regarding the nature of electricity. Duke Energy carries the burden of proof and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 (“[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence”). Moreover, this overly-broad issue fails to sufficiently specify an error.

16. Duke Energy contends that the Court erred in disregarding the Department’s expert witness’s testimony that Duke Energy provides a service. Duke Energy carries the burden of proof and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 (“[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence”). In reaching my factual determinations, I gave this evidence little, if any, weight and therefore chose not to reference it, being unpersuasive. Nevertheless, I now specifically find this evidence was not persuasive.²

17. Duke Energy contends that the Court erred in holding that “No other electrical utilities challenged that position [that electric utilities were manufacturers]” Duke Energy carries the burden of proof and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 (“[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence”). Here, the evidence reflected that Mr. Southard was not aware of any challenges to the Department’s position, other than that posed by Duke Energy. See Tr. p. 203, lines 1-2. And Duke Energy presented no evidence to the contrary. Moreover,

² I further note that it is the Court’s responsibility to make “findings of fact.” However, I am not aware of any responsibility to make “non-findings of fact.”

since Duke Energy did not challenge the legal implications of this determination, the Court will not address that issue.

18. Duke Energy contends that the Court erroneously concluded that the Department has a longstanding policy of treating electric utilities as manufacturers for purposes of corporate income tax apportionment. I find the law cited in the Court's Final Decision supports the conclusion reached by the Court. The Court did not give deference to the Department based on its audit manual. Rather, the Court relied on a 1985 S.C. Tax Commission determination and on earlier S.C. Supreme Court decisions in Columbia Ry. and Duke Power Co. v. Bell in concluding that the public, including the General Assembly, was given notice of the Department's policy of treating electric utilities as manufacturers for purposes of corporate income tax apportionment.

19-20. Duke Energy contends that the Court gave improper deference to the Department's alleged long-standing policy of treating electric utilities as manufacturers for South Carolina income tax purposes. As set forth above, the law cited in the Court's Final Decision supports the conclusion reached by the Court. Here, there were prior known interpretations regarding the Department's policy of treating electric utilities as manufacturers for South Carolina corporate income tax purposes, and those interpretations were not contrary to any statute or regulation. The Court's rejection of Duke Energy's position is not a failure to consider that position. Moreover, Duke Energy cited no law in its Motion for Reconsideration to support its reasoning regarding these issues. See e.g., Campbell v. Carr, 361 S.C. 258, 603 S.E.2d 625 (S.C. App. 2004).

21. Duke Energy contends that the Court erroneously concluded that because Duke Energy filed its tax returns using the multi-factor apportionment formula over the course of 23 years, "the returns were filed in accordance with the policies and filing requirements promulgated by the Department." The Court found that Duke's filing according to the multi-factor apportionment formula over the course of 23 years "**leads to the conclusion** that "the returns were filed in accordance with the policies and filing requirements promulgated by the Department and **as understood by Duke Energy at the time the returns were originally filed.**" (Emphasis added). The Final Decision has been amended to remove "and" from before "as understood" because it is unnecessary. Furthermore, Duke Energy failed to explain the implication of the purported error upon the decision in this case. Moreover, as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at

Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 (“[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence”). Here, there was sufficient evidence from which the Court as the finder of fact could reasonably conclude that the Department had a longstanding policy of which Duke Energy should have been aware.

22. Duke Energy contends that the Court erroneously concluded that Columbia Ry., Gas & Elec. Co. v. Query, 134 S.C. 319, 132 S.E. 611 (1926), was decided in the income tax context. The Court’s Final Decision has been amended to address this issue.

23. Duke Energy contends that the Court erred in holding that the Department, in S.C. Tax Comm’n Decision P-D-532, 1985 WL 192777 (Apr. 11, 1985), ruled that the property tax assessment ratio for electric utilities should be 6% (as opposed to 10.5% applicable to the personal property of non-manufacturing entities).” However, as the Tax Commission pointed out in S.C. Tax Comm’n Decision P-D-532, 1985 WL 192777 (Apr. 11, 1985), South Carolina, in Columbia Ry., “has recognized that certain utilities may also be manufacturers,” and that utilities that generate electricity or any other power that they supply to their customers are such utilities and therefore manufacturers. The Commission also cited 17 A.L.R.3d, Taxes, “Manufacturing,” § 44, 102. The Tax Commission thus concluded that “X” Electric and Gas was a manufacturer and that the tax assessment ratio that applied to it was only 6% - the rate that a manufacturer paid on real property owned by or leased to the manufacturer and used primarily as an office building that is not located on the premises of or contiguous to the plant site of the manufacturer, which was the situation in that case. As the Tax Commission also properly pointed out, the reference to “utilities” in 12-43-220(a)(1) is limited to utilities that merely supply light, water, power, heat, transportation or means of communication, but do not generate the power that they supply to their customers. Those that generate the power they supply, such as Duke Energy, are considered manufacturers, not mere utilities.

24. Duke Energy contends that the Court erred in concluding that the terms “goods and materials” contained in Section 12-6-2250(a) “reflect[] that the Legislature intended to cover not just manufacturing but all activities that a business could perform in regards to a *product* prior to making that *product* available to its customers.” (Emphasis in original). The Final Decision has been amended to address this contention.

Duke Energy also asserts that both parties’ experts agree that electricity is not a material. The Court never found that electricity is a material. Rather, the Court noted that raw materials,

such as coal, water, or nuclear fuel, are processed to generate or produce the electricity. Under the facts of this case, the Court considers “generation,” “manufacturing,” and “production,” from which the term “product” is derived, to be synonymous. Duke Energy then argues that Duke Energy presented ample evidence showing that electricity is not tangible personal property or a good. First, as reflected in the Final Decision, tangible personal property is a separate consideration, under subsection (b), from the “goods and materials” discussed in subsection (a). Nevertheless, the evidence established that electricity is tangible. See, e.g., Tr. p. 335, lines 19-21; p. 363, lines 3-7; p. 376, lines 12-23; p. 378, lines 13-15. Finally, Duke Energy maintains that the Department has not presented any evidence to show that electricity is a good or material. On the contrary, there is more than sufficient evidence that the electricity that Duke Energy generated during the Tax Periods at Issue satisfied an economic want, which causes that electricity to fall under the definition of “good.”³

25. Duke Energy contends that the Court improperly applied the Webster’s definitions of “manufacturing” and erroneously concluded that Duke Energy “makes” or “produces” “something.” Duke Energy has cited no law explaining what was improper about applying Webster’s definitions of “manufacturing.” “Manufacturing” is not defined in the applicable statutes, and it is not a legal term of art. Therefore, it is perfectly proper to refer to a dictionary to understand the common usage of a statutorily-undefined term, as our Supreme Court has often done. Again, this Court finds “make,” “produce,” and “manufacture” to be synonymous. As finder of fact recognizing the burden of proof, this Court finds that there was more than sufficient evidence to support its finding that Duke Energy generates, or manufactures, electricity. In fact, Duke Energy’s own witness, Mr. Jamil, testified that Duke Energy generates electricity, and also affirmed that Duke Energy uses various generation processes to produce electricity. See, e.g., Tr, p. 101, line 13 to p. 102, line 48. Therefore, Duke Energy’s own witness testified not only that electric energy is generated or produced by Duke Energy, but also, based on his responses, clearly viewed generation and production as synonymous, and naturally so.

26. Duke Energy contends that the Court erred in finding that “the evidence in this case establishes that Duke Energy is a manufacturer” based on the Court’s definition of

³ The sum of money involved in this case, being just income taxes alone, reflects that Duke Energy’s electricity satisfied a vast quantity of economic want.

“manufacturing” as “the act or process of producing something” when Duke Energy presented evidence that it does not produce anything because electricity cannot be created or destroyed. The Court adopts the conclusions stated in response (25) above and further notes that Duke Energy carries the burden of proof, and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 (“[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence”).

27. Duke Energy contends that the Court improperly considered cases from other states decided in tax contexts *other than income tax* holding that the generation of electricity is manufacturing, while, at the same time, the Court failed to consider *more recent* decisions from other jurisdictions decided in the *corporate income tax context* which hold that the provision of electricity is a service and not manufacturing. First, this Court finds that the cases cited properly supports the legal conclusions reached by the Court. Interestingly, one of the cases cited by the Court is dated September 15, 2011, which appears to this Court to be “recent.” In addition, Duke Energy has not explained why the ages of cases discredit the legal holding of those courts. It is simply a reflection that in those states, as in South Carolina, the law on this issue was settled long ago. Moreover, the Court found cases cited in Footnote 19 to be more akin to South Carolina law and therefore more convincing.

28. Duke Energy contends that the Court erred in making a factual finding that Duke Energy “cannot produce or deliver electricity to consumers in the absence of any one of these parts [- generation, transmission, and distribution,].” At the outset, Duke Energy carries the burden of proof, and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 (“[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence”). Nevertheless, in light of Duke Energy assertion, the disputed language has been modified in the Amended Final Decision.

As to the remaining language, there was evidence that Duke Energy **sometimes** purchases electricity from other electric utilities. See e.g., Tr. p. 117, line 10 to 119, line 8; Tr. p. 181, lines 8-11. However, the evidence did not establish that Duke Energy’s purchasing of electricity from other electric utilities is a significant or necessary part of its business, or is “routinely” done. Mr. Jamil testified that it was “possible” to provide all of its electric service to

South Carolina without generating the electricity. *Id.* at 118, line 25 to 19, line 5. But he also admitted that he understands this would not be the most cost efficient. *Id.* at 119, line 6-8. More importantly, what Duke Energy could possibly do and what it actually did during the Taxable Periods at Issue are two different things. Duke Energy may sometimes purchase electricity from other electric utilities, but most of the electricity that Duke Energy provides to its customers is generated by Duke Energy. In addition, the evidence also clearly established that Duke Energy needs three components – generation, transmission and distribution – to provide electricity to its customers. *See e.g., Id.* at 104, lines 11-24.

29. Duke Energy contends that the Court erroneously reasoned that because electricity can be measured, generating electricity is manufacturing, when in fact, Duke Energy presented evidence that it also provides electricity on a fixed-fee basis. As to Duke Energy's provision of electricity on a fixed-fee basis, this was addressed in Footnote 3 and on p. 20 of the Final Decision, and need not be repeated here. As to measurability, this Court quite agrees that measurability **alone** is not an indication of manufacturing, which is why the Court noted measurability as "further evidence[]" and "further support[]" that generating electricity is manufacturing. All of the other reasons why generation is manufacturing were discussed prior to the paragraph on measurability. Together, all of these reasons led the Court to the conclusion that the generation of electricity was manufacturing.

30. Duke Energy contends that the Court erroneously concluded that Duke Energy cannot "provide" electric service "without the existence of electricity, and the electricity that Duke Energy provides cannot exist without first being produced, or manufactured." Quizzically, Duke Energy questions whether Duke Energy can provide electricity without its existence (it argues that electricity cannot be created or destroyed). The error of that objection is so obvious the Court need not comment further. Furthermore, as reflected in the record, electricity must be sold at a regulated voltage to be usable by the public. Duke Energy's expert testified that "[w]e drop the voltage down to a level that is usable to the customer – typically 120 volts; sometimes 220 volts. . . ." Tr. p. 115, lines 21-24. Since there was no evidence that electricity naturally exist at 120 volts, this Court found that "the electricity that Duke Energy provides cannot exist without first being produced, or manufactured." Additionally, see responses (25) and (26) above for additional explanation.

31. Duke Energy contends that the Court failed to consider testimony by Duke Energy's witness that the Standard Industry Classification System, which was in effect during the Periods at Issue, classified electric utilities and manufacturers in two separate categories, having two different codes, and that as an electric utility, Duke Energy was required to use the code applicable to the electric utilities classification. Footnote 24 in the Final Decision (Footnote 28 in the Amended Final Decision) adequately addresses this issue.

32. Duke Energy contends that the Court made an erroneous finding that "services typically are not measured by the quantity of the product consumed and are not delivered to or measured by mathematical calculations regarding the nature of the services." The Final Decision has been amended to address this issue.

33. Duke Energy contends that the Court made an erroneous finding when it concluded that "any electromagnetic field results from the electric current created by the generator." The Final Decision has been amended to clarify the Court's findings. However, Duke Energy's expert witness (Mr. Jamil), explained that in layman's terms the "electromagnetic field" is "current" or an "electric field." Tr. p. 153, lines 1-3; 17-23. Nevertheless, it is a "charge." *Id.* Mr. Jamil also explained that an electromagnetic field does not exist unless there is a current. Tr. p. 154, lines 21-25. He further testified as follows:

Q: And you have generation facilities in South Carolina and North Carolina.

A: Yes, we do.

* * *

Q: And the generator turns by -- it's the -- I assume it's a fairly large machine; is that correct?

A: Oh, yes.

Q: A mechanical device?

A: Yes.

Q: And then it creates a varying magnetic field?

A: Yes, it does.

Q: And then that generates the electricity?

A: That -- yes, that generates --

Tr. p. 157, lines 14-16; p. 159, lines 7-16. Therefore, ultimately, the electromagnetic field that is created by Duke Energy's generators results in the production of electricity that is sold by Duke Energy.

34. Duke Energy contends that the Court made an erroneous finding and failed to consider evidence presented by Duke Energy when it concluded that “substantially all, if not all, of the electricity provided by Duke Energy is priced at some level based on quantity.” I agree. Therefore, the Final Decision has been amended to reflect the change. “Substantially all, if not all,” will be replaced by “the majority.”

35. Duke Energy contends that the Court improperly discounted the similarities between the electricity provided by a telecommunications company and the electricity provided by Duke Energy. Again, Duke Energy carries the burden of proof, and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 (“[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence”). Here, telecommunications companies use electricity, but they are providers or conveyors of communications or intelligence produced or created by one customer to another. This finding is more thoroughly addressed on pp. 20-21 of the Amended Final Decision.

36. Duke Energy contends that the Court failed to consider the definition of “manufacturing” in other contexts of the South Carolina Income Tax, as brought to the Court’s attention in Duke Energy’s Pre-Trial Brief. To the contrary, the Court considered Duke Energy’s definition as set forth on p. 16 of its pretrial brief in the other contexts of the South Carolina Income Tax Act. The first context cited by Duke Energy was the Renewable Tax Incentive Program under S.C. Code Ann. § 12-6-3588(B)(2). However, the Court rejected the definition of “manufacturing” under that statute because it became effective January 1, 2011, well after the Tax Periods at Issue in this case. As to the other provision cited by Duke Energy in its pretrial brief, Section 12-6-2260(M)(5), (6), the Court could not consider what it could not find. There was no subsection (M)(5) or (6) for Section 12-6-2260 during the Tax Periods at Issue. “Manufacture” is mentioned in (D)(5), the last provision of this statute, but this relates to unmanufactured tobacco stored in warehouses in this State for subsequent shipment to a manufacturer in another state. It provides no guidance as to the meaning of “manufacture” and is unrelated to the case at hand.

As to the definition of tangible personal property, in the Final Decision the Court agreed with Duke Energy that the “tangible property” definition under 12-6-30(11) should be used and did apply that definition. That definition included the term “corporeal,” which is not a legal term

of art in this case, and which is generally understood to mean “of a material nature; tangible.” The Final Decision has nonetheless been amended to clarify that the Court only looked to the other statutory definition of “tangible property” to further support the plain meaning of the definition under 12-6-30(11). Section 12-36-60’s definition was perfectly consistent with the plain ordinary meaning of “tangible” as something corporeal (material/physical).

37. Duke Energy contends that the Court improperly ignored the definition of “manufacturing” contained in the Income Tax Act, Jobs Tax Credit provisions. Duke Energy avers that the Court should have applied Section 12-6-3360(M)(8), which defines a “manufacturing facility” as “an establishment where *tangible* personal property is produced or assembled.” However, during the Periods at Issue, the term “manufacturing facility” was defined in Section 12-6-3360(M)(5), not (8). Nevertheless, the Court agrees with the definition of “manufacturing” contained therein; and because the Court finds that the electricity generated by Duke Energy is tangible personal property, this definition is consistent with the Court’s definitions of “manufacturing” and thus there is no ambiguity as to the definition of the term “manufacturing.”

38. Duke Energy contends that the Court erred in holding that “manufacturing” is defined as “the act of processing or producing something.” In light of this allegation, the Final Decision has been amended to include the more specific definitions for “manufacturing.” Additionally, as to Duke Energy’s arguments concerning the nature of the product produced by law firms, that is not at issue in this case. The Court notes, however, that law firms, like telecommunications, are in the business of conveying information, intelligence, and communications, and therefore do not appear to be manufacturers.

39. Duke Energy contends that the Court erred in holding that Duke Energy is a manufacturer because it charges its customers based on quantity and cannot produce unlimited quantities. To the contrary, all tangible items must be quantifiable, but not all quantifiable items are tangible.⁴ Hours, though quantifiable, are not tangible.⁵ And again, as mentioned in

⁴ Duke Energy argument is an example of the fallacy of denying the antecedent. See, Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking 160 (National Institute for Trial Advocacy 3d ed. 1997); see also Irving M. Copi, Introduction to Logic 295 (5th ed. 1978).

⁵ It is nonetheless notable that the computation of hours is not based upon a physical quantification, but a formulaic quantification. As explained above, electrical current is measured based upon the movement or charge of an electrons, which have mass. Tr. 285, line 21 to p. 283, line 2; p. 330, line 1 to 331, line 2.

response (29) above, the finding that Duke Energy is a manufacturer was not based solely on the fact that it charges customers based on quantity and cannot produce unlimited quantities.⁶ Because tangible items must be quantifiable, showing that an item is quantifiable, though not itself conclusive, is a further indication that an item is tangible. At any rate, Duke Energy carries the burden of proving that electricity is not tangible, which it has failed to meet.

40. Duke Energy contends that the Court's construction of "manufacturer" was erroneous because "the statute's language is plain, unambiguous, and conveys a clear, definite meaning," and even if any ambiguities exist, "the taxpayer should receive the benefit in case of doubt." The soundness of the Court's decision regarding this issue is set forth in the Amended Final Decision and in responses (36) and (37) of this Order.

41. Duke Energy contends that the Court erred in finding that the generation of electricity is a form of processing raw materials used to create energy when Duke Energy presented uncontroverted evidence that electricity (or energy) cannot be created. That contention was controverted by Duke Energy's own witness. Mr. Jamil testified that Duke Energy's generators, which are turned by energy released by Duke Energy's processing of raw materials such as water, coal, or nuclear fuel, create an electric charge that travels in the form of a current and that oscillates electrons to produce an electromagnetic field, and that electromagnetic field generates electricity. Indeed, he testified that all of the generation processes that Duke Energy uses produce electricity. See response (33) above; Tr. p. 101, line 23 to p. 102, lines 1-24; p. 154, lines 11-18; p. 159, lines 7-16.

42. Duke Energy contends that the Court erred in considering Section 12-36-60 to interpret the term "corporeal" used in the definition of "tangible property" codified in Section 12-6-30(11). Though Section 12-36-60 does not mention the term "corporeal," at least in name, it does provide a specific definition of "tangible personal property" – "personal property which may be seen, weighed, measured, felt, touched, or which is in any manner perceptible to the sense" – which coincides with the general understanding of the term "corporeal," which is included as "tangible property under Section 12-6-30(11). The Final Decision has been amended to clarify this point.

⁶ This conclusion is reflected by the Court's finding in the Final Decision that Duke Energy is engaging in manufacturing uses the terms "further evidenced" and "further supports." See Page. 18 of Amended Final Decision.

43. Duke Energy contends that the Court erred in relying on the sales tax definition of “tangible personal property” in Section 12-36-60 in determining whether electricity is tangible or a service for income tax purposes. The Court’s response (36) of this Order addresses this assertion. Furthermore, this Court found no conflict in the definitions of tangible property. Rather, it considered both provisions and found that both set forth the plain, ordinary meaning of “tangible.” In addition, the term “corporeal” used in the first definition is well understood to be synonymous with “tangible.” The Court’s reason for citing the alternate definition of “tangible” was to further reflect this fact.

44. Duke Energy contends that the Court erred in concluding that electricity is tangible personal property based on the first sentence of the sales tax definition of “tangible personal property” in Section 12-36-60. To the contrary, a plain reading of the statute reflects that it clearly includes “intangibles or services” under the definition of “tangible personal property,” as Duke Energy admits in its allegation (45).

45. Duke Energy contends that the Court misinterpreted the sales tax definition of “tangible personal property” in Section 12-36-60, because there the South Carolina Legislature specifically chose to define “services and intangibles, including ... sales of electricity” as tangible personal property, something the Legislature did not do in the income tax context. This issue is addressed in Footnote 32 of the Amended Final Decision. It is also notable that Duke Energy cited Consolidated Hydro, in which the court applied sales tax statutes, including Section 12-36-60, in a license fee context.

46. Duke Energy contends that the Court misinterpreted the nonbinding holding in Consolidated Hydro S.E., Inc. v. S.C. Dep’t of Revenue & Taxation, No. 95-ALJ-17-0634, 1996 WL 909155 (S.C. Admin. L.J. Div. May 13, 1996). More specifically, Duke Energy submits that the court in Consolidated Hydro did not apply the sales tax definition of that term in the license tax context because the Legislature had not defined “services and intangibles, including ... sales of electricity” as “tangible personal property” for license tax purposes. I simply disagree. A license fee was at issue, yet the court in Consolidated Hydro applied sales tax statutes, devoting two paragraphs to consideration of its implications in that case.

47. Duke Energy contends that the Court erred in relying on Section 16-13-380, regarding the theft of electrical services. I agree that the Court erred, but only as to how the Court used that section. The Final Decision has been amended accordingly.

48. Duke Energy contends the Court erred in holding that electricity is a tangible product because it can be measured, felt, stored and consumed, when in fact intangibles such as sunlight, wind, and gravity are all subject to the same. Duke Energy carries the burden of proving that electricity is not tangible, which it has failed to meet. As to the implications of measuring a product, Duke Energy's argument is premised upon the contention that if intangible products can be measured, then the measurement of a product is irrelevant to the determination of whether a product is in fact tangible. It is true that just because something can be measured, felt, etc. does not necessarily mean that it is tangible. However, because that which is tangible must be measurable, demonstrating measurability, though not conclusive of tangibility, supports a showing of tangibility.⁷

As to whether, electricity may be felt, stored or consumed, those issues are addressed above.

49. Duke Energy contends that the Court erroneously concluded that Duke Energy's evidence was insufficient to establish that more than 50 percent of its gross receipts were derived from activities not covered in Section 12-6-2250. Stated more correctly, the Court concluded that Duke Energy failed to meet its burden of proving that more than 50 percent of its gross receipts were derived from activities not covered in Section 12-6-2250. Duke Energy carries the burden of proof and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 (“[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence”). Here, Duke Energy introduced no evidence supporting any breakdown of its gross receipts from manufacturing, services, and/or any other activity. In fact, there was evidence to the contrary. Mr. Robinson testified as follows:

Q: Do you have any experience with respect to working in an electric utility that provided electricity on a flat-fee basis?

A: I know that all electric utilities provide a minority of their product on a flat-fee basis, but the majority is charged for.

Tr. p. 393, lines 13-18.

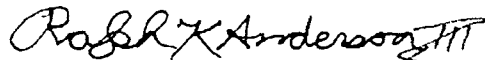
⁷ Once again, Duke Energy tramples upon the fallacy of denying the antecedent. See, Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking 160 (National Institute for Trial Advocacy 3d ed. 1997); see also Irving M. Copi, Introduction to Logic 295 (5th ed. 1978).

50. Duke Energy contends that the Court failed to consider Duke Energy's argument that Duke Energy's 1977 Restated Charter is of little use in deciding whether Duke Energy is engaged in manufacturing. This allegation is perplexing. The Court did not cite the Restated Charter in its factual finding or legal conclusion. The only reference to the Charter is in the Stipulations of Fact. Since the Court failed to address even the existence of the Charter in its Final Decision – thus giving it no weight – it is difficult to understand how the Court erred in giving “little” weight.

IT IS THEREFORE ORDERED that that the Petitioners' Motion for Reconsideration is denied, in part, and granted, in part, in keeping with this Order.

IT IS FURTHER ORDERED that all additional factual findings in this Order are incorporated into the Amended Final Order and Decision as findings of fact.

AND IT IS SO ORDERED.

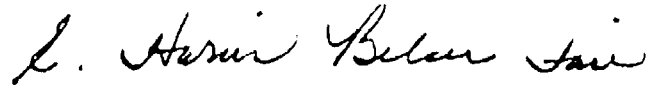


Ralph King Anderson, III
Chief Administrative Law Judge

December 4, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

December 4, 2012
Columbia, South Carolina

January 2, 2013

Rick Reames III
Member
Admitted in SC

RECEIVED
JAN 02 2013

SC Court of Appeals

BY HAND DELIVERY

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

Re: Duke Energy Corporation v. South Carolina Department of Revenue
10-ALJ-17-0270-CC

Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal in the above case. Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondent;
2. A copy of the Order (Exhibit A) which is to be challenged on appeal as well as the Reconsideration Order (Exhibit B); and
3. Our firm's check in the amount of \$100.00 for filing fee.

Please note that on October 9, 2012, the Appellant, Duke Energy previously filed a protective appeal in this matter. We anticipate moving to consolidate both appeals.

Please return one clocked copy to me via our courier. If you require anything further, please let me know.

Very truly yours,

Rick Reames III

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The Honorable Jenny Abbott Kitchings
January 2, 2013
Page 2

RR/caa
Enclosures

cc: The Honorable Ralph K. Anderson III
Harry Hancock
Milton Kimpson
John M. S. Hoefler
Tracey C. Green
John Roberts