IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

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Case No. 19-ALJ-17-0153-CC

2020-001542

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Duke Energy Corporation……..... Appellant,

v.

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

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# FINAL BRIEF FOR APPELLANT

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Samantha K. Trencs (Bar No. 101882)
Eric S. Tresh *(pro hac vice)*
Maria M. Todorova *(pro hac vice)*
Chris R. Lee *(pro hac vice)*
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street, NW Suite 700
Washington, DC 20001-3980
Phone: (202) 383-0534
samanthatrencs@eversheds-sutherland.com
erictresh@eversheds-sutherland.com
mariatodorova@eversheds-sutherland.com
chrislee@eversheds-sutherland.com

*Attorneys for Appellant*
*Duke Energy Corporation*

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## INTRODUCTION

This case is about whether the South Carolina Department of Revenue ("Department") may retroactively deny the capital investment tax credit authorized by S.C. Code Ann. § 12-14-60 (the "Credit") by limiting the credit to $5 million, where the plain language of the statute allows taxpayers to claim up to $5 million of Credit for "any taxable year," and where the South Carolina Department of Revenue ("Department") has advised taxpayers and the Legislature for over fifteen years that taxpayers can claim up to $5 million of Credit annually.

Section 12-14-60 allows taxpayers to claim the Credit for **"any taxable year"** in which they make investments in qualified manufacturing and production property in South Carolina. S.C. Code Ann. § 12-14-60(A)(1). The amount of the Credit is computed by applying the Credit rate from the statute to the value of the investment. S.C. Code Ann. § 12-14-60(A)(2).[1] The Credit is applied against a taxpayer's annual corporate income tax liability and may be carried forward for ten years from the tax year in which it is earned. S.C. Code Ann. §§ 12-14-60(A)(1), (D). For taxpayers like Duke Energy, which are subject to the State's license tax under section 12-20-100, the amount of the Credit "allowed by this section" is limited to no more than $5 million. S.C. Code Ann. § 12-14-60(G) (the "Credit Limitation").

Since the Credit Limitation was enacted in 1998, the Department published written instructions on its tax form (Form TC-11) eleven different times, advising taxpayers like Duke Energy that they could claim up to $5 million in Credit **per tax year**. Taxpayers were required to complete this form in order to claim the Credit. Duke Energy followed the statute, completed the Department's tax form, and limited its Credit to $5 million per year. The Department audited Duke

[1] Different rates apply depending on the type of investment as provided in the statute. S.C. Code Ann. § 12-14-60(A)(2).

Energy's Credits from 1998 to 2011 and confirmed that Duke Energy appropriately claimed no more than $5 million in Credit per tax year.

In July 2014, a tax manager in the Department's policy group unilaterally decided that the Credit Limitation was not an annual limitation, and instead placed a lifetime limitation on the amount of Credit taxpayers like Duke Energy could claim. That decision invalidated the instructions the Department had provided to taxpayers for more than fifteen years. It also had the effect of retroactively denying Credits that had been earned by taxpayers in prior years. Nevertheless, at the direction of the tax manager, and without the knowledge or ascent of the Department's Director, General Counsel, or other leadership, the Credit form was changed to limit the amount of Credit taxpayers like Duke Energy could claim to $5 million in total.

Although the Credit form was changed, the Department continued to advise the General Assembly that the Credit was limited to $5 million annually. In 2017, as the Legislature was considering amending the Credit Limitation to clarify that the limitation was an annual limitation, the Department advised members of the Legislature and the South Carolina Revenue and Fiscal Affairs Office ("RFA) that the clarifying amendment was consistent with the Department's longstanding interpretation of the Credit as an annual limitation. Based in part on the Department's input and following its own independent review, the RFA advised the General Assembly that the clarifying amendment would have no fiscal impact because it would not change the law or the Department's practices.[2]

[2] As discussed below, senior leadership at the Department later sent a memorandum to the General Assembly urging them not to enact the proposed clarifying amendment to the Credit Limitation. As part of this memorandum, the Department disclosed confidential information regarding Duke Energy's tax returns.

Notwithstanding its longstanding interpretation of the Credit Limitation, its prior instructions to taxpayers, its audit practices, or its advice to the General Assembly and the RFA, the Department became entrenched in its newfound position that the Credit Limitation was a lifetime limitation. As a result, in 2019, the Department **retroactively** denied Duke Energy's Credits for the 2010 through 2014 tax years, simply claiming that it had changed its interpretation of the Credit statue.

Duke Energy appealed the denial to the Administrative Law Court ("ALC") where both the Department and Duke Energy claimed that the Credit statute had a plain meaning. The primary difference in the parties' reading of the statute related to whether the Credit Limitation should be interpreted by reference to the entire section 12-14-60, which states that the Credit is available for "any taxable year," as Duke Energy argued, or whether subsection (G) of section 12-14-60 should be read in isolation, as the Department argued. The parties also disagreed regarding the import of the Department's longstanding interpretation of the Credit Limitation as an annual limitation, the Legislature's acquiescence to that interpretation, and the ability of the Department to retroactively deny the Credit under the circumstances of this case.

In its Order, the ALC agreed that the statute should be construed as a whole, but concluded that because subsection (G) was ambiguous, it must be construed against Duke Energy. In so doing, the ALC effectively disregarded subsection (A) of the Credit statute, which provides a Credit for "any taxable year," and the first clause of subsection (G), which creates the Credit Limitation for the annual "credit allowed by this section."

The ALC also failed to consider the legislative intent and purpose of the Credit to encourage "retention and expansion of existing businesses," and instead mechanically accepted the Department's reading of subsection (G) as a $5 million lifetime limitation. S.C. Code Ann. §

12-14-20. The ALC gave no weight to the Department's own longstanding interpretation of the statute, its public, written guidance to taxpayers, and its written communications with the General Assembly, all revealing that for over fifteen years the Department applied the Credit Limitation as an annual limitation.

The ALC's Order should be reversed for four reasons. *First*, the ALC erred in concluding that the application of the Credit Limitation statute was ambiguous. The ALC failed to read subsection (G) in the context of section 12-14-60 as a whole, and thus failed to harmonize subsections (A) and (G) of the statute. Subsection (G) states that the "credit allowed by this section" is limited to $5 million. S.C. Code Ann. § 12-14-60(G). The phrase "credit allowed by this section" in subsection (G) refers to the Credit allowed for "any taxable year" under subsection (A). When these subsections are read together, it is clear that subsection (G) limits only the amount of Credit a taxpayer subject to the license tax can claim "for any taxable year." It does not impose a lifetime limit on the amount of Credit a taxpayer can claim.

*Second*, the ALC erred by misapplying the well-established doctrine of legislative acquiescence, which creates a strong presumption that a uniform construction of a statute for many years in administrative practice has the approval of the Legislature and will not be overturned without cogent reasons. This case presents a textbook case of legislative acquiescence. Over the course of fifteen years, the Department instructed taxpayers that the Credit Limitation was an annual limitation eleven different times. It audited taxpayers like Duke Energy and applied the Credit Limitation as an annual limitation, and it informed members of the General Assembly and the RFA that the Credit Limitation was an annual limitation. The Legislature was aware of the Department's practice and although it amended the Credit statute for other purposes, it made no changes to the Credit Limitation, thereby acquiescing to the Department's interpretation of the

statute. The Department presented no reasons, let alone cogent reasons, for overturning legislative ascent to its interpretation.

*Third*, the ALC erred by resolving any perceived ambiguities in the Credit Limitation statute in favor of the Department. The ALC ignored the purpose of the Credit statute to incent "retention and expansion of existing businesses" in South Carolina and accepted the Department's interpretation of the Credit Limitation frustrating its legislative purpose. S.C. Code Ann. § 12-14-20. The ALC failed to consider that lifetime limitations on tax credits are almost always related to investments in specific facilities or projects, while credit limitations that apply to individual taxpayers (such as the Credit Limitation at issue in this case) are typically annual limitations. The ALC also misapplied the strict construction principle of statutory construction. While tax credit statutes are generally construed against taxpayers, strict construction does not require a court to search for an interpretation in the Department's favor or accept a position that defeats legislative intent or leads to an absurd result.

*Fourth*, the ALC erred in allowing the Department to retroactively change its longstanding position, without a change in the law, without following the rulemaking process, and without giving notice to taxpayers. This retroactive denial of the Credit without any notice or rulemaking violates the South Carolina Taxpayer Bill of Rights, South Carolina's rulemaking laws, and established principles of equity, and raises significant due process concerns.

## STATEMENT OF ISSUES ON APPEAL

I. Whether the ALC erred by disregarding the plain language of section 12-14-60 and concluding that subsection 12-14-60(G) was ambiguous.

II. Whether the ALC erred by disregarding the Legislature's acquiescence to the Department's longstanding interpretation of the Credit Limitation as an annual limitation.

III. Whether the ALC erred by concluding that any ambiguity in the Credit Limitation subsection should be automatically read in favor of the Department as requiring an application of the Credit Limitation as a lifetime limitation.

IV. Whether the ALC erred by allowing the Department to retroactively deny a tax credit that Duke Energy earned from significant investments in South Carolina and in reliance on the Department's longstanding written interpretation of the Credit statute.

## STATEMENT OF THE CASE

Duke Energy appeals an Order on Cross-Motions for Summary Judgment ("Order") issued by the ALC holding that Duke Energy's investment tax Credit is limited to $5 million in total for all tax years pursuant to section 12-14-60(G).

On July 19, 2018, the Department issued a Notice of Adjustment reducing Duke's Energy's Credits by $19,850,727 for the 2010 through 2014 tax years ("Tax Years at Issue"). (R. p. 6; R. pp. 1152-1153.) Duke Energy timely protested the adjustments on October 16, 2018. (R. p. 7; R. pp. 1152-1153; R. pp. 1154-1175.) On April 26, 2019, the Department issued a Department Determination affirming its prior Credit adjustments. (R. pp. 1143-1151.) Duke Energy timely requested a contested case hearing on May 24, 2019 in accordance with S.C. Code Ann. § 12-60-460. (R. p. 7; R. pp. 1176-1206.)

On July 31, 2020, both parties filed cross-motions for summary judgment. (R. p. 1; R. pp. 30-65; R. pp. 66-83.) The ALC held a hearing on the cross-motions on September 24, 2020 (R. p. 1) and issued the Order on October 27, 2020.

Duke Energy timely filed a Notice of Appeal on November 24, 2020. On December 22, 2020, Duke Energy filed a Motion for Extension of time to file its initial brief until February 10, 2021 (R. pp. 165-167), which was granted by this Court on December 29, 2020. (R. p. 27.)

## STATEMENT OF THE FACTS

### I. Background on Section 12-14-60

Section 12-14-60 is part of the Economic Impact Zone Community Development Act of 1995, 1995 S.C. Act No. 25, § 2 (the "1995 Act"). (R. p. 10.) The purpose of this Act is to incentivize capital investment in South Carolina by encouraging "the formation of new businesses and the retention and expansion of existing businesses" and "to promote meaningful employment." S.C. Code Ann. § 12-14-20; (R. p. 10).

The Credit was first enacted in 1995 when the General Assembly passed the 1995 Act, which was codified in S.C. Code Ann. § 12-14-10 *et seq*. The Credit was originally limited to businesses making qualified investments in designated "economic impact zones" in South Carolina but the statute did not limit the amount of the Credit. In 1996, the Credit was broadened by expanding the definition of "economic impact zone." 1996 S.C. Act No. 231, § 10A (amending S.C. Code § 12-14-30 (1996)). A year later, the General Assembly broadened the Credit statute again allowing any unused Credit to be carried forward for ten years measured from each respective tax year. 1997 S.C. Act No. 151.

Of particular relevance to this case, section 12-14-60 was amended twice again in 1998. On June 30, 1998, the South Carolina General Assembly added new subsection (G), which provided:

> The credit allowed by this section for investments made after June 30, 1998, is limited to no more than one million dollars for any entity subject to the license tax as provided in Section 12-30-100.

1998 S.C. Act No. 419, pt. II, § 49II.B; S.C. Code Ann. § 12-14-60(G) (1998) (effective July 1, 1998). Two months later, on August 31, 1998, the General Assembly increased the $1 million credit limitation to $5 million:

> The credit allowed by this section for investments made after June 30, 1998, is limited to no more than five million dollars for an entity subject to the license tax as provided in Section 12-20-100.

1998 S.C. Act No. 442; S.C. Code Ann. § 12-14-60(H) (1998) (effective August 31, 1998) ("1998 Act").[3]

Finally, section 12-14-60 was broadened two more times. In 2005, the General Assembly added an indefinite Credit carryforward for qualifying taxpayers. 2005 S.C. Act No. 113, § 1; S.C. Code § 12-14-60(D)(2) (2005) (effective June 1, 2005). And in 2010, the South Carolina Economic Development Competitiveness Act of 2010 (the "2010 Act") expanded the Credit to apply to the entire state, not just specific economic impact zones. 2010 S.C. Act No. 290, § 21.

As a result of the changes in the 2010 Act, the phrase "economic impact zone" was deleted from subsection (A)(1). As such, during the 2010 tax year at issue in this case, subsection (A)(1) provided:

> There is allowed an economic impact zone investment tax credit against the tax imposed pursuant to Chapter 6 [Income Tax Act] of this title **for any taxable year** in which the taxpayer places in service economic impact zone qualified manufacturing and productive equipment property.

S.C. Code Ann. § 12-14-60(A)(1) (2010) (emphasis added). After the 2010 Act, effective for the 2011 through 2014 tax years at issue in this matter, subsection (A)(1) read:

> There is allowed an investment tax credit against the tax imposed pursuant to Chapter 6 [Income Tax Act] of this title **for any taxable**

[3] In 2010, Subsection H was recodified as Subsection G which is referred to as the Credit Limitation in this brief.

> **year** in which the taxpayer places in service qualified manufacturing and productive equipment property.

S.C. Code Ann. § 12-14-60(A)(1) (emphasis added).

## II. The Department's longstanding interpretation of section 12-14-60

### A. The Department's instructions to taxpayers

From the time the Credit was enacted in 1998 until July 2014, the Department published a tax form (Form TC-11, the "Credit Form") instructing taxpayers that they were required to apply the Credit Limitation annually. (R. p. 281, lines 9-18, p. 282, line 4 – p. 283, line 1; R. p. 295, lines 4-7, p. 296, lines 12-15; R. p. 253, lines 3-5; R. p. 307, line 21 – p. 308, line 5; R. pp. 678-700.)[4] The Credit Form stated that it "**must** be completed and filed with the income tax return in order to claim an investment tax credit . . . ." (R. pp. 674-713 (emphasis added).)[5]

In 1998, the Department amended the Credit Form twice to include the General Assembly's enactment of the Credit Limitation, initially as a one-million-dollar limitation and subsequently as a five-million-dollar limitation. (R. pp. 678-682.) From 1998 to 2014, the Department amended the Credit Form eleven times. In each case, the Department provided step-by-step instructions and a formula requiring taxpayers to apply the Credit Limitation **for each tax year**.[6]

[4] The Credit Form was first published in 1995. Until 1998, there was no limitation on the amount of Credit a taxpayer could claim.

[5] Mr. Timothy Donovan, a former nonresident audit manager and manager of nexus and discovery who retired in August 2018 after 28 years with the Department, testified that taxpayers were required to complete Form SC SCH. TC-11 in order to be allowed the Credit. (R. p. 280, lines 9-14.)

[6] The Credit Form in effect until July 2014 contained the following instructions and formula requiring an annual application of the Credit Limitation:

Depositions in this case confirmed that the Department drafted and published tax forms, including the Credit Form, to ensure the proper application of the laws as intended by the General Assembly. (R. p. 294, lines 7-9; R. p. 254, lines 8-10.) Deposition testimony further proved that the Department intended taxpayers, including Duke Energy, to rely on its forms in computing their South Carolina tax liability. (R. p. 294, lines 11-13.)[7] These facts are not in dispute.

**B. The Department's original audit of Duke Energy's Credits**

In 2012, the Department audited Duke Energy's tax returns for the tax years 2008 through 2011. As part of this audit, the Department reviewed Duke Energy's Credit calculations from 1998 through 2011 applying the Credit Limitation on an annual basis and agreed that Duke Energy's properly applied the Credit Limitation annually.

The Department's audit report stated that the "maximum [capital investment tax] credits" **for each tax year** was $5 million. And the report applied the Credit Limitation annually to each of the tax years. (R. p. 751.) For example, for the 2011 tax year, Duke Energy's investments in the State resulted in a Credit of $6,130,395, which the Department's Audit Schedule C limited to $5 million after applying the Credit Limitation. In addition, the Department agreed that Duke Energy

| | (1) Basis | (2) Credit Percentage | (3) Credit Amount (column 1 x column 2) |
|---|---|---|---|
| 1. Three-year Property | | 0.5% | 1. |
| 2. Five-year Property | | 1.0% | 2. |
| 3. Seven-year Property | | 1.5% | 3. |
| 4. Ten-year Property | | 2.0% | 4. |
| 5. Fifteen-year Property or greater | | 2.5% | 5. |
| 6. Total of lines 1 through 5 | | | 6. |
| 7. Maximum Credit (Form SC1120U filers) | | | 7. $5,000,000 |
| 8. Carryover of unused credits from 1997 and later | | | 8. |
| 9. Credit - Total of lines 6 and 8<br>**Caution:** SC1120U filers add the **lesser** of lines 6 or 7 to line 8 | | | 9. |

[7] *See also* guidance published by the Department instructing taxpayers that "[t]he credit is claimed on Form TC-11." (R. p. 447.)

could claim $5 million in credit for 2011 alone, even though Duke Energy claimed Credits in prior tax years. (R. p. 751.)

The Department's auditor, one of the most experienced and technically competent auditors, testified that his understanding of the Department's position at the time of the audit was that the Credit Limitation was an annual limitation and not a lifetime limitation. (R. p. 266, lines 8-10, p. 268, lines 11-20, p. 271, lines 12-17, p. 277, lines 9-12.) The Department now claims this audit was simply a mistake. There is no dispute about these facts.

### C. The Department's 2014 change to the Credit Form

After more than fifteen years of applying the Credit Limitation on an annual basis, in July 2014, the Department suddenly changed course. In 2014, Ms. Jerilynn VanStory, a tax manager in the Department's policy group, decided that the Credit Limitation should be a lifetime limitation. (R. p. 799.) Ms. VanStory testified in this case that the reason she changed the Department's longstanding interpretation was that she believed the Credit was too broad. (R. p. 318, line 1-p. 319, line 14.) Ms. VanStory did not discuss her views about the Credit or her new opinion about the Credit Limitation with the Department's Director, Legal Counsel, or other Department leadership. (R. p. 305, line 12-p. 306, line 5, p. 309, lines 5-24, p. 310, line 21-p. 311, line 25.)

At the direction of Ms. VanStory, in 2014, the Department's forms group changed the Credit Form from requiring a taxpayer to limit the amount of Credit to $5 million annually to limiting the amount of Credit for the lifetime of the taxpayer. (R. p. 292, line 16-p. 293, line 6; R. pp. 711-713[8].) The law had not changed. And there was no notice, rulemaking, or other guidance

[8] The credit Form was changed to provide as follows:

advising taxpayers that the Department changed its longstanding interpretation of the Credit Limitation.

In any other context, Ms. VanStory's actions would be unimaginable. Without consulting the Department's leadership, she singlehandedly changed the Department's position regarding how the Credit statute should be interpreted. Ms. VanStory did not alert her superiors, did not consider that such a drastic change would require the Department to promulgate a regulation, and did not consider that taxpayers like Duke Energy and their customers had relied on the Department's instructions regarding the application of the Credit Limitation for over fifteen years.

Notwithstanding Ms. Van Story's view and the publication of the new Credit Form, senior employees of the Department still continue to believe that the Credit Limitation is an annual limitation and not a lifetime limitation. (R. p. 269, line19-p. 270, line 13.)

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**Qualified manufacturing and productive equipment:**

| | Basis | Credit Percentage | Credit Amount (column 1 x column 2) |
|---|---|---|---|
| 1. Three-year property | | 0.5% | 1. |
| 2. Five-year property | | 1.0% | 2. |
| 3. Seven-year property | | 1.5% | 3. |
| 4. Ten-year property | | 2.0% | 4. |
| 5. Fifteen-year property or greater | | 2.5% | 5. |
| 6. Add line 1 through line 5 | | | 6. |
| 7. Unused credits from 1997 and later that are available to carry forward | | | 7. |
| 8. Credit (add line 6 and line 7) | | | 8. |
| 9. **Utilities only:** Enter amount from the worksheet in the instructions. | | | 9. |
| 10. The lesser of line 8 and line 9. This is your total credit available for the current year. | | | 10. |

**Line 9 Worksheet - to be completed by utility companies subject to the License Fee under SC Code Section 12-20-100**

| | | |
|---|---|---|
| 1. | Total capital investment credits and economic impact zone credits that can be earned for investments made after June 30, 1998 | 1. $ $5,000,000 |
| 2. | Total capital investment credits and economic impact zone credits used in prior years for investments made after June 30, 1998 | 2. $ |
| 3. | Subtract line 2 from line 1 | 3. $ |
| 4. | Enter amount from line 8 | 4. $ |
| 5. | Enter the smaller of line 3 or line 4 here and on line 9 | 5. $ |

### D. Senate Bill S. 428

On February 16, 2017, the South Carolina Senate introduced Bill S. 428 (the "2017 Bill"), which would have **clarified** that section 12-14-60(G) limited the amount of Credit on an annual basis. That clarifying amendment provided as follows:

> This credit allowed by this section for investments made after June 30, 1998, is limited to no more than five million dollars **annually** for an entity subject to the license tax as provided in Section 12-20-100."

While considering the 2017 Bill, the General Assembly asked the RFA to conduct a fiscal analysis regarding the estimated revenue impact of the legislation. Revenue impact statements are intended to inform legislators of any state and local revenue changes that might result from the passage of legislation. S.C. Code Ann. § 2-7-71. On March 10, 2017, Mr. Craig Parks, Senior Research and Budget Analyst for the Senate Finance Committee, informed the Executive Director of the RFA that:

> [The Bill will] **clarify** an almost 20 yr tax credit for utilities **that the credit is annual which was DORs stance for 15+ yrs – DOR and the utilities want this change and DOR** and Meredith [Cleland Director of Policy at the Department] **is ready to assist you here as well.** This portion is conform to policy and practice only or is at least the intent.

(R. p. 359 (emphasis added).)

Subsequently, on March 20, 2017, the RFA issued a Statement of Estimated Fiscal Impact estimating that the 2017 Bill would have **no fiscal impact**. (R. pp. 803-809.) The Fiscal Impact Statement concluded that:

> This amended section would amend Section 12-14-60(G) to limit the total dollar amount of an investment tax credit allowed by a taxpayer to no more than $5,000,000 "**annually**" for a single taxpayer subject to the corporate license tax. **This clarifying amendment does not alter any current practices by the Department of Revenue**, and **therefore, would not affect state**

> **General Fund income tax revenue in FY 2017-18, and later fiscal years**."

(R. p. 805 (emphasis added).) On March 21, 2017, the South Carolina Senate passed this Bill unanimously.

On or about September 6, 2017, the Department drafted and sent a memorandum to the House Ways and Means Committee's Chairman that stated:

> **Objective:**
> **Clarify** that the investment tax credit **can be taken for any tax year** limited to $5 million per year.
>
> **Proposed language:**
>
> Section 12-14-60 of the 1976 Code, is further amended to read: (G) The credit allowed by this section for investments made after June 30, 1998, is limited to no more than five million dollars for any taxable year for an entity subject to the license tax as provided in Section 12-20-100."

(R. p. 353, line 1-p. 354, line 3; R. pp. 813-814 (emphasis in bold added).) The Department's memorandum apparently supported the clarifying amendment and was entirely consistent with the RFA's findings that the proposed legislation would have no fiscal impact, because the amendment would not have changed the law.

Even though the Department advised the RFA and members of the House Ways and Means Committee that the Credit Limitation was an annual limitation and that it had interpreted it in that manner for over fifteen years, sometime in late 2017, the Department reversed course and began lobbying against the clarifying amendment. As part of its lobbying efforts, the Department took the highly unusual step of disclosing the amount of Duke Energy's earned and unused (carryover)

Credits, and the amount of earned and unused (carryover) Credits for all South Carolina taxpayers. (R. pp. 810, 812.)[9]

The 2017 Bill expired before it was voted on in the South Carolina House.

## III. Duke Energy's Credit computation during the Tax Years at Issue

Duke Energy is a public utility providing electric and gas services to almost one million South Carolina families and businesses. (R. p. 6.) It is regulated by the Public Utilities Commission of South Carolina. (R. p. 841.) Duke Energy qualifies for the Credit under section 12-14-60 if it makes the requisite investments in the State as prescribed in the statute. (R. p. 841.) Duke Energy invested substantial capital in the state and placed in service significant amounts of qualified manufacturing and productive equipment property during the Tax Years at Issue in part in reliance on the Credit. (R. p. 323, line 18-p. 324, line 9.) During the Tax Years at Issue alone, Duke Energy invested over $1 billion into the State. (R. pp. 1290-1300.) Those investments qualified for the Credit – a fact that has not been disputed by the Department.

During the Tax Years at Issue in this case (2010 through 2014), Duke Energy used and relied on the Credit Form prescribed by the Department, which applied the Credit Limitation on an annual basis. Duke Energy claimed a total Credit of $24,850,727 for those tax years. (R. p. 6.)

## IV. The Department's denial of Duke Energy's Credits

After auditing Duke Energy's corporate income tax returns for the Tax Years at Issue, the Department disallowed $19,850,727 of Duke Energy's Credits, based on its new position that the Credit Limitation was a $5 million lifetime limitation. (R. p. 1152.)

[9] The memorandum stated that "has determined there to be $127 million in unused carryforward based on the Tax Year 2015."

The Department never explained why it changed its interpretation that the Credit Limitation applied annually, other than to say it was wrong for more than fifteen years. In other words, the Department now claims that its audit worksheet template was wrong (R. p. 264, lines 7-10, p. 277, lines 6-12); the Credit Form that required taxpayers to apply the Credit Limitation on an annual basis for more than fifteen years was wrong (R. p. 281, lines 9-23, p. 282, line 4-p. 283, line 1; R. p. 295, lines 4-7, p. 296, lines 12-15; R. p. 253, lines 3-5; R. p. 307. line 21-p. 308, line 5); the results of the prior Duke Energy audit were wrong (R. p. 281, lines 13-24; R. p. 266, line 8-p. 267, line 16, p. 277, lines 3-19); the Department's own memorandum to the General Assembly stating that the 2017 Bill "[c]larify that the investment tax credit can be taken for any tax year limited to $5 million per year" was wrong (R. p. 353, line 1-p. 354, line 3; R. pp. 813-814); the Senate Finance Committee's conclusion that the 2017 Bill will "clarify an almost 20 yr tax credit for utilities that the credit is annual which was DORs stance for 15+ yrs" was wrong (R. p. 359); and the RFA's conclusion that the 2017 "clarifying amendment does not alter any current practices by the Department of Revenue" was wrong. The ALC disregarded all of this evidence, never referring to any of it when considering how the statute should be construed.

Table 1 below summarizes Duke Energy's computations of its Credits for each tax year and the Department's adjustments to those Credits:

| A | | B | C | D | E |
|---|---|---|---|---|---|
| Tax Credit Per Return | | Tax Credit Used by Taxpayer | Tax Credit Disallowed by Department | Tax Credit Carryforward Per Taxpayer | Tax Credit Carryforward Per Department |
| 1996 | 208,415 | 208,415 | 0 | 0 | |
| 1997 | 332,120 | 332,120 | 0 | 0 | |
| 1998 | 382,454 | 382,454 | 0 | 0 | |
| 1999 | 194,718 | 194,718 | 0 | 0 | |
| 2000 | 450,347 | 450,347 | 0 | 0 | |
| 2001 | 156,034 | 156,034 | 0 | 0 | |
| 2002 | 346,795 | 346,795 | 0 | 0 | |
| 2003 | 290,036 | 290,036 | 0 | 0 | |
| 2004 | 640,665 | | 0 | 640,665 | 640,665 |
| 2005 | 210,450 | | 0 | 851,115 | 851,115 |
| 2006 | 180,785 | | 0 | 1,031,900 | 1,031,900 |
| 2007 | 438,966 | | 0 | 1,470,866 | 1,470,866 |
| 2008 | 387,240 | | 0 | 1,858,106 | 1,858,106 |
| 2009 | 436,294 | | 0 | 2,294,400 | 2,294,400 |
| 2010 | 501,741 | | 157,060 | 2,796,141 | 2,639,081 |
| 2011 | 4,832,741 | | 4,832,741 | 7,628,885 | 2,639,081 |
| 2012 | 4,951,427 | | 4,951,427 | 12,580,309 | 2,639,081 |
| 2013 | 4,953,682 | | 4,953,682 | 17,533,991 | 2,639,081 |
| 2014 | 4,955,817 | 1,937,887 | 4,955,817 | 20,551,921 | 701,194 |
| | **24,850,727** | **4,298,806** | **19,850,727** | | |

## V. The ALC's Decision

The ALC ruled that subsection 12-14-60(G) imposes a $5 million lifetime limitation on the Credit. (R. p. 21.) The ALC stated that while it was reasonable and plausible for the credit limitation to be annual or lifetime, section 12-14-60(G) was ambiguous, and this ambiguity must be resolved strictly against the taxpayer and in favor of the Department. (R. pp. 12, 20.) The ALC's Order disregarded the long history of legislative acquiescence to the Department's longstanding practice of applying the Credit Limitation annually. (R. p. 20.) Instead, the ALC found that the Department was not bound to its prior interpretation of imposing subsection 12-14-60(G) annually. (R. p. 18-19.) This appeal followed.

## STANDARD OF REVIEW

The appellate court will reverse a decision of the ALC when the administrative decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by an error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-610(B); *Brownlee v. S.C. Dep't of Health & Envtl. Control,* 382 S.C. 129, 136, 676 S.E.2d 116, 119-120 (2009). "Thus, this court can reverse the ALC if the findings are affected by error or law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Schwiers v. S.C. Dep't of Health & Envtl. Control,* 429 S.C. 43, 49, 837 S.E.2d 730, 733 (Ct. App. 2019). "An issue regarding statutory interpretation is a question of law," which is reviewed *de novo. Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274-275, 617 S.E.2d 135, 137 (Ct. App. 2005).

In this case, the ALC's Order violates constitutional and statutory provisions, affirms the Department's position even though it was in excess of its statutory authority, is affected by an error of law, and is clearly erroneous for the reasons set forth below.

## ARGUMENT

### I. The ALC erred by disregarding the plain language of section 12-14-60 and concluding that subsection 12-14-60(G) was ambiguous.

#### A. The language of section 12-14-60 is plain and unambiguous.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). In doing so, the words found in a statute must be given their "plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 459. "Under the plain

meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted).

Both the Department and Duke Energy agreed that the text of the Credit statute is plain. (R. p. 47; R. p. 73.) Section 12-14-60 authorizes the Credit for "any taxable year" in which a taxpayers make the requisite investment in the State:

> There is allowed an investment tax credit against the tax imposed pursuant to Chapter 6 [Income Tax Act] of this title for **any taxable year** in which the taxpayer places in service qualified manufacturing and productive equipment property.

S.C. Code Ann. § 12-14-60(A)(1) (emphasis added). There is no dispute, and the ALC concluded, that under subsection (A)(1) a taxpayer is entitled to the Credit **on an annual basis**. (R. p. 10 ("this section plainly allows a taxpayer to earn and apply the tax credit **every year** the taxpayer places qualifying property into service" (emphasis added).)

Subsection (A)(2) determines the amount of Credit "allowed by this section," i.e., the amount of Credit a taxpayer can claim in a given tax year by applying the Credit rate provided in the statute to the value of the capital investment made by the taxpayer during that year. S.C. Code Ann. § 12-14-60(A)(2).[10] There is no dispute about the interpretation of subsection (A)(2).

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[10] The text of subsection (A)(2) is as follows:

> The amount of the credit allowed by this section is equal to the aggregate of:
>
> | | |
> |---|---|
> | three-year property | one-half percent of total aggregate bases for all three-year property that qualifies; |
> | five-year property | one percent of total aggregate bases for all five-year property that qualifies; |
> | seven-year property | one and one-half percent of total aggregate bases for all seven-year property that qualifies; |
> | ten-year property | two percent of total aggregate bases for all ten-year property that qualifies; |
> | fifteen-year property | two and one-half percent of total aggregate bases for all or greater fifteen-year or greater property that qualifies. |

For taxpayers subject to the license tax, subsection (G) of the statute provides:

> **The credit allowed by this section** for investments made after June 30, 1998 is limited to no more than five million dollars for an entity subject to the license tax as provided in Section 12-20-100.

S.C. Code Ann. § 12-14-60(G) (emphasis added).

Because it is part of section 12-14-60, subsection (G) must be construed to in the context of the whole statute and must be harmonized with the other subsections of the statute. The South Carolina Supreme Court has held that courts "should not concentrate on isolated phrases within the statute, but rather, **read the statute as a whole** and in a manner consonant and in harmony with its purpose." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (emphasis added). "**Words in a statute must be construed in context**, and the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." *Eagle Container Co., LLC v. Cnty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895-896 (2008) (citations omitted) (emphasis added).

Reading subsections (A) and (G) together makes clear that the Credit Limitation is an annual limitation. Subsection (A) of the statute authorizes the Credit and computes the amount of Credit for **"any taxable year."** S.C. Code Ann. § 12-14-60(A); *see also SCANA Corp. v. S.C. Dep't of Rev*, 384 S.C. 388, 683 S.E.2d 468 (2009) (concluding that the Credit is an annual credit).

Subsection (G) of the statute limits "[t]he credit allowed by this section" to $5 million. S.C. Code Ann. § 12-14-60(G). "The credit allowed by this section" is the Credit allowed under subsection (A) for **"any taxable year."** Thus, the specific reference to "[t]he credit allowed by

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> For purposes of this section, whether property is three-year property, five-year property, seven-year property, ten-year property, or fifteen-year property is determined based on the applicable recovery period for such property under Section 168(e) of the Internal Revenue Code.

this section" in subsection (G) makes clear that subsection (G)'s dollar limitation applies to the same Credit allowed under subsection (A) for "any taxable year." Therefore, reading subsections (A) and (G) together a taxpayer subject to the license tax is entitled to the Credit allowed for "**any taxable year**" limited to $5 million per taxable year. This conclusion fully "effectuate[s] the intention of the legislature" to create an **annual** tax credit. *Sloan*, 371 S.C. at 498, 640 S.E.2d at 459.

None of the words or phrases used in the entire section 12-14-60 are remotely ambiguous. The phrase "any taxable year" is used throughout the South Carolina Tax Code and has always been interpreted as referencing a single tax year. *See, e.g.*, S.C. Code Ann §§ 12-6-3670, 12-6-3660, 12-6-3385, 12-6-3515. The South Carolina Supreme Court has confirmed that the phrase "any taxable year" as used in the very statute at issue here, section 12-14-60, plainly means a single tax year and that the plain language of the statute authorizes the Credit **annually**. *See, e.g., SCANA*, 384 S.C. 388, 683 S.E.2d 468. Subsection (G) is equally clear in its reference to "[t]he credit allowed by this section." That phrase plainly refers to the annual credit described in subsection (A) of the statute.

### B. The ALC erroneously concluded that the language of subsection 12-14-60(G) is not plain.

The ALC's Order begins with two conflicting conclusions. First the ALC states that "subsection (G) **plainly** states the legislature's intent that no taxpayers who are subject to the license tax as provided in section 12-20-100 is[sic] eligible for more than $5 million of tax credit." (R. p. 11.) Then, a page later, the ALC claims that "[o]verall, subsection (G) **does not plainly** set forth weather the $5 million limitation is an annual limitation or a lifetime limitation" (R. p. 12), but observes that "this conclusion does not necessarily mean that the limitation is ambiguous and will be strictly construed at this juncture." (R. p. 12.) Which is it? Does subsection (G) have a plain

meaning or does it not? And in answering that question, does not South Carolina law require the court to look to the statute as a whole?

The ALC goes on to reject Duke Energy's plain reading of the Credit Limitation as an annual limitation insisting, without much explanation, that "subsection 12-14-60(G) addresses the tax credit not from the perspective of how it is earned (annually) or when it is taken (annually), but the extent to which it can be utilized . . . ." (R. p. 14.) But nothing in subsection (G) suggests that the Credit can no longer be earned, taken, or utilized annually just because a taxpayer is subject to the license tax. Subsection (G) merely instructs how much of the "credit allowed by this section," i.e., the amount of annual Credit determined under subsection (A), the taxpayer can claim for "any taxable year." If the Legislature wanted to fundamentally change the nature of the Credit from an annual credit to a lifetime credit for taxpayers subject to the license tax, it could have easily done so. Instead, by specifically referring to "[t]he credit allowed by this section" in subsection (G), the Legislature made clear that Duke Energy remains entitled to the **annual** credit "allowed" under section 12-14-60(A)(1), except that annual Credit is capped at $5 million.

Ultimately, the ALC's Order concludes that "the application of the limitation described in section 12-14-60(G) is ambiguous" as "[i]t is both reasonable, and plausible, for the $5 million limitation to be either an annual limitation or a lifetime limitation," and that "the ambiguity must be resolved against the taxpayer and in favor of the Department." (R. p. 20.) The ALC provides the following explanation in support of its conclusion:

> Specifically, I find the Department's determination is reasonable when considering the statute as a whole. In particular, subsection 12-14-60(A)(2) imposes a limit upon "[t]he amount of the credit allowed by this section"; however, subsection 12-14-60(G) imposes a limit upon "[t]he credit allowed by this section." Considering both of these subsections within the context of subsection 12-14-60(A), I find that imposing the limit upon the "amount" of the credit

> presumes a right to the credit. But limiting the credit "allowed" reflects an intention to limit the credit itself.

(R. pp. 20-21.)

There are multiple problems with the ALC's reasoning. First, the credit "allowed" by the Credit statute is an **annual** credit. Each year, taxpayers can invest and qualify for the Credit. Subsection (G)'s reference to "[t]he credit allowed by this section" means exactly what it says – the **annual** Credit allowed under subsection (A) is limited to $5 million.

Second, tax credits, by their very nature, are amounts that allow a reduction to the amount of a taxpayer's annual tax liability. Tax credits have no separate identity other than as a representation of a dollar amount. It is undisputed that Duke Energy has "a right" to claim the Credit and that "right" is an annual right. (R. p. 6.) The only dispute relates to how much of that annual "right" it can claim per tax year. The ALC's distinction between a "limit upon the 'amount'" and a "limit on the credit itself" makes little sense in the context of the Credit statute viewed in its entirety.

Third, the ALC's interpretation suggests that subsection (A)(2) presumes "a right to the Credit" while subsection (G) does not. Again, nothing in subsection (G) negates a taxpayer like Duke Energy's "right to the credit." Subsection (A)(1) makes it clear that the "right" is an annual right, a fact that is undisputed and which the ALC even acknowledges ("**There is allowed an investment tax credit** against the tax imposed pursuant to Chapter 6 of this title **for any taxable year** in which the taxpayer places in service qualified manufacturing and productive equipment property." S.C. Code Ann. § 12-14-60(A)(1); (R. p. 10). All subsection (G) does is modify that **annual right** by imposing an amount limitation ($5 million); it does not, however, eliminate that right or change its **annual** application.

Furthermore, the phrase "[t]he credit allowed by this section" in subsection (G) refers to all subsections of section 12-14-60, including (A)(1) and (A)(2). As a result, the Court's distinction between the language used in subsections (A)(2) and (G) is one without a difference and ignores the structure of the Credit statute. Subsection (G) applies to the Credit amount determined under (A)(1) and (A)(2) and only to the extent that amount exceeds $5 million.

The only possible way to reach the ALC's conclusion that the Credit Limitation is ambiguous or that it should not be applied on an annual basis is to either ignore the fact that subsection (A)(1) provides for an annual Credit, or to read subsection (G) in isolation. But South Carolina courts "do not look at statutes in isolation. Instead, [they] consider how the statutes operate with each other when striving to arrive at any one statute's proper meaning." *Fairfield Waverly, LLC. v. Dorchester Cnty. Assessor,* 437 S.C. 287, 852 S.E.2d 739 (Ct. App. 2020). "[T]he Court should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose." *Duke Energy Corp.,* 415 S.C. at 355, 782 S.E.2d at 592; *see also S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) ("In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect."). Because the purposes of the Credit is to allow taxpayers to claim an **annual** Credit, applying the Credit Limitation as a lifetime limitation conflicts with that purpose. Accordingly, the ALC ruling should be reversed.

## II. The ALC erred by disregarding the Legislature's acquiescence to the Department's longstanding interpretation of the Credit Limitation as an annual limitation.

### A. The Department had a longstanding interpretation of the Credit Limitation as an annual limitation for more than fifteen years.

If there was any doubt that the Credit Limitation is an annual limitation under the plain language of section 12-14-60, the Department's own practice and guidance for more than fifteen

years confirms the annual application of the Credit Limitation. Shortly after the enactment of section 12-14-60, the Department drafted and published the Credit Form, which taxpayers were required to complete in order to claim the Credit. S.C. Code Ann. § 12-60-1720 (taxpayers are mandated to "comply with the department's regulations, rules, and procedures, and shall use the forms the department prescribes.") (R. pp. 674-713); R. p. 280, lines 9-14.)

After the enactment of the Credit Limitation, the Department revised and published the Credit Form twice. (R. pp. 678-679; R. pp. 680-681.) The first revision included the Credit Limitation as originally enacted by the Legislature in the amount of $1 million. (R. pp. 680-681.) The second revision followed the Legislature's amendment to the Credit Limitation from $1 million to $5 million. (R. p. 682.) On both of these versions of the Credit Form, the Department required taxpayers to follow a methodically developed, step-by-step formula and apply the Credit Limitation on **an annual basis**. In total, the Department agrees that it amended and published new Credit Forms eleven times and consistently required taxpayers to apply the Credit Limitation on an annual basis. (R. p. 253, lines 3-5; R. p. 307. line 21-p. 308, line 5; R. p. 295, lines 4-7, p. 296, lines 12-15.)

The Department's prior audits also reflected its application of the Credit Limitation as an annual limitation. As discussed above, the Department audited Duke Energy for tax years 2008 through 2011. In that audit, the Department used its standard workpaper template used for auditing the amount of the Credit claimed by utilities subject to the license tax. (R. p. 751; R. p. 264, lines 7-10, p. 265, lines 4-16.) Using that template, the Department applied the Credit Limitation on an annual basis. The Department's audit report also applied the Credit Limitation on an annual basis. (R. p. 751.) During depositions, the Department testified that some of its employees, including the

audit group supervisor, continue to interpret the Credit Limitation as an annual limitation. (R. p. 269, line 19-p. 270, line 13.)

The Department's longstanding interpretation of the Credit Limitation was also known by South Carolina legislators and the RFA. In considering the 2017 Bill, the Legislature understood that applying the Credit Limitation as an annual limitation was "DORs[sic] stance for 15+ yrs," and that "[t]his clarifying amendment does not alter any current practices by the Department of Revenue" and was intended to "conform to policy and practice." (R. p. 359; R. pp. 813-814; R. p. 805.) The RFA was also fully aware that the 2017 Bill "does not alter any current practices by the Department of Revenue, and therefore, would not affect state General Fund income tax revenue in FY 2017-18, and later fiscal years." (R. p. 805).

### B. The Legislature has acquiesced to the Department's longstanding interpretation of the Credit Limitation.

The South Carolina Supreme Court has consistently held that "where 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 Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950); *see also Charleston Cnty. Assessor v. Univ. Ventures, LLC*, 427 S.C. 273, 831 S.E.2d 412 (2019) (finding that the Department's fifteen-year interpretation of a statute was entitled to weight).

In *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984), the South Carolina Supreme Court rejected the Tax Commission's (the Department's predecessor) attempt to change its interpretation of a statutory deduction for nonresidents. In that case, the statute initially provided a general deduction for nonresidents, which the Commission interpreted to include business and nonbusiness deductions. Subsequently, the statute was amended to allow

nonresidents to claim nonbusiness deductions only when the state of the taxpayer's residence had reciprocal legislation. The amendment was later found invalid. However, the Tax Commission contended that its interpretation of the statute prior to the amendment was wrong and it should have been interpreted to exclude nonresidents' nonbusiness expenses. The Court concluded that "[t]he Commission's attempt to change its interpretation of the statute is not persuasive. Where the administrative construction of a statute has been uniform and has been acquiesced in by the General Assembly, such construction is entitled to weight." *Id.* at 495, 387-88 (citing *Etiwan*).

Similarly, in *G.E. Moore Co. v. Walker*, 232 S.C. 320, 102 S.E.2d 106 (1958), the South Carolina Supreme Court rejected the South Carolina Industrial Commission's attempt to change its construction of a statute that had been in place for twenty-two years, relating to the method for computing compensation payable under the Workmen's Compensation Act. In evaluating the reasonableness of the Commission's construction of the statute, the Supreme Court relied on the legislative acquiescence principle announced in *Etiwan.* The Court emphasized that "[d]uring that [twenty-two-year] long period of time such construction was apparently never challenged, nor was any effort ever made in the Legislature to amend the statute." *Id.* at 327, 109.

This case is no different. Since subsection 12-14-60(G) was first enacted in 1998, the Department interpreted the Credit Limitation as an annual limitation for more than fifteen years. The Department revised the form it required taxpayers to complete in computing their Credit eleven times, and each and every time instructed taxpayers to apply the Credit Limitation annually. The Department followed the same practice for years. And although the Credit statute was amended numerous times since it was enacted in 1995, the Legislature never amended or altered the statute to reject the Department's interpretation.

When the Legislature tried to clarify the Credit Limitation in 2017, both the RFA and the Department represented to the General Assembly that applying the Credit Limitation as an annual limitation was the "DORs[sic] stance for 15+ yrs" and that "[t]his clarifying amendment does not alter any current practices by the Department of Revenue," but was only intended to "conform to policy and practice." (R. p. 359; R. pp. 813-814; R. p. 805.) Therefore, even if the Legislature was not aware of the Department's interpretation of the Credit Limitation prior to 2017 (which it was), it was certainly made aware in 2017. Yet, it took no action to change the statute or otherwise signal that the Department's application of the Credit Limitation annually was incorrect. Therefore, the Department's longstanding interpretation of the Credit Limitation is entitled to significant "weight, and should not be overruled without cogent reasons." *Etiwan*, 217 S.C. at 359, 60 S.E.2d at 684. The Department has not offered any cogent reasons for overturning its prior practice and none exist.

While the ALC Order acknowledges the Supreme Court's directive in *Etiwan,* the ALC quickly dismisses it by accepting the Department's claim that its longstanding position was wrong. But the Supreme Court has previously held that the rule of resolving doubt in favor of a party is subordinate to the Department's longstanding administrative interpretation if the Legislature has given such interpretation at least its implied assent. *Ryder Truck Lines, Inc. v. S.C. Tax Comm'n,* 248 S.C. 148, 152-153, 149 S.E.2d 435, 437 (1966). Because the ALC failed to give weight to the Legislature's acquiescence to the Department's longstanding practice, it committed a reversible legal error.

The ALC justifies its conclusion to accord no weight to the Department's longstanding interpretation by explaining that "the Department disclaims any official interpretation prior to 2014" because "its Form TC-11 was not officially reviewed by its Policy Department until 2013,"

and "[s]ince its Policy Department's determination, the Department has consistently applied the credit limitation on a lifetime limitation ever since." (R. p. 18.) This is simply not true. The undisputed evidence in this case proves that even after the Credit Form was amended in 2014, the Department was still advising the Legislature that the Credit Limitation was an annual limitation. And even if it were true, what about the Department's position for the prior fifteen years? Is that longstanding position rendered a nullity because an audit manager changed a tax form?

The South Carolina Supreme Court has found that tax worksheets, tax guides, reports, and tax incentive publications could serve as the Department's interpretation of a statute. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 77-78, 716 S.E.2d 877, 882-83 (2011). The Supreme Court concluded that those documents sufficiently established the Department's longstanding policy. The Department's Credit Forms (eleven versions of them) and audit worksheets here are no different. Therefore, even if they might not have been reviewed by the Policy Department for fifteen years, as the Department claims, they nevertheless established the Department's longstanding interpretation of the Credit Limitation.

Moreover, the Department never issued a "Policy Department's Determination" as the ALC concludes. The only policy determination issued by the Department that alludes to its new interpretation of the Credit Limitation is the Determination that led to this appeal. That Determination was issued in April 2019 and only to Duke Energy; it is not accessible by other taxpayers and was prepared solely for this dispute. To this date, the Department has not issued any other guidance other than the updated Credit Form, which the Department claims cannot establish an "official interpretation." (R. pp. 17-18.)

## III. The ALC erred by concluding that any ambiguity in the Credit Limitation subsection should automatically be read in favor of the Department.

### A. The ALC misapplied recognized principles of statutory construction.

The ALC concluded that because "application of the limitation in 12-14-60(G) is ambiguous, the ambiguity must be resolved against the taxpayer and in favor of the Department." But even if the Credit Limitation subsection were ambiguous, which both parties agreed it was not, the ALC erred in granting relief to the Department because the ALC misapplied recognized principles of statutory construction.

"Generally, a court must apply the rules of statutory interpretation to resolve the ambiguity and discover the intent of the legislature." *Mead v. Beaufort Cnty. Assessor*, 419 S.C. 125, 139, 796 S.E.2d 165, 173 (Ct. App. 2016). A "statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *CFRE, LLC*, 395 S.C. at 74, 716 S.E.2d at 881 (internal citations omitted). "We therefore should not concentrate on isolated phrases within the statute." *Id.* As discussed above, when read together, subsections (A) and (G) lead to only one reasonable and logical result that requires the application of the Credit Limitation on an annual basis.

The ALC notes that ambiguities in tax credit statutes are strictly construed against the taxpayer. (R. p. 12.) But "[t]his rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor. It does not mean that we will search for an interpretation in [the Department]'s favor where the plain and unambiguous language leaves no room for construction." *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 140, 750 S.E.2d 65, 69 (2013) (citation omitted). "Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists." *Inman v. Life Ins. Co. of Va.*, 223 S.C. 98,

102, 74 S.E.2d 423-24 (1953). In fact, it is "[o]nly when the literal application of the statute produces an absurd result will we consider a different meaning." *CFRE, LLC*, 395 S.C. at 75, 716 S.E.2d at 881.

In *CFRE*, *LLC*, the South Carolina Supreme Court refused to automatically defer to the Department's new interpretation of a statute under the strict construction principles, as the ALC had done. The Court observed that while the specific statutory subsection at issue in that case was "at first blush" susceptible to the interpretation proposed by the Department, "we cannot examine [that subsection] in isolation and the ALC's order overlooked the specific impact of [that subsection.]" *Id*. at 79. The Court then read the plain text of that subsection in the context of the entire statute and also considered the Department's longstanding interpretation of that statute, noting that such interpretation would not be rejected unless it conflicts with the statute's plain language. *Id*. at 77.

Accordingly, strict construction does not permit courts to automatically construe exemption and credit statutes in favor of the Department. Yet, that is exactly what the ALC did here. The ALC provides very little explanation why it chose to construe any perceived ambiguities in favor of the Department. It simply states that the different language used in subsections (A)(2) and (G), which purportedly creates a "right to the credit" in the former section but not in the latter, is a good enough reason support its application of the strict construction rule against Duke Energy. If this is not an attempt to "search for an interpretation in [the Department]'s favor where the plain and unambiguous language leaves no room for construction," nothing else is.

As discussed above, the ALC's reasoning is not only inexplicable and not supported by the plain text of the Credit statute, but is premised on reading subsection (G) in isolation, rather than analyzing the entire statute as a whole as required under South Carolina law. "Even under the

principles of strict construction, [the ALC] cannot ignore the plain language" of the Credit statute. *CFRE, LLC*, 395 S.C. at 76, 716 S.E.2d at 882. The ALC also failed to consider the Department's more than fifteen-year practice and guidance of interpreting the Credit Limitation as an annual limitation. Worse, the ALC entirely ignored Legislature's express acquiescence to that practice.

The South Carolina Supreme Court has held that the rule of resolving doubt in favor of a party is subordinate to the Department's longstanding administrative interpretation if the Legislature has given such interpretation at least its implied assent. *Ryder Truck Lines, Inc.*, 248 S.C. at 152-53, 149 S.E.2d at 437 ("a strong presumption arises that the administrative construction has the approval of the legislature" and "we would not be justified in overturning the commission's long continued application of the statute to which the legislature has given at least implied assent.") While administrative practice is not by itself conclusive and the final responsibility rests with the court, "administrative practice is a weight in the scale" and the courts are "bound to weigh seriously such rulings." *Stone Mfg. Co. v. S.C. Emp't Sec. Comm'n.* 219 S.C. 239, 249, 64 S.E.2d 644, 648 (1951). The ALC did not do so in this case.[11]

Therefore, that subsection (G) is an annual limitation based on the structure and the language of the whole Credit statute is not only the reasonable and logical conclusion, but it also does not require "strained or liberal[]" construction of the statute. Accordingly, the ALC's decision should be reversed.

[11] Rather than weighing the Department's consistent and longstanding interpretation of the Credit Limitation for fifteen years, the ALC characterizes Duke Energy's request to do so as invoking "inverse agency deference doctrine" and summarily concludes that the Department "is not bound by a prior interpretations that was in error." (R. p. 17.) But the ALC's reasoning is at odds with longstanding South Carolina Supreme Court precedent discussed above.

### B. The ALC erred in accepting the Department's interpretation of the Credit Limitation because it frustrates the legislative purpose of the Credit statute.

The rule of strict construction "is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose." *Wingfield v. S.C. Tax Comm'n*, 134 S.C. 251, 131 S.E.2d 421, 423 (1926). Economic development statutes, while granting credits, should not be so strictly construed against the taxpayer as to defeat or destroy the legislative intent and should reward, not frustrate, the policy of rewarding investment and encouraging economic development. *Hercules Contractors & Eng'rs, Inc. v. S.C. Tax Comm'n*, 280 S.C. 426, 435, 313 S.E.2d 300, 306 (Ct. App. 1984) ("While the rule of strict construction against a tax exemption is well established ... it is also recognized that such a rule "does not impinge upon the all-prevailing rule that a statute is to be construed in accordance with its real intent and meaning, and not so strictly as to defeat the legislative purpose." (Internal citations omitted.)) Indeed, "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *See Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993); *see also Eagle Container Co., LLC v. Cnty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008) ("The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose," (citations omitted)).

The purpose of section 12-14-60 is to "to revitalize capital investment in this State, primarily by encouraging the formation of new businesses and the retention and expansion of existing businesses" and "to promote meaningful employment." S.C. Code Ann. § 12-14-20. The Department's interpretation of subsection (G) is not only at odds with that purpose, but it frustrates it because applying the Credit Limitation on a lifetime basis fails to encourage continued investments made by existing businesses that would otherwise lead to their expansions in the State. Indeed, the only reasonable way the Credit Limitation furthers the statute's legislative purpose is

by applying the Credit Limitation on an annual basis. Allowing existing taxpayers that are subject to the license tax to claim up to $5 million of Credit annually serves as an incentive to those taxpayers to remain or expand in the State by making additional investments, thus achieving the Credit statute's legislative purpose and intent. Accordingly, the ALC's holding and the Department's interpretation of the Credit Limitation frustrate the General Assembly's intent.

The South Carolina Supreme Court has previously recognized the importance of economic development incentives like the Credit at issue in this case. In one case dealing with a sales tax exemption, the Court acknowledged that "tax exemption statutes are strictly construed against taxpayers," but allowed a taxpayer to claim an exemption for purchases of machinery because such a result "produced no absurd result" and it was "consistent with the general purpose of the exemption" "to promote new industry within the State and encourage expansion of present industry." *Se.-Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 489-490, 280 S.E.2d 57, 58-59 (1981); *see also Anonymous Corp. v. S.C. Dep't of Rev.*, 99 ALJ-17-0153, 1999 WL 1094323, *8 (Nov. 9, 1999) (noting that "[c]ourts of other jurisdictions have recognized that construing tax exemption statutes too narrowly could defeat the legislative purpose of such statutes.")[12]

[12] *See Amoena Corp. v. Strickland*, 283 S.E.2d 894, 897 (Ga. 1981) (construing the Georgia sales tax exemption for machinery and equipment in which the Georgia Supreme Court stated that "it is true that tax exemptions are to be strictly construed against the taxpayer and doubts resolved in favor of taxability. However, this should not impinge on the other rule that a statute is to be construed in accordance with its real intent and meaning and not so strictly as to defeat the legislative purpose."); *Sharp v. Tyler Pipe Indus., Inc.*, 919 S.W.2d 157, 161 (Tex. Ct. App. 1996) (terms "liberal" and "strict" as applied to statutory construction can be misleading where other principles are at work; construing tax exemption statutes too narrowly could defeat legislative purpose of economic development); *Arizona v. Capitol Castings, Inc.*, 88 P.3d 159, 160 (Ariz. 2004) (concluding machinery exempt from tax by emphasizing the purpose of the tax exemptions was to "stimulate business investment in Arizona in order to improve the state's economy and increase revenue from other taxes" and that the exemptions "should further, not frustrate, the policy of encouraging investment and spurring economic development").

The Department itself has taken a similar position in interpreting the former South Carolina Infrastructure Credit, which was allowed against a taxpayer's corporate income taxes in "an amount equal to fifty percent, not to exceed ten thousand dollars, of expenses paid or accrued by the taxpayer in building or improving any one infrastructure project." S.C. Code Ann. § 12-7-1250(A) (Supp. 1988). The Department concluded that while the credit statute language was "ambiguous," "the appropriate interpretation of this statute should be the one most favorable to the taxpayer." Technical Advice Memorandum 89-14 (May 17, 1989).[13] As a result, the Department concluded that that credit statute "should thus be construed to mean that a taxpayer is not limited to the number of projects which will qualify for the credit." *Id.* The Credit at issue in this case is of no less importance to South Carolina's economic development than the State's former Infrastructure Credit.

### C. The ALC erred in accepting the Department's interpretation of the Credit Limitation because it produces an absurd result.

Reading a lifetime limitation into the Credit statute would lead to an absurd result. The South Carolina Supreme Court has held that a statutory construction would be rejected if "it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." *Kiriakides v. United Artists Commc'ns, Inc.,* 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

The ALC agreed with the Department's theory that under subsection 12-14-60(G), once Duke Energy uses $5 million of Credit, it may not claim any additional Credit, no matter how far in the future and no matter how much it invests in the State. However, subsection (G) limits the Credit "to no more than five million dollars for **an entity** subject to the license tax as provided

[13] *Available at* https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/TAM89-14.pdf (last visited February 10, 2021).

in Section 12-20-100." S.C. Code Ann. § 12-14-60(G) (emphasis added). A business enterprise can include hundreds of legal entities and a combined tax filing group can include hundreds of taxpayer entities. If the Department's theory were correct, a taxpayer can easily avoid the purported lifetime limitation by forming a new business entity or making its investments in the State through a different entity within its organizational structure. This new entity would be entitled to its own separate $5 million in Credit even if the limitation were a lifetime limitation, because subsection (G) imposes a limit on the credit of an "**entity**." And the taxpayer could continue creating new entities (or using existing entities) as often as needed to avoid the alleged $5 million per-entity, lifetime limitation. This could not possibly be the intent of the Legislature. If the Legislature truly intended to impose the Credit Limitation as a lifetime limitation **per taxpayer**, as the Department claims and the ALC concludes, it would not have chosen words that would allow multiple commonly owned entities to claim a $5 million credit.

The Order ignores the fact that the General Assembly chose its words carefully when it enacted the Credit statue. It used the phrase "any taxable year" to establish an annual Credit and intentionally linked the Credit Limitation to "[t]he credit allowed by this section." S.C. Code Ann. §§ 12-14-60(A), (G). In the limited instances where the General Assembly enacts a credit with a lifetime limitation, it almost always imposes the limitation with respect to a specific project or facility,[14] or a specific affiliated group of taxpayers.[15] The credit Limitation in subsection 12-14-

[14] For example, section 12-6-3570 imposes a lifetime limitation and imposes the limitation on the amount of credit for a motion production "facility" or to the amount of credit a taxpayer may claim for one such "project." A now repealed version of section 12-6-3510 applied a lifetime limitation and this limitation also applied to a specific "project" or "facility." Therefore the lifetime limitation does not apply to the amount of credit a taxpayer can earn in total, but imposes a lifetime limitation on the amount of credit a taxpayer can generate from investment in one particular facility.

[15] Section 12-6-3530(B) imposes a lifetime limitation that applies to the total amount of credits claimed by all taxpayers in the aggregate under the program, and it does not impose a lifetime limitation on each individual taxpayer. It imposes a cap on total statewide credit, regardless of how

60(G) is neither. It is not based on a project or facility and does not apply to affiliated groups of taxpayers. And it is "limited to no more than five million dollars **for an entity**." S.C. Code Ann. § 12-14-60(G).

The ALC makes a curious observation that if the South Carolina General Assembly intended for the limitation to be annual, it would have applied the limitation to all taxpayers and not just taxpayers subject to the license tax. (R. p. 21.) There is absolutely nothing in the statute, the legislative history or the evidence in this case that supports the ALC's conclusion in this regard. Surely the General Assembly can choose to impose an annual limitation on the amount of Credit for some taxpayers, and not for others. Not all taxpayers are created equal. As mentioned above, utilities are capital-intensive businesses that often make large amounts of investments. The fact that the Legislature chose to limit the annual amount of Credit for utilities, and not for other businesses, is perfectly reasonable. Therefore, the ALC's observation is incorrect and its holding should be reversed.

## IV. The ALC erred by allowing the Department to retroactively deny a tax credit that Duke Energy earned from significant investments in South Carolina and in reliance on the Department's longstanding written interpretation of the Credit statute.

### A. The Department's retroactive application violates Duke Energy's due process rights.

The Department's attempt to retroactively deny Duke Energy's Credits violates South Carolina and federal constitutional guarantees of due process. U.S. Const., amend XIV, § 1; accord *Huber v. S.C. State Bd. of Physical Therapy Exam'rs*, 316 S.C. 24, 26-28, 446 S.E.2d 433, 435 (1994). A fundamental principle of due process is that laws must exist before a person can be

much one particular taxpayer claims. Section 12-6-3588 imposes a lifetime limitation on taxpayers, but it also imposes an annual limitation on the taxpayer and also provides that the entire business may generate credits only for a limited number of years.

required to comply with them. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "[R]egulated parties should know what is required of them so [that] they may act accordingly," and "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* A law or regulation that "fails to provide a person of ordinary intelligence fair notice of what is prohibited [or required], or is so standardless that it authorizes or encourages seriously discriminatory enforcement" violates this constitutional guarantee. *Id.* (citation omitted).

In *Fox Television*, the FCC had a history of enforcing a federal law banning "obscene, indecent, or profane language" only if the obscenity was pervasive and repeated rather than "isolated or fleeting." 567 U.S. at 246. After isolated curse words and brief displays of nudity were broadcast on Fox and ABC, the FCC "clarified" its policy in a new order stating that isolated incidents could be indecent under federal law. *Id.* at 249. The FCC retroactively applied this "clarification" to impose fines on Fox's and ABC's previous broadcasts. *Id.*

The U.S. Supreme Court struck down the sanctions orders as a violation of the constitutional guarantee of fair notice. As the Court explained, the regulatory history leading up to the fines made "it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent." *Id.* at 254. The FCC's "lack of notice to Fox and ABC that its interpretation had changed . . . failed to provide a person of ordinary intelligence fair notice of what is prohibited." *Id.* (brackets, citation, and internal quotation marks omitted).

This case is no different and the Department's attempt to retroactively deny Duke Energy's Credits should be rejected. Allowing the Department to reach back and require taxpayers to comply with its interpretation of the law that not only did not exist, but required taxpayers to do the

opposite, amounts to an unlawful exaction in violation of the Due Process Clause. As discussed above, it is undisputed that during the Tax Years at Issue in this case (2010 through 2014), the Department instructed taxpayers on its Credit Form to apply the Credit Limitation annually. And in 2013, the Department's audit report confirmed that Duke Energy correctly applied the Credit Limitation per tax year.

Perhaps recognizing the Due Process concerns arising from its holding, the ALC observes that "[e]ven if the Department previously applied what it now deems to be an incorrect interpretation of § 12-14-60(G) to a prior audit of Duke, that does not bind the Department to the same interpretation in the future if the prior interpretation was in error." (R. p. 19.) However, this appeal does not relate to the "future;" it relates to tax years 2010 through 2014. In other words, the Department's change in its tax form in 2014 had the effect of retroactively denying Duke Energy's tax credits for the years 2010 through 2014 **and** eliminating its Tax Credits for all future years. The ALC's characterization of the Department's application of its prior interpretation of the Credit Limitation as "in the future" is simply wrong.

The Department's attempt to retroactively disallow Duke Energy's Credits not only impacts Duke Energy, but it also impacts its South Carolina customers. As a regulated public utility, Duke Energy must go through a ratemaking process before state utility regulatory commissions in order to set the prices (rates) it can charge its customers for its electric services. (R. p. 841); *see generally Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692 (1923). The underlying concept of utility rulemaking is to set rates at a level that allows the utility to collect revenues equal to its cost of providing service plus earn a reasonable rate of return on its invested capital. *Id*. Typically, state utility commissions allow recovery of certain costs, including costs associated with capital investments made in South Carolina. *S. Bell*

*Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 602-03 (1978). By retroactively denying the tax credit at issue in this case the ALC has not only impacted Duke Energy, but also its customers.

### B. The Department's retroactive application of its new interpretation violates South Carolina's rulemaking laws and the Taxpayer's Bill of Rights.

It bears repeating that for more than fifteen years after the enactment of the Credit statute, the Department instructed taxpayers to apply the Credit Limitation on an annual basis. However, sometime on or around July 24, 2014, the Department abruptly revised its Credit Form to require the computation of the Credit Limitation on a lifetime basis. The Department made this change without providing public notice, without permitting public comment, without conducting a public hearing, without preparing reports on the impact of the change, and without following any rulemaking procedures pursuant to S.C. Code Ann. §§ 1-23-110 to 160. Indeed, Department leadership, including its Director and General Counsel, were not even consulted on this drastic change in position. The Department's approach to this matter violates South Carolina's rule-making laws such that it constitutes invalid "administrative overreach that attempts to end run the legislative process." *Joseph v. S.C. Dep't of Labor, Licensing & Reg.*, 417 S.C. 436, 455, 790 S.E.2d 763, 773 (2016).

Furthermore, the South Carolina Taxpayers' Bill of Rights provides that "[t]he department shall publish brief but comprehensive statements in simple and nontechnical language which explain procedures, remedies, and the rights and obligations of the department and taxpayers." S.C. Code Ann. § 12-58-60. As a result, a taxpayer has the right to "receive forms … in plain, easy-to-understand language." (*See* R. p. 1209.) The Department's Credit Form that was in effect for over fifteen years plainly instructed Duke Energy to compute the Credit Limitation on an annual basis. Duke Energy justifiably relied on the Department's representations reflected in the Credit Form.

The Department now wants to ignore its own form and alleges that it is "not binding on the Department." (R. p. 1148.) This statement and the Department's actions are in direct conflict with the Department's obligations under the Taxpayers' Bill of Rights. The Department does not dispute that its Credit Form contained an annual limitation for fifteen years, it agrees that forms should reflect South Carolina statute, it agrees Taxpayers rely on these forms, and it agrees that filing of these forms is required to claim the Credit. (R. p. 280, lines 9-14; R. p. 254, lines 8-10; R. p. 294, lines 7-13.) As a result, the Department failed to comply with the requirements of the South Carolina Taxpayer's Bill of Rights.

### C. The Department should be estopped from, and is unjustly enriched by, retroactively changing its interpretation and denying Duke Energy's Credit.

Duke Energy invested substantial capital in the state of South Carolina and significantly contributed to the economy and infrastructure in this State. (R. p. 323, line 18-p. 324, line 9, p. 345, lines 10-15.) Indeed, during the Tax years at Issue, Duke Energy invested over $1 billion into the State. (R. pp. 1290-1300.) In making the decision to invest in South Carolina, Duke Energy relied, in part, on the Department's fifteen-year interpretation of subsection (G) as an annual limitation. (R. p. 325, lines 15-22, p. 330, line 24-p. 331, line 6, p. 332, line7-p. 333, line2.) Then, long after Duke Energy made its investment in South Carolina, the Department wants to change its longstanding practice **retroactively** and seeks to apply the Credit Limitation on a lifetime basis, not an annual basis as it has done in the past.

Even assuming, *arguendo*, that Department's new interpretation were valid (which it is not), the Department should be estopped from retroactively applying that interpretation. In South Carolina, "[c]ourts apply the doctrine of equitable estoppel when one party, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury." *State Accident Fund v. S.C. Second*

*Injury Fund*, 388 S.C. 67, 76-77, 693 S.E.2d 441, 446 (Ct. App. 2010). Such misrepresentation need not be intentional and reasonable reliance is sufficient. *Dillon Cnty. School Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 218, 332 S.E.2d 555, 561 (Ct. App. 1985), *overruled on other grounds, Atlas Food Systems & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995). The Department represented for many years that the Credit Limitation applied annually. Duke Energy reasonably relied on the Department's representation based on the Department's Credit Form instructing Duke Energy to apply the limitation on an annual basis. Accordingly, the ALC's holding that the Department is not estopped from changing its interpretation **retroactively** is erroneous.

Furthermore, the Department would be unjustly enriched by the Department's retroactive application of its new interpretation of the Credit Limitation. Unjust enrichment is an equitable doctrine, akin to restitution, which contemplates that a person who is unjustly enriched at the expense of another must make restitution to the other. *Barrett v. Miller*, 283 S.C. 262, 321 S.E.2d 198 (Ct. App. 1984). To recover on a theory of restitution, the plaintiff must show: (1) that he conferred a nongratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff its value. *JASDIP Props. SC, LLC v. Estate of Richardson*, 395 S.C. 633, 640, 720 S.E.2d 485, 489 (Ct. App. 2011).

Duke Energy conferred significant benefits on the State of South Carolina by making investments in the State worth $1 billion during the tax Years at Issue. (R. p. 333, lines 7-22, p. 334, lines 21-25, p. 345, lines 7-12.) During the Audit Period, Duke Energy invested substantial amounts in its power generating facilities in South Carolina and placed in service significant amounts of qualified manufacturing and productive equipment property throughout the state.

(R. p. 324, lines 5-16, p. 334, lines 21-25, p. 339, line 12-p. 340, line 4.) For tax years 2010 through 2014 alone, Duke Energy invested over $1 billion into the State as seen in its South Carolina corporate income tax returns and Credit Forms. (R. pp. 1290-1300.) South Carolina realized value from this investment as evidenced by its willingness to provide the Credits. Duke Energy reasonably relied on the Department's representations to pay for the benefit and made investment decisions in South Carolina based on this representation. (R. p. 334, lines 21-25.)

Duke Energy has optionality concerning whether to invest in South Carolina or other states and the availability of tax credits impact its decisions. (R. p. 325, line 15-p. 326, line 4, p. 343, line 15-p. 344, line 6.) It makes capital investment decisions based on the impact over a long time period and the reversal of a fifteen year policy concerning application of the Credit Limitation impacts the economics of these decisions. (R. p. 332, line 7-p. 333, line 2.) Duke Energy understood the Credit Limitation to be annual based on its read of Subsection (G) in harmony with Subsection (A) of Section 12-14-60. (R. p. 338, lines 17-24.) Given the Department's long held practice of calculating the Credit Limitation annually, and not as a lifetime cap, the Department understood that Duke Energy expected to receive annual Credits of up to $5 million per year from its nearly two decades of investment in South Carolina. The Department's reversal of its position on the interpretation of the limitation and the reduction to previously generated and accrued credits, financially impacts Duke Energy's earnings, financial statements, shareholders, and customers. (R. p. 328, line 23-p. 329, line 4, p. 344, lines 7-23.) Accordingly, Duke Energy and its South Carolina customers would be financially harmed and the Department would be unjustly enriched by the Department's retroactive application of this new interpretation to deny Duke Energy's Credits.

## CONCLUSION

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

I. Reverse the ALC's Order and enter a finding that the ALC erred in holding that as a matter of law, Section 12-14-60(G) imposes a lifetime limitation on the Credit.

II. Reverse the ALC's Order and enter a finding that the ALC erred in holding that as a matter of law, Duke Energy is not entitled to the amount of Credit as claimed.

RESPECTFULLY SUBMITTED,

Samantha K. Trencs (Bar No. 101882)
Eric S. Tresh *(pro hac vice)*
Maria M. Todorova *(pro hac vice)*
Chris R. Lee *(pro hac vice)*
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street, NW Suite 700
Washington, DC 20001-3980
Phone: (202) 383-0534
samanthatrencs@eversheds-sutherland.com
erictresh@eversheds-sutherland.com
mariatodorova@eversheds-sutherland.com
chrislee@eversheds-sutherland.com

*Attorneys for Appellant*
*Duke Energy Corporation*

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In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

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Case No. 19-ALJ-17-0153-CC

2020-001542

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Duke Energy Corporation……..... Appellant,

v.

South Carolina Department of Revenue…….. Respondent.

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CERTIFICATE OF COUNSEL

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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

RESPECTFULLY SUBMITTED,

Samantha K. Trencs (Bar No. 101882)
Eric S. Tresh *(pro hac vice)*
Maria M. Todorova *(pro hac vice)*
Chris R. Lee *(pro hac vice)*
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street, NW Suite 700
Washington, DC 20001-3980
Phone: (202) 383-0534
samanthatrencs@eversheds-sutherland.com
erictresh@eversheds-sutherland.com
mariatodorova@eversheds-sutherland.com
chrislee@eversheds-sutherland.com
*Attorneys for Appellant*
*Duke Energy Corporation*

July 21, 2021