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 REPLY BRIEF FOR APPELLANT

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## INTRODUCTION

The South Carolina Department of Revenue's ("Department") brief misapplies the applicable law in four important respects.

First, the Department agrees the language of S.C. Code Ann. § 12-14-60 is plain and unambiguous and the statute should be construed as a whole, yet it asks the Court to read subsection (G) of the statute in isolation to support its interpretation that the $5 million limitation on the amount of investment tax credit ("Credit Limitation") is a lifetime limitation. How could the Department possibly claim that the Credit Limitation unambiguously provides a lifetime limitation when the Department itself interpreted the Credit Limitation as an annual limitation for over fifteen years?

Second, the Department admits that for more than fifteen years it instructed utility taxpayers, in writing and in practice, to apply the Credit Limitation on an annual basis, yet it claims that it did not have a longstanding practice regarding the interpretation of the limitation that the Legislature could have acquiesced to prior to this dispute. The Department's attempt to retroactively replace its longstanding interpretation of the Credit Limitation with its new audit position is precisely the type of administrative overreach the well-established doctrine of legislative acquiescence is designed to prevent.

Third, the Department incorrectly claims that the Administrative Law Court ("ALC") properly applied South Carolina statutory construction principles, even though the ALC's Order ("Order") misapplies those principles, produces an absurd result, and frustrates the purpose and language of the statute.

Lastly, the Department argues that the Order should be affirmed even though the Department's retroactive application of the Credit Limitation is in direct contravention with its

practice and instructions to taxpayers for more than fifteen years. The Department's actions in this case violate Duke Energy Corporation's ("Duke Energy") right to due process, the South Carolina Taxpayer Bill of Rights, and the principles of unjust enrichment and equitable estoppel.

This Court should reject the Department's arguments, reverse the Order, and grant the relief requested in Duke Energy's Brief.

## ARGUMENT

### I. The plain and unambiguous language of section 12-14-60 states that the Credit Limitation is an annual limitation.

The Department argues that "the plain language" of section 12-14-60 limits Duke Energy's Credit to $5 million for all time because "[s]ection 12-14-60(G) limits the amount of the credit" and "**[n]o other subsection of the statute explains** or contradicts **the limitation imposed**." (Respondent's Br. at 13-14 (emphasis added.)) The Department is wrong.

Subsection (G) begins with the phrase "[t]he credit allowed by this section . . . ." S.C. Code Ann § 12-14-60(G). "This section" is section 12-14-60. Therefore, contrary to the Department's argument, section 12-14-60 provides context that explains the limitation set forth in subsection (G). Had the Legislature meant to say otherwise, it would not have started subsection (G) with an express referenced to the entire statute.

Furthermore, South Carolina rules of statutory construction require that a statute must be read "as a whole" and "[w]ords in a statute must be construed in context." Therefore, subsection (G) must be construed in the context of the entire section 12-14-60. *See Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016); *Eagle Container Co., LLC v. Cnty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895-896 (2008) (citations omitted)

The ALC concluded, and there is no dispute, that subsection (A)(1) of the statute authorizes an **annual credit**, *i.e.*, it entitles a taxpayer to earn and apply on its tax return the Credit on an

annual basis. (R. p. 10 ("[T]his section [12-14-60(A)(1)] 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) computes the amount of this **annual** credit. S.C. Code Ann. § 12-14-60(A)(2). Subsection (B) contains relevant definitions for purposes of section 12-14-60. Subsection (C) provides that property eligible for other credits is not subject to section 12-14-60. S.C. Code Ann. § 12-14-60(C). Subsection (D) permits the carryforward of unused credit for the specified period. S.C. Code Ann. § 12-14-60(D). Subsections (E) and (F) provide for the recapture of the Credit if certain events occur. S.C. Code Ann. §§ 12-14-60(E), (F). Nothing in the plain text of these subsections indicates that "the credit allowed by this section" is a lifetime credit. Indeed, the ALC and the Department admit that all of the other parts of Section 12-14-60 provide annual instruction to taxpayers. (R. p. 14; Respondent's Br. at 16-17.) Thus, "the credit allowed by this section" should be interpreted in the same manner. In fact, even the ALC acknowledged that the Credit Limitation "plainly allows a taxpayer to earn and apply the tax credit **every year** the taxpayer places qualifying property into service." (R. p. 10 (emphasis added).)

Admittedly, subsection (G) places a limitation on the amount of the Credit; it does not, however, change the Credit from an annual credit to a lifetime credit. It 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). Read in the context of the statute as a whole, subsection (G) limits the annual credit for investments made by utilities after June 30, 1998 (which is the enactment date of the Credit Limitation)[1] to $5 million.

[1] Investments by utility taxpayers made prior to June 30, 1998 were not subject to this limitation. S.C. Code Ann. § 12-14-60 (eff. before July 30, 1998).

Rather than read section 12-14-60 as a whole, the Department seeks to disconnect subsection (G) from the rest of the statute. For example, the Department argues that "although from a timing standpoint the statute allows the credit for any taxable year, this does not make the limitation expressed in subsection (G) annual." (Respondent's Br. at 17.) But this is not a chicken-or-egg dilemma. Subsection (G) is clear that it limits "the credit allowed under this section." S.C. Code Ann. § 12-14-60(G). And the Department agrees "the statute allows the credit for any taxable year." (Respondent's Br. at 17.) Thus, if the Credit is annual, the only logical and reasonable conclusion based on the plain statutory text is that the limitation must also be annual absent language to the contrary.

Not only does the Department read subsection (G) in isolation from the rest of the statute, but it also attempts to muddle the statute's plain language by cherry-picking isolated phrases from different subsections of the statute. For example, the Department claims that it "has allowed Duke to claim the tax credit 'for any taxable year' as part of its annual corporate income tax return." (Respondent's Br. at 17.) But, it also claims that "the limitation on the tax credit is not determined by the fact that the credit is taken as part of a requirement to annually file a tax return." (*Id.*) This is demonstrably false. As the ALC concluded, section 12-14-60 "plainly allows a taxpayer to **earn and** apply the tax credit **every year**." (R. p. 10 (emphasis added).) Therefore, the statute allows Duke Energy not only to "claim" the Credit "for any taxable year," but also to earn the Credit "for any taxable year."[2]

[2] The Department further states that "it is against all logic that all tax credits are always allowed to be computed annually without limitation." (Respondent's Br. at 17.) Duke Energy is not arguing that all South Carolina tax credits are always allowed to be computed annually without limitation. There are multiple South Carolina credit that apply a lifetime limitation. (Appellant's Br. at 36-37.) However, these credits specifically state that the limitation is lifetime and these annual credit limitations apply to a specific project, facility, or affiliated group. (*Id.*) In contrast, section 12-14-60 is different. The credit is calculated on a per-taxpayer, per-year basis and the limitation is

The Department next claims that its interpretation of the Credit Limitation is correct because the title to the 1998 legislation enacting the Credit Limitation contained the word "total," a term that does not appear anywhere in section 12-14-60. (Respondent's Br. at 14.) The Department's contention is misplaced.

First, "[f]or interpretative purposes, the title of a statute and heading of a section are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, but they cannot undo or limit what the text makes plain." *Garner v. Houck*, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993). The title and headings of a bill "may not be construed to limit the plain meaning of the text." *Id.* The Department agrees the text of section 12-14-60 is plain and unambiguous. (Respondent's Br. at 13.) Thus, the Department's reliance on the title of the 1998 legislation is of no consequence.

In any event, the ALC dismissed the Department's argument "because 12-14-60(G) could still be read to refer back to § 12-14-60(A)(1), in which case the word 'total' could simply mean the entire or whole credit for 'any taxable year.'" (R. p. 17.) This Court should do the same.[3]

## II. The Department's attempt to replace its longstanding practice with its new audit position violates the well-established principle of legislative acquiesce.

For more than fifteen years the Department instructed utility taxpayers, through duly published tax forms, that they can claim up to $5 million of the Credit for each taxable year they invest in the State. (Appellant's Br. at 9-10.) The Department's position was well known by

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calculated on a per-entity basis. It is not calculated based on a specific project, facility, or affiliated group. Section 12-14-60 contains no language indicating that the limitation is lifetime. Subsection (A) specifically requires calculation of the credit annually and thus because subsection (G) references subsection (A), the credit limitation must be read as a limitation imposed on the annual credit calculation.

[3] "Total" could also refer to the total amount of aggregate credit from the various types of property specified in subsection (A)(2).

taxpayers, enforced by its audit staff, and openly published for all to see. (Appellant's Br. at 10-11.)

Indeed, prior to this dispute, the Department reissued the Credit tax forms eleven times and every single time, it prescribed the same instructions and a detailed formula that instructed taxpayers that they can earn and use on their tax return up to $5 million of the Credit **per year**. (Appellant's Br. at 7-9.) The Department audited Duke Energy and applied the Credit Limitation as an annual limitation. (*Id.* at 11.) The Department's longstanding guidance and practice are entirely consistent with the plain text of the Credit statute, as discussed above, and further its purpose to incent economic investment in the state every year.

The Department now claims that its fifteen-year policy – and all of the guidance it provided to taxpayers during that period – was not binding on it because it was allegedly not reviewed by its Policy Group.[4] Effectively, the Department argues it is entitled to **retroactively** replace that longstanding policy with a new policy, developed during its audit of Duke Energy and only made known to taxpayers when Duke Energy appealed the Department Determination in 2019. The lack of diligence and transparency associated with the Department's change in its application of the Credit Limitation is simply stunning.[5]

The Department's policy is strongly presumed to have been approved by the Legislature. *See, e.g., Ryder Truck Lines, Inc. v. S.C. Tax Comm'n,* 248 S.C. 148, 152-153, 149 S.E.2d 435, 437 (1966) ("we would not be justified in overturning the commission's long continued application

[4] The Department's "Policy Group" is really just a single individual as the Department admitted that its General Counsel, its Director, and other senior personal were unaware that the Department's position regarding the interpretation of the Credit Limitation was being revisited or even discussed. (Appellant's Br. at 2.)

[5] The Department's actions are made worse by the disclosure of Duke Energy's confidential information to legislative staff in this case when it attempted to influence the legislature's views on the application of the Credit limitation. (Appellant's Br. at 14-15.)

of the statute to which the legislature has given at least implied assent");[6] *Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) ("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."); *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). Although section 12-14-60 has been amended several times since its enactment, the language of subsection (G) has remained unchanged since the time the Credit Limitation was enacted in 1998 and the Department's written guidance and practice of instructing utility taxpayers that they are entitled to earn up to $5 million of the Credit every year have remained unchanged since that time.

The Department claims that the Legislature was not aware of its longstanding instruction that the Credit Limitation was an annual limitation. (Respondent's Br. at 25, 29.) However, the record in this case shows the opposite is true. The Department's policy was clearly laid out in tax forms that the Department published each year. (Appellant's Br. at 9-10.) These tax forms contained specific instructions regarding the application of the Credit Limitation. (*Id.*) As a matter of practice, the Department expected taxpayers to follow the instructions on the tax forms to determine how much Credit they were entitled to earn every tax year. (*Id.*)[7]

[6] Contrary to the Department's argument, the South Carolina Supreme Court has applied the rule of legislative acquiescence to the Department's longstanding practice in cases where the Department did not issue any written guidance, let alone "public policy documents." (Respondent's Br. at 28-29.) *See, e.g., Ryder Truck Lines.*

[7] The Department's suggestion that the fact that the tax form stated that the Credit is limited to "no more than five million dollars" was an indication that the limitation was a lifetime limitation is particularly disingenuous because it ignores the rest of the form, which the Department itself admitted applied the limitation on an annual basis (Respondent's Br. at 22; Appellant's Br. at 9.)

In addition, the Department applied its instructions on audit to all utility taxpayers. And the Department's guidance and practice were in effect for such a long period of time that they were well known to the South Carolina Revenue and Fiscal Affairs Office ("RFA")[8] and the South Carolina Senate. (Appellant's Br. at 13-14.) How much more knowledge could the legislature have had? The Department's longstanding position was published, applied on audit, and made known to the RFA.[9]

The South Carolina Supreme Court has previously opined that "undated tax worksheets" express the Department's "opinion" and interpretation of the law and "will be accorded the most respectful consideration." *See CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. at 77, 716 S.E.2d at 882. Therefore, the Department's claim that the Credit Forms did not form its longstanding interpretation of the Credit Statute is not only disingenuous, but it is inconsistent with Supreme Court precedent.

In an attempt to wiggle out of its own past practices and draw attention from the record in this case, the Department mischaracterizes Duke Energy's position. Nowhere in its brief does Duke Energy claim that "the Department's credit form prior to 2014 is dispositive of the meaning of the credit limitation imposed by § 12-14-60." (Respondent's Br. at 24.) It is, however, substantial

[8] In its March 20, 2017 Fiscal Impact Statement, the RFA 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).)

[9] The Department argues that during the 2017-2018 legislative session, ". . . the General Assembly considered language which would have specifically changed the limitation from a lifetime to an annual basis. . . " (Respondent's Br. at 5.) However, this claim contradicts statements from the RFA and South Carolina Senate stating that S.0428 was a **clarifying** amendment and that the Department applied the limitation annually. (Appellant's Br. at 13-14.)

evidence of the Department's longstanding interpretation, policy and practice to which the Legislature has acquiesced and which should be given great weight. *See CFRE, LLC*, 395 S.C. at 77, 716 S.E.2d at 882.

Further, to justify its bait-and-switch approach, the Department argues that its prior audit of Duke Energy for the tax years 2011 through 2013, which applied the Credit Limitation annually, did not address "the specific issue of the application of the tax credit" because it "was not addressed in the Department Determination issued as a result of the undated audit, nor was it an issue in the dispute or a consideration in the resolution of the case." (Appellee's Br. 23.) Essentially, the Department claims that no stick should be placed in the Department's own audit history and workpapers. The Department's argument is nonsensical. If the Department conducts an audit, applies the Credit Limitation as an annual limitation, and a taxpayer agrees with that application of the Credit Limitation, there would never be a dispute and no need for a Department Determination on the issue.

## III. The ALC's Order misapplies the rules of statutory construction and conflicts with the purpose of the statute.

### a. The ALC misapplies the rule of strict construction.

The text of section 12-14-60 is plain and unambiguous; and the Department agrees. (Respondent's Br. at 13.) But even if the statute were ambiguous, the rule of strict construction "does not mean that [a court] will search for an interpretation in [DOR'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). Yet, that is precisely what the Order does. It essentially reads subsection (G) in isolation and out of context and ignores the Department's own longstanding instruction and practice. (Appellant's Br. at 21-30.) Moreover, the rule of resolving doubt in favor of a party is subordinate to the Department's longstanding

administrative practice and administrative practice is a weight in the scale that courts are bound to consider. *Ryder Truck Lines, Inc.*, 248 S.C. at 152-53, 149 S.E.2d at 437; *Stone Mfg. Co. v. S.C. Emp. Sec. Comm'n*, 219 S.C. 239, 249, 64 S.E.2d 644, 648 (1951). As discussed in Duke Energy's Brief, the ALC misapplied these principles of statutory construction. (Appellant's Br. at 30-33.)

The Department effectively claims that a strict construction of an isolated phrase in subsection (G)[10] makes the Credit Limitation a lifetime limitation. (Respondent's Br. at 32-33.) This argument is wrong because it misses the point that the entire statute must be read "as a whole" and "[w]ords in a statute must be construed in context." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016); *Eagle Container Co., LLC v. Cnty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895-896 (2008).

Moreover, the cases relied on by the Department in support of its strict construction argument are distinguishable from the present case. In *Home Medical Systems v. South Carolina Department of Revenue*, 382 S.C. 556, 677 S.E.2d 582 (2009), a strict construction against a sales tax exemption was consistent with the Department's longstanding construction of the exemption. Here, a strict construction against an annual Credit Limitation, as proposed by the Department, is inconsistent with the Department's own longstanding guidance and practice.

In *Centex International, Inc. v. South Carolina Department of Revenue*, 406 S.C. 132, 750 S.E.2d 65 (2013), and *C.W. Matthews Contracting Co. v. South Carolina Tax Commission*, 267 S.C. 548, 230 S.E.2d 223 (1976), the court concluded that strict construction against an application of a credit and deduction, respectively, was warranted because it was consistent with the stated legislative purpose of the relevant statute. Here, as explained below and in Duke Energy's Brief,

[10] The Department selectively points to the phrase "no more than five million dollars" in subsection (G) in support of its argument that "the credit limitation imposed by subsection (G) should be broadened beyond its plain language." (Respondent's Br. at 32-33.)

construing the Credit Limitation as a lifetime limitation conflicts with the stated legislative purpose of section 12-14-60. (Appellant's Br. at 33-35.)

In *TNS Mills, Inc. v. South Carolina Department of Revenue*, 331, S.C. 611, 503 S.E.2d 471 (1998), the South Carolina Supreme Court concluded that a taxpayer was not entitled to a property tax exemption because, although it qualified for the exemption, it did not properly complete the Department's tax form for the exemption. Here, it is undisputed that Duke Energy qualified for the annual Credit; that it properly completed and timely submitted the Department's credit forms; and that for over fifteen years, the Department's tax forms calculated the Credit Limitation annually. (Appellant's Br. at 9.)

Therefore, the strict construction rule does not support the Department's position and the Order.

**b. The ALC's construction of the Credit statute conflicts with the purpose of the statute.**

Contrary to the Department's claim, Duke Energy is not arguing "that it should be incentivized more, not less . . . ." (Respondent's Br. at 33.) Instead, Duke Energy's position is that "the 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. 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); *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.)).

The legislative purpose of the Credit 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." S.C. Code Ann. § 12-14-20. A credit that a taxpayer can earn year after year if it continues to make a capital investment in the state – such as the Credit in this case – effectuates the legislative purpose. Therefore, the Department's interpretation of the Credit as applied to utility taxpayers to the contrary is at direct odds with the Credit statute's purpose and defeats that purpose.

## IV. The Department's retroactive application of its new audit position violates Duke Energy's right to due process, the South Carolina Taxpayer Bill of Rights, and the principles of equity.

The Department retroactive application of the Credit Limitation violates South Carolina and federal constitutional guarantees of due process, and negatively impacts its customers in South Carolina. (Appellant's Br. at 38-39.)

Contrary to the Department's argument, the retroactive replacement of its longstanding policy with its new interpretation developed, on audit, in 2019 does not constitute sufficient notice to taxpayers. As a result, the Department actions violate the South Carolina Taxpayer's Bill of Rights. (Respondent's Br. at 39.) The Department's Credit Form that was in effect for over fifteen years gave no notice to utility taxpayers that the Credit Limitation was a lifetime limitation. Indeed, the opposite is true. The form plainly instructed taxpayers like 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 bound by a prior version of its credit form. . . ." (Respondent's Br. at 21.) This statement and the Department's actions are in direct conflict with the Department's obligations under the Taxpayers' Bill of Rights.

Furthermore, as explained in Duke Energy's brief, the Department will be unjustly enriched and should be estopped from retroactively applying its new audit position. (Appellant's Br. at 41-44.) The Department issues tax forms to notify taxpayers of their tax obligations and instruct them how to compute their tax liability. For the Department to now argue that it is not bound by its own guidance it provided for over fifteen years is fundamentally unfair to both Duke Energy in this action and other taxpayers that relied on the Department's statements.

Furthermore, when making investment decisions, Duke Energy relied on the Department's forms and other representations that the credit limitation is annual. (Appellant's Br. at 43.) Duke has optionality concerning whether to invest in South Carolina or other states and the availability of credits and the Department's representations concerning credits impact those investment decisions. (*Id.*) Thus, there should be no dispute that the Department consistently represented that the credit limitation is applied annually, that Duke Energy relied on this representation when making investment decisions, and that South Carolina received additional investments in the state because of the Department's misrepresentation.

## CONCLUSION

Based on the reasons set forth above and in its brief, Duke Energy respectfully requests that this Court reverse the ALC and grant the relief requested in Duke Energy's Brief.

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CERTIFICATE OF COUNSEL

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

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