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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 19-ALJ-17-0153-CC
Appellate Case No. 2020-001542

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

v.

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

THE SOUTH CAROLINA CHAMBER OF COMMERCE'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT, DUKE ENERGY CORPORATION

Pursuant to Rule 213, SCACR, the South Carolina Chamber of Commerce (the "Chamber") moves for leave to file an *amicus curiae* brief in this action urging this Court to reverse the decision of the Administrative Law Court ("ALC"). In that Order ("ALC's Order"), the ALC improperly held that the South Carolina Department of Revenue (the "Department") can retroactively change its interpretation of the tax law to limit investment tax credits to a *lifetime* amount of $5 million without any warning, public hearing, due process, or change in the law.

The Chamber is a leading voice and advocacy organization, with a mission of creating an environment in which the State of South Carolina and its businesses can prosper. The Chamber dates back to 1940, and for more than eighty years, it has been a trusted resource and advocate for South Carolina businesses. The Chamber's membership is comprised of businesses from across the State and across industries, from startups and family-owned businesses to multi-national

enterprises—all of whom call South Carolina home. The Chamber is a non-profit and non-partisan group that advocates for a fair, balanced, and predictable tax system. Through its advocacy, the Chamber identifies issues hindering South Carolina's business and economic growth and works to remedy them, including by filing *amicus curiae* briefs in appellate cases that affect its membership. The Chamber has a keen interest in advancing tax policy that is clear, administrable, and announced prospectively.

The Chamber's members are especially interested in ensuring that the South Carolina business community can rely on the Department of Revenue's longstanding interpretations of the tax law. The lack of consistent tax policies and the ability of revenue agents to retroactively change longstanding policies without the assent of the legislature, and without following the South Carolina Administrative Procedure Act ("APA"), makes future investment decisions difficult and undercuts confidence in the business climate more generally. Unfortunately, the ALC's Order in this case permits exactly the type of retroactive change in the Department's longstanding interpretation of the tax law that most concerns the Chamber's members.

For the foregoing reasons, the Chamber respectfully requests that the Court grant leave to present an *amicus curiae* brief. A copy of the Chamber's proposed *amicus curiae* brief is attached hereto as **Exhibit A** and is being conditionally filed with this motion in accordance with Rule 213, SCACR.

Respectfully submitted,

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EXHIBIT A

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AMICUS CURIAE BRIEF OF THE SOUTH CAROLINA CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT, DUKE ENERGY CORPORATION

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INTEREST OF AMICUS CURIAE

The South Carolina Chamber of Commerce (the "Chamber") is a leading voice and advocacy organization, with a mission of creating an environment in which the state of South Carolina and its businesses can prosper. The Chamber dates back to 1940, and for more than eighty years, it has been a trusted resource and advocate for South Carolina businesses. The Chamber's membership is comprised of businesses from across the state and across industries, from startups and family-owned businesses to multi-national enterprises—all of whom call South Carolina home. The Chamber is a non-profit and non-partisan group that advocates for a fair, balanced, and predictable tax system. Through its advocacy, the Chamber identifies issues hindering South Carolina's business and economic growth, and works to remedy them, including by filing *amicus curiae* briefs in appellate cases that affect its membership. The Chamber has a keen interest in advancing tax policy that is clear, administrable, and announced prospectively.

The Chamber's members are especially interested in ensuring that the South Carolina business community can rely on the Department of Revenue's longstanding interpretations of the tax law. The lack of consistent tax policies and the ability of revenue agents to retroactively change longstanding policies without the assent of the legislature, and without following the South Carolina Administrative Procedure Act ("APA"), makes future investment decisions difficult and undercuts confidence in the business climate more generally. Unfortunately, the Administrative Law Court's ("ALC") Order in this case permits exactly the type of retroactive change in the Department's longstanding interpretation of the tax law that most concerns the Chamber's members.

For at least fifteen years, Duke Energy Corporation ("Duke") made investments in South Carolina that qualified for investment tax credits under S.C. Code Ann. § 12-14-60 (the "Credit").

For each of the years that Duke made these investments, the Department advised Duke, and other taxpayers, that they were able to claim up to $5 million in Credit *each year* ("Credit Limitation"). After all those years, without any warning, public hearing, due process, or change in the law, the Department's audit staff advised Duke that its Credit cannot exceed a total amount of $5 million for its lifetime. The Department further claimed that its new interpretation applied retroactively to 1998 when the Credit Limitation was enacted. This new interpretation directly conflicted with the Department's own published policy, which it distributed to taxpayers, and with the manner in which the Department previously interpreted the Credit on audit.

The Chamber's primary concerns with the ALC's Order are that it ignores state law and enables unfair and unpredictable tax administration. First, the ALC's Order sweeps aside the doctrine of legislative acquiescence, which provides that where Department policies have been in effect for a long period of time and are well known, those policies take on the force of law as the legislature is deemed to have acquiesced to the policy. In this case, the Department's policy of instructing taxpayers to claim up to $5 million in Credit for each year in which qualified investments were made was in place for over fifteen years, was published on an annual form issued by the Department, and was applied consistently by the Department's audit staff. This is a textbook case of legislative acquiescence and one that the ALC's Order simply ignored.

Second, the ALC's Order allows the Department to unilaterally undo a longstanding policy and then retroactively apply that policy with no advance notice to taxpayers, no compliance with the APA, and no due process. This is in direct conflict with numerous legal principles as well as South Carolina's long-standing public policy of fostering economic growth and development. Moreover, this type of tax administration deprives the Chamber's members of both the finality and predictability of calculating their tax liability year-to-year and their ability to accurately determine

the economic benefits of further-investing in the State. Without limits on the Department's ability to randomly change its longstanding, published positions, taxpayers are left guessing at how to interpret the tax law. For these reasons, the Chamber urges the Court to reverse the decision below.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The Chamber concurs in and adopts the "Statement of Issues on Appeal", the "Statement of the Case", the "Statement of the Facts", and the "Standard of Review" set forth by Appellant in its Final Brief for Appellant, filed on July 21, 2021 (hereinafter "Appellant's Brief"). (Appellant's Brief 5-18.)

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case asks the Court to determine whether Duke's Credit for the tax years 2010 through 2014 was limited to $5 million in total, where the plain text of the Credit statute and the Department's longstanding interpretation of the statute provide that Duke is entitled to claim the Credit up to $5 million *per tax year*. As part of its inquiry, the Court must decide whether the South Carolina Legislature is deemed to have acquiesced to the Department's longstanding interpretation, which provided that a taxpayer making qualified investment is entitled to $5 million of Credit *annually*; and whether the Department can *retroactively* change its fifteen-year application of the Credit and replace it with a new position it adopted for the first time during a subsequent audit of Duke. Finally, the Court must decide whether the Department can actively advise taxpayers on the Department's tax forms and during prior audits that they are allowed to claim up to $5 million in Credit each year on qualifying investments, but then fifteen years later, decide that Duke is only entitled to claim $5 million in total Credit for all tax years combined.

The Department does not dispute that all of the foregoing is true. It does not dispute it continuously published tax forms instructing taxpayers they were eligible to claim up to $5 million

a year in Credits; it does not dispute that it conducted audits and concluded that taxpayers were eligible to claim up to $5 million per year in Credits; and it does not dispute that after fifteen years, it changed its position without prior notice and without following the APA. Its defense is simply that it made a mistake for more than fifteen years, and it is allowed to change its policy retroactively after certain Department employees reviewed the applicable statute and reached a different conclusion than the one others within the Department had previously reached.

Certainly the Department is vested with the authority to interpret the tax law and the Chamber does not suggest that the Department cannot change its views. However, in a case like this one, where the Department's position was longstanding and well-known, South Carolina law demands either a change in the tax law on a prospective basis only or at least a notice and hearing on such a significant departure from long-settled policy. Indeed, where concerns exist with regard to the interpretation of the tax law, the Department has many options, including undertaking a formal rule making process under the APA or seeking legislative clarification. But rather than undertake or provide any due process, the Department instead simply denied most of Duke's Credits. This type of behavior is inconsistent with a business-friendly state like South Carolina and is of substantial concern to the Chamber and its members.

In addition to the policy implications associated with the ALC's Order and its failure to correctly apply the doctrine of legislative acquiescence, the decision is rife with additional legal errors including the ALC's refusal to acknowledge due process constraints on retroactive taxation and its misinterpretation of South Carolina's basic rule of law.

I. The ALC's Order Erroneously Interprets and Misapplies the Doctrine of Legislative Acquiescence.

The Department's new interpretation of the Credit Limitation is directly at odds with the Legislature's decision not to amend that statutory provision. For fifteen years, the Department

regularly published guidance indicating that taxpayers could claim up to $5 million in annual Credits. It also audited taxpayers and advised them that they could claim up to $5 million in annual Credits. Its position was longstanding, open, and well-known. Given the multiple amendments to the Credit statute for other purposes over the last twenty years, the Legislature would have been well aware of the Department's position. At a minimum, the Legislature was made aware of the position in 2017 when it considered amending the Credit Limitation. The Legislature ultimately decided to neither amend the statute, nor did it instruct the Department to change its longstanding position. Yet, in ruling in the Department's favor, the ALC's Order simply dismissed the longstanding rule of legislative acquiescence even though it acknowledged that the statute was ambiguous.

It is black-letter law in South Carolina that if the Legislature does not amend a statute to overrule a well-known administrative agency's interpretation, the Legislature is deemed to have acquiesced to the agency's interpretation. *See, e.g.*, *Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950). In articulating its view of legislative acquiescence, the South Carolina Supreme Court has declared:

> We have held in many cases 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.

Id.

In *Etiwan*, the taxpayer attempted to charge off a bad debt on its income tax return based on the estimate it had available, while the definite amount was not available until after the end of the tax year. *Id.* The South Carolina Supreme Court found that the taxpayer's estimation was not allowed by the statute, and the Tax Commission's (the forerunner to the Department) longstanding

interpretation of the statute should not be unsettled, and the taxpayer knew its obligations under the Tax Commission's interpretation. That is the opposite of the Department's current administration of the Credit Limitation.

The Supreme Court's decision in *Etiwan* is accompanied by a litany of other cases that have adopted and applied the doctrine of legislative acquiescence in South Carolina. Recently, the Supreme Court held that in the context of property tax assessments and reassessments, the assessor's decade-long assessment practice was entitled to deference, as that interpretation survived numerous prior reviews before the ALC and the South Carolina Court of Appeals. *Charleston Cnty. Assessor v. Univ. Ventures, LLC*, 427 S.C. 273, 288, 831 S.E.2d 412, 420 (2019).

In *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984), the Commission disallowed an individual taxpayer from taking certain deductions on their South Carolina income tax return based on its interpretation and application of a proviso added to South Carolina law. *Id.* at 494, 316 S.E.2d at 387. The South Carolina Supreme Court rejected the Commission's new interpretation, instead opting to follow the Commission's prior regulation which allowed just such a deduction: "The 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. We agree with the Commission's initial construction of the statute." *Id.* at 495, 316 S.E.2d at 387-88 (citing *Etiwan*).

The Court of Appeals has also cited to legislative acquiescence as a useful tool. *See, e.g.*, *S. Bell Tel. & Tel. Co. v. S.C. Tax Comm'n*, 297 S.C. 492, 495, 377 S.E.2d 358, 361 (Ct. App. 1989) (noting that the Tax Commission's long-standing statutory interpretation should be

"accorded the most respectful consideration" (quoting *Dunton v. S.C. Bd. of Examiners in Optometry*, 219 S.C. 221, 223, 353 S.E.2d 132, 133 (1987))).

Similar to its South Carolina counterpart, the United States Supreme Court has also used legislative acquiescence as a valuable interpretive tool when addressing long-standing agency interpretations. For example, in *Massachusetts Mutual Life Insurance Company v. United States*, 288 U.S. 269 (1933), when the Court was tasked with reviewing the Treasury Department's interpretation of Revenue Act of 1926, the Court looked to Congress's reenactment of the law in question without alteration, an action the Court found to be "taken with knowledge of the construction placed upon the section by the official charged with its administration." *Id.* at 273. The Court concluded, "[i]f the legislative body had considered the Treasury interpretation erroneous it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute." *Id.*

The U.S. Supreme Court's application of legislative acquiescence is not unique to its holding in *Massachusetts Mutual*. *See, e.g.*, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740 (1996) ("[A]gency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist."); *White v. Winchester Country Club*, 315 U.S. 32, 41 (1942) ("[S]ubstantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute."); *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 492-93 (1931) ("The reenactment of the statute by Congress, as well as the failure to amend it in the face of the consistent administrative construction, is at least persuasive of a legislative recognition and approval of the statute as construed."); and *National*

Lead Co. v. United States, 252 U.S. 140, 145 (1920) (affording "great weight" to the Treasury Department's almost forty-year interpretation and administration of a law).

None of these cases support the principle advanced by the ALC's Order—that the Department's longstanding policy is only afforded great weight when it is advanced by the Department. Nor do they support the Department's notion that only the most recent pronouncement is entitled to deference. Rather, courts routinely look to the length of the agency's interpretation and whether the Legislature has blessed that interpretation—both of which support the Department's prior application of the Credit Limitation.

Despite the long history of South Carolina courts' as well as the U.S. Supreme Court's application of this well-settled and judicially affirmed principle, the ALC's Order gave legislative acquiescence to the Department's interpretation no weight and offered no cogent reason for simply dismissing Duke's claims in this regard. Instead, it employed circular logic, agreeing that the Department's long-standing interpretation of the Credit Limitation was incorrect simply because the Department said the prior interpretation had always been incorrect—without any change in the law or public pronouncement to the contrary.

Here, the Legislature amended the Credit Limitation in 1998 to increase the cap from $1 million to $5 million, and despite several subsequent amendments to section 12-14-60 generally, the Credit Limitation provision remained unchanged. Throughout those amendments, the Department's interpretation and application of the Credit Limitation was consistently applied on an annual basis. That interpretation dates back to the Department's first administration of the Credit Limitation and its promulgation of the requisite form to claim the Credit, Form TC-11.

Rather than claiming it is indeed rebuking its prior guidance, the Department instead advocates that it in-fact has never provided guidance on the statute in question. Taxpayers,

however, are required to follow the Department's rules, regulations, and procedures. Among those are the forms and instructions provided by the Department. On the forms in question, the Department provided eleven revisions, all of which required taxpayers to calculate and apply the Credit Limitation on an annual basis. To say that its instructions on its forms are not guidance to taxpayers is perplexing to say the least.

The ALC's Order ignores the Legislature's decision to leave the Credit Limitation unchanged for over fifteen years, as well as the Department's own consistent interpretation during that time and its guidance to taxpayers via Department forms. Instead, the ALC's Order assents to the Department's rejection of its own lengthy precedent in favor of a policy adopted during the Department's audit of Duke. None of the cases discussed above support the principle advanced by the ALC's Order, that the Department's policy is only afforded great weight when it is advanced by the Department. Nor do they support the Department's notion that only the most recent pronouncement is entitled to deference.

Instead, the above discussed cases provide that the long-standing interpretation and administration of statutes by the agency charged with their administration, and not expressly changed by the Legislature, are entitled to significant weight. The Legislature is the sole creator of statutory text, and only the Legislature has the ability to amend or alter the text—which it may do in response to how an administrative agency has chosen to interpret and administer the law. The Legislature's failure to amend its statutory text is proof of its assent to how the administrative agency has chosen to interpret and apply the law. The Legislature's acquiescence in this case is strong proof that the Department's prior interpretation is the one envisioned by the Legislature. Had the Legislature wanted to change the Credit Limitation from an annual limitation to a lifetime one in 2014, or in any of the years since its enactment in 1998, it had every opportunity to do so.

Instead, it declined to do so, thereby acquiescing to the Department's longstanding interpretation of the Credit Limitation statute.

Accordingly, the doctrine of legislative acquiescence requires that the Department's longstanding interpretation of the Credit Limitation be given weight, and this Court should reverse the ALC's Order.

II. The ALC's Order Offends Due Process Principles.

As the South Carolina Supreme Court has held, "[t]he fundamental requirements of due process include notice . . . ." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). Lack of prior notice of the rules of an administrative agency creates a process that is "arbitrary and . . . affect[s] fundamental fairness . . . ." *McIntyre v. Sec. Comm'r of S.C.*, 425 S.C. 439, 452, 823 S.E.2d 193, 199-200 (Ct. App. 2018), *reh'g denied* 2019 S.C. App. LEXIS 218 (Ct. App. Feb. 19, 2019), *cert. denied* (June 28, 2019) (*citing* 1 William Blackstone, Commentaries *46, "[a]ll laws should be therefore made to commence in futuro, and be notified before their commencement . . . .")).

Due process also requires the Department to abide by the mandates provided in the APA. The APA requires public notice, the opportunity for public comment, and public hearings when new regulations are being considered. S.C. Code Ann. § 1-23-110. The Department provided no such opportunities to taxpayers prior to changing its interpretation of the Credit Limitation.

Under the APA, a regulation means "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency." *Id.* § 1-23-10(4). A regulation subject to the APA only requires that a "binding norm" be created by the agency's actions, such that it "so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion." *See Myers v. S.C. Dep't Health &*

Human Servs., 418 S.C. 608, 620, 795 S.E.2d 301, 307-08 (Ct. App. 2016) (quoting *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 475-76, 636 S.E.2d 598, 610 (2006)).

Yet, the ALC's Order affirms the Department's ability to retroactively "disclaim," without prior notice, its longstanding interpretation, which has been in place since the enactment of the Credit Limitation in 1998 (and has been published to taxpayers via Department forms and instructions), and apply its novel interpretation retroactively, going all the way back to 1998. Further, the ALC's Order sanctions the Department ignoring the APA requirements, as the Department's Credit Limitation interpretation established a "binding norm" regarding taxpayers' ability to apply the Credits. A binding norm is a regulation subject to the APA's required notice and comment rulemaking procedures—which the Department ignored. The ALC's Order cannot be reconciled with fundamental principles of due process and should be reversed.

III. The ALC's Order Is Based on Numerous Statutory Construction Errors.

The ALC's Order affirming the Department's new interpretation of the Credit Limitation contains numerous legal flaws, as explained in Appellant's brief. (Appellant's Brief 18-41.) First, in concluding that the Credit Limitation is ambiguous, the ALC's Order violates fundamental canons of statutory interpretation that require the ALC to consider the whole text of the Credit statute and relevant legislative history in interpreting the Credit Limitation. Instead, the ALC's Order reads the Credit Limitation in total isolation. *See S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991) ("Clearly, words in a statute must be construed in context.").

Second, in concluding that the Credit Limitation must be automatically construed against Duke, the ALC's Order violates the well-settled principle of strict construction which does not require a court to search for an interpretation in the Department's favor. *Se.-Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981) ("This rule of strict construction simply

means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor."). Yet, that is precisely what the ALC's Order does in concluding that the Credit Limitation must be construed in the Department's favor.

Third, the ALC's Order misunderstands the strict construction rule which is subordinate to the Department's longstanding administrative interpretation to which the Legislature has assented to at least implicitly. *See Inman v. Life Ins. Co. of Va.*, 223 S.C. 98, 102, 74 S.E.2d 423, 423-24 (1953). Yet, the ALC's Order makes the Department's longstanding interpretation in this case and the Legislature's acquiescence to that interpretation subordinate to the strict construction rule. *See Wingfield v. S.C. Tax Comm'n*, 134 S.C. 251, 131 S.E.2d 421, 423 (1926).

Furthermore, as Duke sufficiently explains, the text of the Credit statute is plain and the Department's interpretation is not based on the plain text of the Credit statute and the Credit Limitation provision, which, as relevant in this case, have remained substantially the same since their enactment in 1996 and 1998, respectively. (Appellant's Brief at 18-21).

Accordingly, because the ALC's Order is based on numerous errors in statutory construction, it reaches an erroneous conclusion that this Court should reverse.

IV. The Administrative Law Court's Interpretation of the Credit Limitation Is Unsound Tax Policy and Makes Tax Planning by the Chamber's Members Impossible.

In addition to utilizing the doctrine of legislative acquiescence to arrive at its conclusion, the South Carolina Supreme Court's *Etiwan* decision also argues in favor of avoiding unnecessary "administrative confusion never intended by the general assembly." *Etiwan*, 217 S.C. at 360. On the contrary, the Department's new interpretation of the Credit Limitation, and its retroactive elimination of the Credits taxpayers accrued in prior years only results in confusion, which strikes at the heart of the Chamber's desire for a fair, balanced and predictable tax system.

This confusion is multiplied by the Department's disavowal of its previous guidance as being unofficial, leaving taxpayers uncertain how to proceed. If taxpayers cannot trust the returns and forms provided by the Department, what can they trust? It is not the providence of sound tax administration to force taxpayers to question whether the directions and guidance provided by the Department continuously for years, could be renounced with no notice, which in this case resulted in retroactively eliminating years' worth of tax benefits. The Department's disavowal of prior guidance is anathema to sound tax policy and administration.

Taxpayers locate in South Carolina because of its business-friendly climate. The State has a long history of providing tax credits and other incentives to taxpayers as a means of encouraging growth and broadening the State's tax base. These credits and incentives bring new businesses to our State, which expands the State's economy and creates jobs both directly and indirectly from the incentivized investments. The effect of the ALC's Order negatively impacts these taxpayers, as well as posing a direct threat to the State's business-friendly reputation and its continued economic growth.

The Department has required taxpayers to file a Form TC-11 to claim their Credit and apply the Credit Limitation since 1998. That form was amended eleven times between 1998 and 2014, and with each amendment the Credit Limitation was applied on an annual basis. Form TC-11 was the Department's only interpretation of the Credit Limitation, so taxpayers were left with no alternative but to interpret Form TC-11 as the Department's official guidance. Now the Department has embarked on this massive policy shift, with no notice, just a revision to Form TC-11. Forms may not have the same force and authority as laws, however, clear and balanced tax administration requires that taxpayers be able to rely on forms promulgated and published by the Department.

The effects of the Department's testimony are even more alarming for the Chamber's members. Apparently, the Department's Policy Department had never "officially reviewed" Form TC-11 until 2013 when it became an issue related to Duke's audit. (R. p. 18.) It was only at this point that it was determined that Form TC-11 did not reflect the Department's understanding of the Credit Limitation, whereupon Form TC-11 was revised—again.

According to the ALC Order's interpretation of the Department's conduct, the Department is allowed to both (i) represent its interpretation of a law for more than fifteen years, and upon an audit, revise that interpretation, and (ii) assert that there was in fact no formal interpretation, allowing the Department to issue its first "official" interpretation using the same form as its previous "unofficial" interpretations. The Department cannot be permitted to change the rules in the middle of the game, while providing no notice and no cognizable reason for the change after fifteen years.

The approach advocated by the Department in this litigation, results in unsound tax administration, and puts all of South Carolina's taxpayers—including the Chamber's members—in a quandary. What are taxpayers to do, follow the Department's present guidance or attempt to anticipate how that guidance may change even without a change in the law? That position is untenable, but is the position blessed by the ALC's Order.

Instead, this Court should look to how both the Legislature and the Department have conducted themselves for more than fifteen years, which has yielded sound and predictable policy. If the Department desires to change its policy, it should not be allowed to do so simply by stating its prior policy was not official.

The Department's actions may be a harbinger of things to come, and how it will treat the State's business community. Rather than providing official interpretations of the laws it

administers, the ALC's Order encourages the Department to govern through unofficial guidance, where it is allowed to replace its interpretation of laws at a moment's notice during a taxpayer's audit and never be bound by those prior interpretations. This runs counter to every basic tenant of sound tax policy. Thus, for the foregoing reasons, the Court should reverse the ALC's Order.

CONCLUSION

The ALC and the Department erred by interpreting the Credit Limitation on a lifetime basis rather than on an annual basis in the context of the statute. The ALC's Order ignores the South Carolina Legislature's acquiescence to the Department's long-standing interpretation of the Credit Limitation as applying annually, producing poor tax policy and unclear tax administration. Accordingly, the Chamber respectfully requests that this Court reverse the ALC's Order.

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Charleston, South Carolina
January 5, 2022

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 19-ALJ-17-0153-CC
Appellate Case No. 2020-001542

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

v.

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

CERTIFICATE OF COMPLIANCE

I certify that the Amici Curiae Brief of the South Carolina Chamber of Commerce (the "Chamber") in Support of Appellant Duke Energy Corporation, attached to the Motion for Leave to file the same in this matter, complies with Rule 211, SCACR, to the extent made applicable by Rule 213, SCACR.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I have served via electronic mail a copy of the foregoing **South Carolina Chamber of Commerce's Motion for Leave to File *Amicus Curiae* Brief in Support of Appellant, Duke Energy Corporation; the South Carolina Chamber of Commerce's *Amicus Curiae* Brief in Support of Appellant, Duke Energy Corporation (conditionally filed); and Certificate of Compliance** on parties' counsel of record at the following e-mail addresses:

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The Honorable Jenny Abbott Kitchings
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RE: Duke Energy Corporation v. South Carolina Department of Revenue
Appellate Case No.: 2020-001542
Our File No.: 006247/01501

Dear Ms. Kitchings:

Enclosed for filing via e-mail in the above matter, please find the South Carolina Chamber of Commerce's Motion for Leave to File *Amicus Curiae* Brief in Support of Appellant, Duke Energy Corporation; the conditionally filed *Amicus Curiae* Brief of the South Carolina Chamber of Commerce in Support of Appellant, Duke Energy Corporation; Certificate of Compliance; and a Proof of Service. Enclosed via U.S. Mail is a check in the amount of $50.00 as the required filing fee.

By copy of this letter to all counsel, we are hereby serving them with a copy of the above documents. We ask that, at your convenience, you return a copy of the attached documents to us bearing the Court's file stamp.

Thank you for your assistance, and please do not hesitate to contact us should the Court require any additional information.

With kind regards,

Bryson M. Geer

BMG:ls
Enclosures
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