THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Administrative Law Judge

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

Duke Energy Corporation..... Appellant,

v.

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

REPLY BRIEF OF APPELLANT

Burnet R. Maybank III
James Frederick Reames III
Tanya A. Gee
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
PO Drawer 2426 (29202)
Columbia, SC 29201
(803) 771-8900

Eric S. Tresh, *Pro Hac Vice*
Maria M. Todorova, *Pro Hac Vice*
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street, NE, Suite 2300
Atlanta, GA 30309
(404) 853-8000

Jeffrey A. Friedman, *Pro Hac Vice*
SUTHERLAND ASBILL & BRENNAN LLP
700 Sixth St NW #700
Washington, DC 20001
(202) 383-0718

Attorneys for Duke Energy Corporation

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATUTES

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

INTRODUCTION

The South Carolina Department of Revenue ("Department") asks this Court to selectively defer to its interpretations of South Carolina law. On the one hand, the Department advocates for deference to its purported administrative policy with regard to the Gross Receipts Issue and Electricity Issue. On the other hand, the Department claims to have a long-standing policy with regard to the Waiver Issue even though a different policy was evidenced by its own forms, bulletins, and the sworn testimony of the Department's senior-ranking officials.

The inconsistencies in the Department's arguments do not stop there. Several times in its briefs to the South Carolina Administrative Law Court ("ALC") and its brief to this Court, the Department argued that the plain meaning of South Carolina statutes should control. Yet with regard to the meanings of "gross receipts" and "total sales," the Department asks this Court to disregard the plain meaning of the statutes. Even though the term "gross" is used eighty-five times in the South Carolina Code and means "all" in every other instance, in this case the Department claims that "gross" is not really "gross."

The Department's positions obfuscate the important legal questions presented in this appeal. The Department cannot unilaterally breach contracts it entered into that kept open the statute of limitations for both the Department and the taxpayer. The Department cannot retroactively apply law changes that limited the statutory definition of "sales" and "gross receipts" and changed the effect of IRS federal audit adjustments. The Department cannot ignore its own application of "manufacturing" and the substantial evidence that demonstrates that Duke Energy is a service provider and does not manufacture goods. For these reasons and those set forth in Duke Energy's Brief and below, Duke Energy respectfully requests that this Court reverse the ALC's decision and

grant the relief requested in the Duke Energy's Brief.

ARGUMENT

I. THE DEPARTMENT DISREGARDED ITS LONG-STANDING INTERPRETATION OF THE LAW AND IGNORED FACTUAL ISSUES WHICH RENDER THE ALC'S SUMMARY JUDGMENT DECISION IMPROPER.

A. The Department makes inconsistent arguments regarding the effect of its policies.

For over twenty years, two of the Department's most senior officials represented to Duke Energy that Form FS-43 ("Waivers") extended the time period for Duke Energy to file South Carolina income tax refund claims.[1] The Department's officials' representation was "[c]onsistent with its ***longstanding administrative position***, . . . [that] [i]f the taxpayer agrees to the Department's request that a waiver of the time limitations on assessments be extended, . . . the Department will also consider the ***time within which a taxpayer may file a claim for refund to be extended until the agreed upon date.***" S.C. Rev. Proc. Bulletin No. 00-3, 2000 S.C. Tax LEXIS 144, at *6-7(S.C. Dep't of Rev. Dec. 4, 2000).[2] (Emphasis added.)

The ALC disregarded and gave no weight to the Department's long-standing positions with regard to the effect of Form FS-43. The ALC chose not to hold an evidentiary hearing to determine whether the acts of the Department's senior officials and the Department's published guidance regarding the Waiver Issue constituted long-standing policy that should be afforded deference by the court. The consequences of the

---

[1] *See* Davant Aff. ¶¶ 6, 14, 19 ("[T]he purpose of Form FS-43 was to allow the Department and the taxpayer by agreement to extend the time for assessment or refund."); Anderson Aff. ¶¶ 10, 12, 13 ("To encourage a taxpayer's agreement to extend the time to assess additional tax, the Department intended that Form FS-43 similarly extend the time for a taxpayer to file a refund claim or for the Department to grant a refund.") Collectively, these officials had been with the Department over seventy years.

[2] This Revenue Procedure Bulletin is almost identical to S.C. Rev. Proc. Bulletin No. 95-5 (S.C. Dep't of Rev.), which it superceded.

ALC's ruling are dramatic – South Carolina taxpayers will no longer be able to reasonably rely on the Department's interpretations without fear that these interpretations could be retroactively changed in an instant when it supports the Department's purposes.

The Department has argued throughout this case that its long-standing views should be entitled to deference by the Court. (Respondent's Brief at 26-28, 46-47.) The ALC ruled in this case that, with regard to the Gross Receipts Issue and the Electricity Issue, the Department's alleged long-standing position is entitled to deference, even when evidence of such a position is found in a "secret" audit manual that was never published or distributed outside of the Department. Duke Energy acknowledges that the Department's long-standing administrative positions are entitled to deference when they are published and are consistent with South Carolina tax law. Nonetheless, the ALC afforded deference to the Department's claimed administrative position that did not exist (or was not memorialized or communicated), and to administrative positions that are inconsistent with South Carolina law.[3]

B. Under the plain language of the South Carolina statutes, Duke Energy's refund claims for the 1978 through 2001 Tax Years ("Tax Periods at Issue") were timely.

South Carolina law authorized the Department to extend the applicable limitations period for both assessments and refund claims. (Appellant's Brief at 11-15.) Specifically, former S.C. Code Ann. § 12-54-80 explicitly authorized the Department and a taxpayer to enter into an agreement to extend the limitations period applicable to assessments for underpayments or overpayments, prior to the expiration of the limitations

[3] The Department's former employees disagree on the Department's long-standing policy regarding the effect of the Waivers. (*Compare* R. Urban Dep. Tr. 10:1-2; 10:10-11, 59:14-25, 60:1-2, *with* Davant Aff. ¶¶ 6, 14.) The disagreement over whether the Department actually waived the statute of limitations in this case is "***a question of fact for the finder of fact***" and thus precludes summary judgment. *City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 234-35, 599 S.E.2d 462, 466 (Ct. App. 2004) (emphasis added).

period. And that is precisely what the Department and Duke Energy did year after year, for more than two decades. (McCarver Aff. ¶ 8; Davant Aff. ¶¶ 6, 14, 19; Anderson Aff. ¶ 10.) At no point during any of the tax years at issue did the Department refuse to sign a Waiver because it lacked its authority to do so.

The Department's position is inconceivable: that the Department and Duke Energy entered into contracts on a serial basis to extend the statute of limitations that were designed to only allow the Department to assess tax and were not designed to allow Duke Energy to seek a refund. No taxpayer of a sound mind would repeatedly agree to such a one-sided arrangement.

The Department's depiction of the facts does not reflect the facts or the law, and produces an "absurd result." Indeed, the Department paid income tax refunds to Duke Energy for the years at issue in the instant case – there is no question that both parties that executed Form FS-43 knew and intended that the statute of limitations remained open for both parties to review and revise the tax calculations contained within Duke Energy's tax return. (Appellant's Brief at 13.)[4]

The Department's position is particularly distressing in light of the express

[4] The Department attempts to distract this Court by mistakenly asserting that Duke Energy's contention that the Department paid income tax refunds to Duke Energy after the applicable limitations periods expired is a "new issue" raised in post-trial submission to the ALC and thus, it claims the issue is not preserved for review. (Respondent's Brief at 13, n.16.) The Department is simply wrong. Duke Energy did raise that very same issue in its Memorandum of Law in Opposition to the South Carolina Department of Revenue's Motion for Summary Judgment and in Support of Duke Energy's Cross-Motion for partial Summary Judgment filed with the ALC. (*See* Duke Energy's Cross-Motion at 6, n.2 (discussing that Duke Energy was owed a corporate income tax refund for years 1978-1994 which the Department determined and paid to Duke Energy in 2001 – more than 20 years after the first tax year at issue).) Moreover, contrary to the Department's assertion, Duke Energy was not required to request a reconsideration of the ALC's ruling on this issue or any of the other issues presented in its brief concerning timeliness in a Motion for Reconsideration. A Motion for Reconsideration is not necessary to preserve issues that have been ruled upon at trial. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76-77, 497 S.E.2d 731, 734 (1998). Further, contrary to the Department's contention, this Court can consider all issues raised by Duke Energy in its Brief that are not specifically set out in the statement of issues because those issue are *reasonably clear* from Duke Energy's arguments. *See Eubank v. Eubank,* 347 S.C. 367, 555 S.E. 2d 413 (S.C. Ct. App. 2001).

language of the Waiver Form that the Department executed. Prior to 1995, Form FS-43 provided:

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

(Waiver Forms (emphasis added).) The Department's officials who were authorized to sign – and did sign – the Waivers did not contemplate the "one-way" position adopted in the Department's Brief. (McCarver Aff. ¶ 8; Davant Aff. ¶¶ 6, 14, 19; Anderson Aff. ¶¶ 10, 12, 13.)

In addition, South Carolina law holds that a statute of limitations is procedural in nature and operates as a defense to limit the remedy available from an existing cause of action. *Hercules, Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 143, 262, S.E.2d 45, 48 (1980); *Jenkins v. Meares*, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990). The Department's argument and the ALC's holding to the contrary ignore South Carolina's long-standing law which unequivocally provides that, in a tax context, "[a] party can waive a statute of limitations defense." *Anonymous Taxpayer v. S.C. Dep't of Rev.*, 377 S.C. 425, 440, 661 S.E.2d 73, 80 (2008). Indeed, this Court has found that a "waiver is a ***question of fact for the finder of fact***." *City of N. Myrtle Beach*, 360 S.C. at 234-35, 599 S.E.2d at 466 (emphasis added).

Finally, the Department has not, and cannot, identify any other state that takes the position that a properly executed agreement between a department of revenue and a taxpayer authorizes assessments but not refund claims. Such a position is not only absurd, but out of step with tax procedure everywhere.

C. The Department's view of the impact of federal income tax adjustments is wrong.

Federal adjustments made by the IRS to Duke Energy's federal tax returns had the effect of re-opening the statute of limitations for tax years 1978 through 1984 and 1986 through 1993. (Appellant's Brief at 15; Monroe Aff. ¶¶ 5-7; September 23, 1992 Determination; May 11, 2001 and July 17, 2001 Final Determination; IRS Notice; Waiver Schedule; Waivers.) The Department claims that any extension resulting from an IRS adjustment would have been limited to the tax issues raised by the IRS. (Respondent's Brief at 16.) The Department cites no statutory authority in support of its assertion.[5] In fact, the Department did not cite to anything it has ever issued authorizing such an interpretation. Yet, in 1995 the South Carolina legislature ***changed the law*** to specifically limit the effect of a federal adjustment on extensions only to issues raised by the IRS. *See, e.g.* S.C. Code Ann. § 12-54-85(D)(1). The Department's penchant for retroactively applying law changes in this case is disconcerting and undermines the Department's credibility in this case and with taxpayers generally. The ALC's ratification of these retroactive law changes is an error of law.

II. THE DEPARTMENT'S CLAIM THAT THE PLAIN LANGUAGE OF THE STATUTE DOES NOT REQUIRE DUKE ENERGY TO INCLUDE ALL OF ITS SALES IN ITS SOUTH CAROLINA INCOME TAX APPORTIONMENT CALCULATION IS ERRONEOUS.

A. Duke Energy's sales of securities are "sales," not "recoveries of principal."

In an attempt to confuse this Court, the Department repeatedly characterizes Duke Energy's sales of securities as "recoveries of principal" or "loans" that are without risk.

[5] The Department cites to the ALC's Amended Summary Judgment Order which likewise cites to no authority in making the same erroneous assertion as the one made by the Department in its Brief. (*See* ALC's Amended MSJ Order at 8, n.11.)

(Respondent's Brief at 21-23.) First, nothing in the record supports such an analogy. Furthermore, the timing of this appeal demonstrates the irony – and inaccuracy – of the Department's characterization. Only recently we have seen more than a few local governments declare bankruptcy and default on their bonds.[6] In short, there is no such thing as a risk-free investment. The Department's characterization of Duke Energy's investment in government securities is naive at best, and disingenuous at worst.

The record demonstrates that Duke Energy's sales of securities, which generated gross receipts upon disposition, were just that – sales, and not loans. (Love Dep. 26:3-26:7; Love Aff. ¶ 13.) Marketable securities are bought and sold. The fact that one may repeatedly buy similar, short-term investments is reflective of an investment strategy designed to provide liquidity and a rate of return at an acceptable level of market risk. The Department seems to concede that an alternative investment strategy – perhaps one that involves the purchase and sale of common stock – would produce "gross receipts" rather than a "return of principal." (Respondent's Brief at 21-23.) However, the Department cannot provide a legal (or policy) basis for favoring an investment strategy that is longer term, yields more volatile returns, and/or attracts greater market risk.

When a security is sold or redeemed, the entire amount is received from the relinquishment of a commodity. *See General Motors Corp. v. Franchise Tax Bd.*, 39 Cal. 4th 773, 786-87, 139 P.3d 1183, 1190-91 (2006). In contrast, in a loan transaction, (which is substantially different than buying and selling securities), amounts paid on the

---

[6] *See, e.g., Detroit is Broke; Could Bankruptcy Lie Ahead?* (May 13, 2013), available at http://news.yahoo.com/detroit-broke-could-bankruptcy-lie-ahead-185859786.html ; *Another California City Scrambling to Avoid Bankruptcy* (September 27, 2012), available at http://www.foxnews.com/politics/2012/09/27/another-california-city-scrambling-to-avoid-bankruptcy/ (stating that Central Valley would be the fourth California city to file for municipal bankruptcy this year); *City Council in Harrisburg Files Petition of Bankruptcy* (October 12, 2011), available at http://www.nytimes.com/2011/10/13/us/harrisburg-pennsylvania-files-for-bankruptcy.html?_r=0.

loan typically reflect a return of principal and an interest payment. As the California Supreme Court succinctly put it:

> To better understand this basic distinction and how it applies even in the case of debt instruments like bonds and Treasury bills, consider the case of a security (a $ 10,000 Treasury bill, say) bought on the market from a securities dealer, then redeemed with the issuer, the United States government. The price the purchaser/taxpayer receives on redemption, $ 10,000, is dependent on the value of the commodity it holds and independent of the price it paid to the broker. ***The taxpayer is not being repaid for money it lent; it had, in fact, paid nothing and lent nothing to the United States government. The entire amount received is properly treated as gross receipts.*** . . .

General Motors Corp., 39 Cal. 4th at 786-87, 139 P.3d at 1190-91 (emphasis added). Unlike a "loan," Duke Energy was not protected from fluctuations in the value of the securities it had acquired and the purchase/redemption price was dependent on the market rates for the purchased securities.

The Department analogy of sales of securities to car leases also makes little sense. First, nothing in the record supports such an analogy. Second, unlike a car lease, sales of marketable securities are highly dependent on the market environment. When one returns a car at the conclusion of a lease, one can simply walk away or buy the car for predetermined residual value. When one sells a bond, the amount of money earned is entirely dependent on the market.

B. The Department ignores the plain language of South Carolina's income apportionment statutes.

For the Tax Periods at Issue in this case, South Carolina law required the inclusion of "total gross receipts" or "total sales" in the computation of a taxpayer's single-factor or multi-factor apportionment formula. (Appellant's Brief at 21-22.) It is black letter law that "[t]he language of a tax statute must be given its plain ordinary

meaning in the absence of an ambiguity therein." *Beach v. Livingston*, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1996)); *Alltel Commc'ns, Inc. v. S.C. Dep't of Rev.*, 399 S.C. 313, 320, 731 S.E.2d 869, 873 (2012).[7] Applying this standard of statutory construction, "gross receipts" means gross, and "total sales" means all. The Department argues that gross and total do not mean all receipts but rather "net receipts." Not only is the Department's view inconsistent with the plain language of the statutes, but the Department has not cited to any part of the South Carolina Code that supports such view.

C. The Department misconstrues the South Carolina Legislature's actions.

If there was any doubt as to whether "gross" means "gross" or "total" meant "all," the South Carolina legislature removed it in 2006. In 2006, the Legislature enacted sweeping changes to the South Carolina apportionment statutes. Rather than require the inclusion of all of a taxpayer's receipts in the sales factor numerator, the Legislature's amendment carved out ***ten new categories of receipts to be excluded from "gross receipts" and "sales."*** 2007 S.C. Laws Act 110 § 51.A (enacted as S.C. Code Ann. § 12-6-2295(B)) (emphasis added). Indeed, the plain language of the title to the 2006 amendment indicates that the purpose of the enactment of S.C. Code Ann. § 12-6-2295 was to add a new definition of gross receipts for apportionment purposes. *See Demas v. Convention Motor Inns,* 268 S.C. 186, 190, 232 S.E.2d 724, 726 (1977) (recognizing propriety of discerning legislative intent from the title of an act).

These changes, for the first time, excluded sales of securities from the South Carolina income apportionment formula. S.C. Code Ann. § 12-6-2295(B)(1) ("gross receipts" or "sales" excludes "repayment, maturity, or redemption of the principal of a

[7] The Department agrees that the plain language of a statute should control. (Respondent's Brief at 22.)

loan, bond, or mutual fund or certificate of deposit or similar marketable instrument").

The Department attempts to side step this change in law by arguing that because the legislature did not act until 2006, the Legislature must have supported the Department's interpretation of "gross receipts." Yet the Department has offered no evidence, not a single affidavit or deposition, that would explain why, if the Legislature supported the Department's view of the law, it would have acted at all. No evidence was presented indicating the Legislature was making a clarification. And the changes to the law were so sweeping and drastic that it is simply impossible to believe that the change was merely an affirmation of the Department's position. Especially when the Department's own officials acknowledged that other provisions in the 2006 change to the definition of gross receipts were indeed changes. (Major Dep. 23:7-26:5.)

Once again, illustrating the inconsistency in the Department's positions when it suits its purpose, the Department previously argued that more limited statutory amendments were changes in the law. For example, the Department argued that a 1985 statutory amendment to the South Carolina license tax, which previously imposed the tax on "the entire gross receipts" from business and was later changed to "the gross receipts derived from services rendered from regulated business," limited the scope of the tax and was thus a change in the law. Br. App't at 8-9; *Duke Power Co. v. S.C. Tax Comm'n*, 292 S.C. 64, 354 S.E.2d 902 (1987). Why such a massive expansion of the definition of "gross receipts" in this case could be viewed as a mere clarification is inconceivable given the Department's prior position.

D. The Department did not have a "long-standing administrative policy" of interpreting "gross" receipts to mean "net" receipts.

The Department's argument that "gross" means "net" is premised on its alleged long-standing administrative policy to require only the inclusion of the net gain or interest from short-term investment transactions in the calculation of the apportionment formula. (Respondent's Brief at 27.)[8] While, as a general matter, the construction of a statute by an agency will be accorded deference, "where the terms of the statute are clear, the court must apply those terms according to their literal meaning . . . [and] the court will reject the agency's interpretation where it is specifically contrary to the statute or regulation." *Comm'rs of Pub. Works v.* S.C. *Dep't of Health & Envtl. Control,* 372 S.C. 351, 359, 641 S.E.2d 763, 767 (Ct. App. 2007) (emphasis added).

If the Legislature wanted to limit the scope of "gross receipts" by only including the net receipts from certain transactions, it was free to do so (and subsequently did do so in 2007). The Department's policy is in effect asking the Court to retroactively usurp the role of the Legislature and create a limitation that did not otherwise exist. *Am. Petroleum Inst. v. S.C. Dep't of Rev.*, 382 S.C. 572, 579, 677 S.E.2d 16, 20 (2009); *Henderson v Evans,* 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977).

E. Contrary to the Department's contention, including gross receipts from sales of securities in the standard apportionment formula does not misrepresent every taxpayer's business activity.

The standard apportionment formula is designed to reasonably represent and provide a "rough approximation" of a taxpayer's income attributable to business activity in each state. S.C. Code Ann. § 12-6-2210; *Eastman Kodak Co. v. South Carolina Tax*

[8] The Department is incorrect in asserting that Duke Energy has not challenged the ALC's finding that the Department had a long-standing administrative policy to exclude recovered principal from the apportionment formulas. (Respondent's Brief at 29, n.26.) First, there is no such finding in the Amended MSJ Order. Furthermore, Duke Energy brought this issue before the ALC in its Memorandum of Law in Opposition to the South Carolina Department of Revenue's Motion for Summary Judgment and in Support of Duke Energy's Cross-Motion for Partial Summary Judgment filed with the ALC. (*See* Duke Energy's Cross-Motion at 44-47.) Duke Energy also raised this very issue at the summary judgment hearing. (MSJ Tr. 124:13-129:5.)

Comm'n, 308 S.C. 415, 419, 418 S.E.2d 542, 544 (1992); *Covington Fabrics Corp. v. South Carolina Tax Comm'n*, 264 S.C. 59, 66-67, 212 S.E.2d 574, 577-78 (1975).

The Department argues that it would always be a misrepresentation of a taxpayer's business activities to include gross receipts from sales of securities in the standard apportionment factor. (Respondent's Brief at 31.) Yet the Department offers no evidence whatsoever in support of its position. Furthermore, it offers little explanation as to why including receipts from sales of securities in the gross-receipts/sales factor denominator does not, or could not, roughly approximate a taxpayer's business activity in South Carolina. Indeed, in many cases, depending on the size of the taxpayer, the location of its business operations, the type of industry it is in, and a variety of other factors, including all of the taxpayer's gross receipts fairly reflects its business activities.[9]

Further, in its initial brief the Department argues for the first time that Duke Energy's sales of securities are not connected with its trade or business. (Respondent's Brief at 25.) This argument is not only incorrect, but also inconsistent with the Department's lawyers' previous statements. (SC DOR Response to Questions by Court on July 13, 2012).[10] Indeed, the record demonstrates that Duke Energy's treasury department was an integral part of the company's primary business operations. (Love Dep. 21:5-15; Love Aff. ¶¶ 11, 17.) If Duke Energy's treasury department fails to

---

[9] The Department's reasoning is also based on the mistaken presumption that the inclusion of the principal in the apportionment formula always results in distortion. (Respondent's Brief at 32.) As discussed throughout this brief, the determination of distortion is a factual inquiry that must be made on a case by case basis.

[10] In order for the Department to claim that Duke Energy's sales of securities are unrelated to its primary operations, it would have essentially had to claim that proceeds from such sales constituted non-business income and were allocable, and not subject to apportionment. S.C. Code Ann. §§ 12-6-2230 and 12-6-2220(5). It is uncontested that all business income must be included in the factor. S.C. Code Ann. §§ 12-6-2280 and 12-6-2295(A). The Department has not made such a claim in the course of this controversy. Additionally, by conceding that some portion of the receipts from Duke Energy's sales of securities are includable in the apportionment formula, the Department concedes that receipts from such transactions are business income subject to apportionment.

precisely coordinate Duke Energy's cash needs, the activities of the entire company could grind to a halt. (Love Dep. 29:7-19; Love Aff. ¶¶ 11, 17.) Furthermore, the Department previously acknowledged that the income from the sale of securities is related to Duke Energy's primary operations and is in fact business income. (Amended MSJ Order at 3; Department's MSJ at 6.)

F. The Department erroneously disregards South Carolina's definitions of "gross receipts" and "sales" in other contexts.

The South Carolina Supreme Court and the Department have broadly construed the definition of "gross receipts" in the past. *Duke Power Co. v. S.C. Tax Comm'n*, 292 S.C. 64, 66, 354 S.E.2d 902, 903 (1987). Even though the Department argues that the definition of "gross" in the license tax context should not be controlling for the Gross Receipts Issue, the entire thrust of its argument with respect to the Electricity Issue is that the Supreme Court's holdings in the manufacturer's tax context should apply.[11]

The Department claims that Duke Energy cites to only one case, *Travelscape*, to support its contention that cases and rulings in other contexts define "gross receipts" to include principal. (Respondent's Brief at 32.) In fact, Duke Energy's Brief cites to several authorities that distinguish between gross and net receipts. (Appellant's Brief at 25-26.) The South Carolina Code itself contains 85 uses of "gross" for tax purposes, including gross receipts, gross income, gross wages, gross estate, and gross proceeds. (Duke Energy's Cross-Motion at 32-33; Gross Receipts Statutes.) These statutes uniformly have been interpreted by the Department to mean "gross" and not "net."[12]

---

[11] (Respondent's Brief at 35; Department's MSJ at 28-29 (citing *Columbia Ry., Gas & Elec. Co. v. Query*, 134 S.C. 319, 324, 132 S.E. 611 (1926)); *Duke Power Co. v. Bell*, 156 S.C. 299, 306, 152 S.E. 865, 868 (1930)).

[12] For example, S.C. Code Ann. § 12-36-90 imposes the sales tax on "[g]ross proceeds of sales." S.C. Code Ann. § 12-37-930 imposes a special depreciation rule for certain "gross cost of assets" located in this state. "Gross wages" means all wages, and not the net amount an employee receives after deductions.

G. The Department ignores the predominant number and more recent decisions of other state courts that have ruled that gross receipts from sales of securities must be included in the sales or gross receipts apportionment factor.

In support of its position, the Department cites to a few older cases from other jurisdictions, with statutes substantially different from South Carolina's. However, the Department omits reference to ***more recent*** decisions, in jurisdictions where the applicable statute mirrors South Carolina's, which hold that "gross" means "gross."

For example, in a case dealing with the inclusion of receipts from sales of securities in the sales apportionment factor, the California Supreme Court stated:

> We agree with Microsoft that . . . "[g]ross" implies the whole amount received, not just the amount received in excess of the purchase price. To only consider the net price difference as "gross receipts" is an awkward fit with the statutory language, at best.

Microsoft Corp. v. Franchise Tax Bd., 39 Cal. 4th 750, 759, 139 P.3d 1169, 1174 (2006).

In the most recent case on point, the California Court of Appeal held that the full sales price of future sales contracts were "gross receipts" to be included in the sales factor. *General Mills v. Franchise Tax Bd.*, 172 Cal. App. 4th 1535, 1543, 92 Cal. Rptr. 3d 208, 214 (Ct. App. 2009) ("'[g]ross' implies the whole amount received, not just the amount received in excess of the purchase price. . . . To the extent the language is ambiguous, we generally will prefer the interpretation favoring the taxpayer"). The California cases adopt the view espoused by other courts that the term "gross receipts" requires the inclusion of ***all*** receipts, including receipts from the sale of securities.[13]

[13] For example, in *Sherwin-Williams Co. v. Dep't of Rev.*, 329 Or. 599, 996 P.2d 500 (Or. 2000), the Oregon Supreme Court affirmed the Oregon Tax Court's decision that the Department of Revenue erroneously included in the sales factor only net income rather than gross receipts from the disposition of

Moreover, the group of cases relied upon the Department to employ a statutory analysis that directly contravenes South Carolina law. (Respondent's Brief at 25.) The progenitor of this group of cases, *AT&T v. Director, Division of Taxation*, 194 N.J. Super. 168, 173, 476 A.2d 800, 802 (App. Div. 1984), premises its holding on the notion that interpreting New Jersey's receipts factor to include all receipts from short-term securities investments would produce "absurd results." The rest of the cases cited by the Department follow *AT&T* and reason similarly. In contrast, whether certain receipts constitute "gross receipts" or "total sales" under South Carolina's income apportionment regime does not first require, or permit, a consideration as to whether such a determination would produce an "absurd result." Indeed, the ALC and the Department themselves recognized the proper analysis required under South Carolina law during the summary judgment proceedings:

> Court: Well, when you say it does not provide a reasonable basis, is that analysis more one that should be made in the ***second stage*** of – by this case or is that one that is more – I know you are going to say "yes," so it's ***more proper in determining what the statute says***.
>
> . . . .
>
> Because if it does result in something that's absurd, then you would find that apportionment – the standard apportionment formula is one that should not be used and it would invoke the statute to allow you to use the more appropriate formula, is that not . . . .
>
> Mr. Greene: If – yeah. If you – for instance, if you reach that conclusion, that gross receipts from these types of

---

investment securities. Other courts have likewise held that the gross receipts rather than the net income from the sale of intangibles should be included in the sales factor. *Western Elec. Co. v. Norberg*, AA No. 81-391 (R.I. Dist. Ct. 6th Div., Mar. 30, 1983), *cert. denied*, 461 A.2d 679 (R.I. 1983); *United States Steel Corp. v. Wisconsin Dep't of Rev.*, No. I-6578 (Wis. Tax App. Comm'n May 9, 1985); *Illinois Tool Works, Inc. v. Lindley*, 70 Ohio St.2d 175, 436 N.E.2d 220 (1982); *AT&T v. Dep't of Rev.*, 15 OTR 202, 2000 WL 1279835 (Or. T.C. 2000); *Pennzoil Co. v. Dep't of Rev.*, 15 OTR 101, 2000 WL 1025573 (Or. T.C. 2000); *AT&T v. State Tax Appeal Bd.*, 241 Mont. 440, 787 P.2d 754 (1990); *Mead Corp. v. Dep't of Rev.*, No. 00 CH 01854 (Ill. Cir. Ct. Feb. 5, 2002).

> transactions, the return of somebody's principal within 30 days is a gross receipt, it has to be added to the apportionment basis, we would go to ***the next step***.

(Testimony Tr. 141:17-:23; 143-15-:18; 143:23-144:4; 144:5-:11, emphasis added.) That "second stage" or "next step" was not yet before the ALC as the ALC only needed to first determine "what the statute says" – i.e., whether, based on the plain language of the apportionment statutes, Duke Energy's receipts from sales of securities constitute "gross receipts" or "total sales."

Moreover, other state courts that have considered the "gross receipts" issue more recently have specifically rejected the "absurd results" line of cases for two reasons:

> First, they do violence to the language of the statutes they interpret. In each case, the same language governs both sales of off-the-shelf products and sales of securities. *AT&T* and its progeny offer no explanation why in one instance that language should require inclusion of gross proceeds and in the other require inclusion of only net proceeds. Second, they overlook the fact no absurd result is required.

Microsoft Corp., 39 Cal. 4th at 763, 139 P.3d at 1176; accord *Sherwin-Williams Co. v. Johnson*, 989 S.W.2d 710, 715 (Tenn. Ct. App. 1998). These courts have found that where the statutory language is plain and clear, "[a]n absurd result is not necessary for, in spite of the plain language of [the sales factor statute], the commissioner may opt for a different scheme of assessment whenever the resulting apportionment does not fairly represent the taxpayer's business in this state." *Sherwin- Williams*, 989 S.W.2d at 715. In this case, the plain language of the apportionment statute requires that all gross receipts from Duke Energy's sales of investment securities be included in the gross-receipts apportionment factor. The Department may not disregard the plain, unambiguous words of the statute.

H. The Department improperly interprets the standard apportionment formula by looking to whether the inclusion of gross receipts in the factor results in distortion.

The Department is incorrect in using distortion principles to interpret the meaning of "gross receipts." The only issue before the ALC was whether, as a matter of law, the gross receipts from the sales of securities should be included in the standard apportionment formula. (Amended MSJ Order at 2; Duke Energy's Cross-Motion at 30.) Whether the inclusion of the principal in the apportionment formula results in distortion is an entirely separate and inherently factual question, to be addressed only after the standard apportionment formula results have been determined. The Court must first apply the plain language of South Carolina's apportionment provisions – including a calculation of the sales factor. (*See* Appellant's Brief at 26-32.) Distortion is determined only after the apportionment results are calculated and was a factual question not properly before the ALC. *See CarMax Auto Superstores West Coast, Inc. v. S.C. Dep't of Rev.*, 397 S.C. 604, 611, 725 S.E.2d 711, 714 (Ct. App. 2012).

III. THE DEPARTMENT MISINTERPRETS SOUTH CAROLINA LAW, WHICH TREATS MANUFACTURERS AS PERSONS DEALING IN TANGIBLE PERSONAL PROPERTY, AND IGNORES THE RECORD, WHICH ESTABLISHES THAT DUKE ENERGY IS A SERVICE PROVIDER.

A. The Department fails to recognize that taxpayers primarily engaged in the business of manufacturing are only those dealing in tangible personal property.

The Department concedes in its brief that Duke Energy's principal business is the provision of electricity. (Respondent's Brief at 33.) The Department claims that Duke Energy is a manufacturer because "[m]anufacturing is, in short, a process" and the "[s]ubstantial evidence supports the ALC's determination that producing electricity is manufacturing based on the common understanding of that term." (Respondent's Brief at

37-38.) The Department's theory is flawed because it misapplies South Carolina law.

For South Carolina income tax apportionment purposes, South Carolina courts and the Department have consistently viewed "manufacturers" as "taxpayers whose principal business in South Carolina is dealing in ***tangible personal property***." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Rev.*, 2009 S.C. Tax LEXIS 56, at *48, *58 (S.C. Admin. L. Ct. May 4, 2009) (emphasis added), *upheld on appeal*, 388 S.C. 138, 694 S.E.2d 525 (2010); S.C. Rev. Proc. No. 09-1, 2009 S.C. Tax LEXIS 84, at *2-3 (S.C. Dep't of Rev. Jan. 13, 2009). (*See also* Appellant's Brief at 34-35.)

Indeed, persons whose principal business in the State was dealing in tangible personal property and persons who were service providers are two distinct categories of taxpayers, subject to entirely different income apportionment regimes: persons dealing in tangible property were required to apportion their income based on the multi-factor apportionment formula pursuant to S.C. Code Ann. § 12-6-2250 (applicable for tax years after 1995), S.C. Code Ann. § 12-7-1140 (applicable to tax years prior to 1996); and all other taxpayers (including service providers) must apportion their income based on a single-factor gross-receipts apportionment formula pursuant to S.C. Code Ann. § 12-6-2290 (applicable for tax years after 1995), S.C. Code Ann. § 12-7-1190 (applicable to tax years prior to 1996). Thus, the Department's contention that "the question in this case is whether the process of generating electricity is manufacturing, not whether electricity is tangible personal property" (Respondent's Brief at 37), is erroneous because it fails to recognize the distinction between sellers of tangible personal property and sellers of services. If a taxpayer's end product is a service, it simply cannot be a manufacturer for corporate income tax purposes. (Respondent's Br. at 37.)

The Department's mischaracterization of Duke Energy as a manufacturer is premised on two ***non-income-tax*** judicial decisions concerning the former Manufacturer's Tax Act and an out-of-context property tax opinion issued by the South Carolina Attorney general. (Respondent's Brief at 35-37, 46-47.) Simultaneously, however, the Department attempts to minimize the significance of *Consolidated Hydro S.E., Inc. v. South Carolina Department of Revenue & Taxation,* No-ALJ-17-0634, 1996 WL 909155 (S.C. Admin. L.J. Div. May 13, 1996), where the ALC held that the provision of electricity is not tangible personal property and instead constitutes a service for license tax purposes. (Respondent's Brief at 42.)[14] The Department's reliance on the property tax and Manufacturer's Act decisions, while attempting to dismiss a license tax case that is exactly on point, makes little sense and is disingenuous at best.

Furthermore, unlike the Manufacturer's Tax Act at issue in those cases, the term "manufacturing" used in the income apportionment tax statutes presupposes a taxpayer dealing in tangible personal property and requires an examination of a taxpayer's activities to make such a determination. Notably, the courts in those cases did not perform such an examination and instead, relied on a single statement in the company's charter.[15] Therefore, those cases are unpersuasive.

---

[14] Furthermore, the Department fails to recognize that other states, including South Carolina's sister state North Carolina, treat the provision of electricity as a service. *See, e.g.,* Request for Private Letter Ruling-Nexus Issues (N.C Dep't of Rev. Feb. 9, 2007) ("For corporate income tax purposes, North Carolina does not consider the sale of electricity as the sale of tangible personal property.") The Department states that "numerous" other courts have held that electricity is tangible and cites to several non-tax cases. (Respondent's Brief at 43.) The Department fails to recognize, however, that numerous courts have also held that the sale of electricity is a service or not a "product." *See Buckeye Union Fire Ins. Co. v. Detroit Edison Co.,* 38 Mich. App. 325, 196 N.W. 2d 316 (1972); *Williams v. Detroit Edison Co.*, 63 Mich. App. 559, 234 N.W. 2d 702 (1975); *Navarro Cnty. Electric Coop., Inc. v. Prince*, 640 S.W. 2d 398 (Tex. App. 1982); *Otte v. Dayton Power & Light Co.*, 37 Ohio St 3d 33, 523 N.E. 2d 835 (1988).

[15] The Department introduced a copy of Duke Energy's 1977 Restated Charter into evidence presumably because the Charter mentions the word "manufacture." The Charter also authorizes Duke Energy to: (a) "[D]eal in ... electrical and other power for the generation, distribution and supply of electricity for light, heat and power, and for any other uses and purposes"; (i) "Produce, purchase, sell and deal in farm and

The Department also attempts to confuse this Court with regard to the significance of the definition of "tangible personal property" set forth in S.C. Code Ann. § 12-36-60 for South Carolina sales tax purposes. First, while the ALC appeared to apply, as it must, the definition of "tangible property" for South Carolina income tax purposes, contrary to the Department's contention (Respondent's Brief at 41), the ALC construed the meaning of that term by expressly relying on the definition of "tangible personal property" for sales tax purposes. Specifically, as fully discussed in Duke Energy's Brief (Appellant's Brief at 36), the ALC reasoned that the first sentence of the sales and use tax definition of "tangible personal property" "***coincides*** with the general understanding of the term 'corporeal' included in the definition of 'tangible property' [for income tax purposes . . . ." (Amended Final Order at 23-24 (emphasis added).) The ALC then summarily concluded that "according to the plain and ordinary meaning [of the income tax definition] which is ***supported*** by the general [sales and use tax] definition of tangible personal property given the first sentence of Section 12-36-60, I conclude that electricity is tangible personal property." (*Id.*) (Emphasis added).

The ALC failed to recognize that the first sentence of the sales and use tax definition has no mention of the term "electricity." (*See* Appellant's Brief at 36.) It is the second sentence of that definition that specifically states that, for sales and use tax purposes, the term "tangible personal property" "***also*** includes ***services and intangibles,***

---

dairy products and the various materials entering into or used in the production thereof"; (q) "[C]arry on and conduct the business of storage, cold storage, refrigeration, freezing, and icemaking . . . ."; (t) "[D]o all and everything . . . which shall at any time appear conducive or expedient for the protection or benefit of the Corporation ...." The record contains no evidence that would indicate that Duke Energy deals in dairy products or conducts the business of icemaking. And simply because Duke Energy's Restated Charter used the term "manufacture" in 1977 in reference to a business activity, does not mean that Duke Energy's principle business is manufacturing for purposes of corporate income tax apportionment. Indeed, Duke Energy refers to itself as a service provider in numerous other documents it files with state and federal agencies. (Appellant's Brief at 44-46.)

including . . . sales of electricity." *See, e.g.,* S.C. Code Ann. § 12-36-60 (emphasis added); (*see also* Appellant's Brief at 35-36). Thus, recognizing that the ordinary understanding of the term, as reflected in the first sentence of the definition, does not include services and intangibles, the South Carolina Legislature included additional language reflecting the Legislature's decision to treat services or intangibles such as electricity as tangible personal property ***for South Carolina sales and use tax purposes***. Comparing the income tax definition of "tangible property" and the sales tax definition of "tangible personal property," it is clear that the Legislature did not make the same decision to treat electricity as tangible property for South Carolina ***income tax purposes***. Therefore, it is the Department that "misses the mark" (Respondent's Brief at 41) in reading the ALC's Amended Order and Duke Energy's Brief.

B. The Department's claim of the existence of an alleged "long-standing policy" of treating electric service providers as manufacturers is false.

The Department has not cited, as it cannot, to a single decision, ruling, regulation or other document issued by the Department that establishes its purported "long-standing administrative policy that electric utilities are manufacturers." (Respondent's Brief at 46.) Indeed, no such guidance exists. The ***only*** evidence presented by the Department in support of its so-called "long-standing" policy is a corporation manual that was never, and is still not, made available to the public or otherwise distributed outside of the Department, and that cites to no authority in support for such a "policy." (Appellant's Brief at 43-44.)[16]

The Department claims that this Court should nevertheless afford deference to its "secret" policy. The South Carolina's highest court has expressly opined that because an

[16] In fact, the corporation manual contains inconsistencies that even the Department's witness was not able to explain. (Trial Tr. 242:6-10.)

agency guideline "has not been formally adopted as a regulation, ***it does not have the force and effect of law and is entitled to no deference***." *Doe v. S.C. Dep't of Health & Human Servs.*, 398 S.C. 62, 68, 727 S.E.2d 605, 608 (2011) (emphasis added); *see also* S.C. Tax Comm'n Dec. 93-78, 1993 S.C. Tax LEXIS 140 (July 29, 1993) ("rejecting taxpayer's use of long-standing agency interpretation because "[w]e do not believe there are any 'generally accepted consolidation' rules which exist ***if they are not codified***" (emphasis added)). (*See also* Appellant's Brief at 43-44.) Therefore, ALC's decision affording deference to the Department's "secret" policy stands alone in this regard and should be overturned.[17]

In an apparent attempt to suggest some culpable responsibility, the Department claims that "for 23 years, Duke Energy filed its returns using the multi-factor apportionment formula," it must have known of the Department's "secret" policy. (Respondent's Brief at 47-48.) This unfounded and uncalled for allegation is not true and makes little sense. First, there is nothing in the record that suggests, even remotely, that Duke Energy was aware that the Department's so-called "policy" existed. Furthermore, multi-state taxpayers, such as Duke Energy, file numerous state tax returns every year, often more than once a year. It is not uncommon for such taxpayers to make errors in filing their tax returns. Indeed, it is for that reason why state laws permit state revenue agencies to review a taxpayer's tax returns and make corrections by issuing assessments, or afford taxpayers with the opportunity to correct any errors by filing refund claims. In fact, Duke Energy's witness testified under oath that Duke Energy filed its original tax

[17] The Department misleadingly asserts that Duke Energy did not appeal from the ALC's finding that the Department had a long-standing administrative policy that electric utilities are manufacturers. (Respondent's Brief at 46.) To the contrary, Duke Energy's Brief specifically states that "[t]he ALC erred in holding that the Department has a 'long-standing policy' of treating electric service providers as manufacturers" and details the basis for that assertion. (Appellant's Brief at 43.)

returns for the Tax Periods at Issue by erroneously apportioning its income based on the multi-factor apportionment formula, an error which Duke Energy later corrected.

C. The Department ignores the record, which establishes that Duke Energy's is a service provider.

The extensive evidence presented at trial establishes that Duke Energy is not a manufacturer or manufacturing is not its primary business because Duke Energy does not deal in tangible personal property. (Appellant's Brief at 38-40, 44-46.) Duke Energy's expert witness Professor Ioannis Papapolymerou - a distinguished professor of electrical engineering at the Georgia Institute of Technology, who has won numerous prestigious awards and frequently performs work for the U.S. Department of Defense – testified extensively that electricity lacks physical characteristics, is not an object, and has no substance, physical shape or form, weight, height, volume or other dimension typically attributable to tangible property. (Appellant's Brief at 7-10, 38.)[18] Moreover, in responding to the question of whether electricity is a service, the Department's own expert testified "[i]f [electrical energy] were provided on a flat-fee basis, you could consider it a service." (Trial Tr. 384:25-385:3.)[19]

The Department mistakenly assumes that because an "electric charge" is "associated with electricity," an electric charge is electricity. (Respondent's Brief at 40-

[18] Again, the Department attempts to confuse this Court by claiming that Duke Energy did not appeal from the ALC's factual ruling that electricity is a "physical product with physical characteristics." (Appellant's Brief at 38-39.) This assertion is false as Duke Energy's Brief specifically states that "the ALC erroneously held that electricity is tangible personal property because: it 'is a physical product' with 'physical characteristics.'" (Appellant's Brief at 39.) Further, the Department's argument that Duke Energy did not preserve its claim that "tangible personal property" is ambiguous for review is also without merit. (Respondent's Brief at 42, n.37.) This exact issue was raised in Duke Energy's Pre-Trial Brief (Pre-Trial Brief at 11) and contrary to the Department's assertion, Duke Energy was not required to request a reconsideration of the ALC's ruling on this issue in a Motion for Reconsideration. A Motion for Reconsideration is not necessary to preserve issues that have been ruled upon at trial. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76-77, 497 S.E.2d 731, 734 (1998).

[19] When asked whether electricity provided on a flat-fee basis is any different scientifically than the electricity provided on a per kilowatt hour basis, the Department's expert opined "all kilowatt hours are the same." (Trial Tr. 385:4-:13.)

41.) To the contrary, the evidence in the record clearly establishes that electricity is ***not*** an electric charge; rather, an electric charge is the source of the electromagnetic field. (Trial Tr. 259-260, 264; Appellant's Brief at 9-10.)

Contrary to the Department's contention, Duke Energy does not "process electrons" or "goods and materials." (Respondent's Brief at 34, 46.) The electrons, which already reside in the power lines, simply facilitate the propagation of electricity. (Appellant's Brief at 8.) All Duke Energy does is it provides an electromagnetic field – a force field - that lacks physical characteristics, cannot be created or destroyed, and is neither a matter nor a material. (Appellant's Brief at 7-10, 38.)[20]

The Department mistakenly focuses on the ALC's finding that electricity is a product. (Respondent's Brief at 38.)[21] It is unclear from the Department's Brief or the ALC's Order what is meant by the term "product." In any event, as stated in Duke Energy's Brief, the ALC's reference to electricity as a product is improper and completely irrelevant because the term "product" is not found in the income tax definition of "tangible property" and the Department has not otherwise introduced any credible evidence that electricity is a "product." (Appellant's Brief at 40.)

Contrary to the Department's contention, the extensive evidence presented at trial establishes that the provision of electric service is Duke Energy's primary and principal business because Duke Energy derives its principal receipts from sales of services, i.e.,

---

[20] The Department erroneously contends that Duke Energy makes a conclusory statement regarding operation of a generation does not involve processing of goods and materials. (Respondent's Brief at 49, n.41.) Indeed, in its Brief, Duke Energy explained that there was extensive evidence in the record that showed that a generator simply caused the flow of an electromagnetic field, or electricity (Appellant's Brief at 8, 46.)

[21] Contrary to the Department's assertion, Duke Energy did appeal from the ALC's finding in this regard. (Respondent's Brief at 39; Appellant's Brief at 40.)

electricity. (Appellant's Brief at 45-46.)[22]

CONCLUSION

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

Respectfully submitted,

Burnet R. Maybank III
James Frederick Reames III
Tanya A. Gee
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
PO Drawer 2426 (29202)
Columbia, SC 29201
(803) 771-8900

Eric S. Tresh, *Pro Hac Vice*
Maria M. Todorova, *Pro Hac Vice*
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street, NE
Atlanta, GA 30309
(404) 853-8806

Jeffrey A. Friedman, *Pro Hac Vice*
SUTHERLAND ASBILL & BRENNAN LLP
700 Sixth St NW #700
Washington, DC 20001
(202) 383-0718

Attorneys for Duke Energy Corporation

May 16, 2013
Columbia, South Carolina

[22] Once again, the Department attempts to distract the Court by claiming that Duke Energy was required to introduce NAICS codes into evidence. (Respondent's Brief at 44, n.39.) This contention is incorrect because the Court is able to take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *S.C. Dep't of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 466 (Ct. App. 2009). Furthermore, Duke Energy's witness Cooper Monroe, who has prepared or reviewed Duke Energy's federal tax returns for twenty four years, testified that the NACIS (formerly SIC) codes that exist today are substantially the same as the ones in effect during the Tax Periods at Issue. (Trial Tr. 94:15-95:25.)