

Before the  
Administrative Hearing Commission  
State of Missouri



CHARTER COMMUNICATIONS  
ENTERTAINMENT I, LLC,

Petitioner,

v.

DIRECTOR OF REVENUE,

Respondent.

No. 14-1199 RS

**DECISION**

Charter Communications Entertainment I, LLC (CCE I) is entitled to manufacturing exemptions on the use tax it paid on telecommunications replacement equipment in the amount of \$1,495,652.30, plus statutory interest.

**Procedure**

On July 14, 2014 and June 17, 2015, CCE I filed complaints appealing the Director of Revenue's (Director) denial of its requests for use tax refunds.<sup>1</sup> On August 8, 2014 and July 17, 2015, the Director filed an answer. With leave, CCE I filed an amended complaint on December 18, 2019. On February 3, 2020, the Director filed an answer to the amended complaint. On August 28, 2020 and September 1, 2020, a hearing was held before Commissioner Audrey

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<sup>1</sup> CCE I's July 14, 2014 complaint was for tax period February 1, 2010 through December 31, 2011, and was assigned case number 14-1199. CCE I's June 17, 2015 complaint was for tax period January 1, 2012 through December 31, 2012, and was assigned case number 15-1021. On July 21, 2015, we consolidated the cases for purposes of hearing and decision into case number 14-1199.

Hanson McIntosh.<sup>2</sup> CCE I was represented by Matthew Landwehr and Kristen Sanocki of Thompson Coburn, LLP. The Director was represented by Thomas Houdek and Stephen Krogmeier. The matter became ready for decision on April 16, 2021, when the last brief was filed.

Commissioner Renee T. Slusher, having read the full record including all the evidence, renders the decision. Section 536.080.2;<sup>3</sup> *Angelos v. State Bd. of Regis'n. for the Healing Arts*, 90 S.W.3d 189 (Mo. App. S.D. 2002).

### **Findings of Fact**

1. Charter Communications, Inc. (Charter) is a nationwide provider of telecommunications,<sup>4</sup> video, and internet services. Charter has facilities in approximately 41 states with millions of customers. Charter has provided telecommunications service in Missouri since the late 1990s.

2. Charter is organized like an umbrella with multiple limited liability companies (LLC) underneath it, with Charter being the sole member of each of the LLCs. CCE I is one of these affiliated operating companies.

3. Charter provides its services through a shared infrastructure of equipment (Charter Network). Charter does not have separate networks for each service it provides.

4. The Charter Network is private and does not utilize the open Internet.

5. Charter Fiberlink-Missouri LLC (Fiberlink) is another one of Charter's 100% owned and operated affiliated companies, and it is a telecommunications company.

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<sup>2</sup> The delay in the hearing date was due to the parties staying discovery following the Missouri Supreme Court's decision in *IBM Corp. v. Director of Revenue*, 491 S.W.3d 535 (Mo. banc 2016), and the subsequent decision by the Missouri Legislature to amend §§ 144.030.2 and 144.054 in 2018. The parties resumed litigation with the service of discovery in June 2019 by CCE I.

<sup>3</sup> Statutory references are to RSMo 2016, unless otherwise stated.

<sup>4</sup> Telecommunications refers to telephone service. CCE I refers to it internally as "voice." Tr. at 23.

6. At all relevant times, Fiberlink used the Charter Network, including equipment owned by CCE I, to provide telecommunications service to Charter's Missouri customers.

7. Fiberlink billed its Missouri customers for telecommunications service, and in 2011 and 2012 Fiberlink collected telecommunications sales tax from such customers and remitted it to the Missouri Department of Revenue (Department).<sup>5</sup>

8. In 2011 and 2012, CCE I purchased equipment from Cisco Systems, Inc. (Cisco) for use in the portion of the Charter Network located in Missouri.

9. CCE I paid use tax on the Cisco equipment, carried the equipment on its books, and capitalized and depreciated all such equipment as assets.

10. In 2014 and 2015, Cisco assigned to CCE I the right to pursue use tax refunds on the 2011 and 2012 equipment.<sup>6</sup>

#### *CCE I's Use Tax Refund Requests*

11. On February 20, 2014,<sup>7</sup> CCE I sent the Director a refund request under § 144.190.4, RSMo Supp. 2012, in the amount of \$693,635.05 for the use tax it paid on the 2011 Cisco equipment (the 2014 refund request), and attached, in part, all applicable invoices that included the amount of use tax paid for each item, a spreadsheet that summarized the invoices, and a notarized assignment of rights statement from Cisco allowing CCE I to seek the refund. CCE I sought the refund pursuant to §§ 144.030.2(4)<sup>8</sup> and 144.054.2 (manufacturing exemptions).

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<sup>5</sup> In 2011 and 2012, Fiberlink paid approximately \$3.9 million and \$4.9 million in telecommunications sales tax, respectively.

<sup>6</sup> See § 144.190.4(1), RSMo Supp. 2012.

<sup>7</sup> On February 24, 2014, the Director received the refund request.

<sup>8</sup> CCE I's cover letter cites to § 144.030.2(5). For purposes of this decision, § 144.030.2(4) and (5) are the same as discussed more fully below, and merely reflect changes in the subdivisions due to amendments to the statute.

12. The Director determined that CCE I provided all necessary documentation for the Director to evaluate the 2014 refund request. On May 16, 2014, the Director determined the 2011 equipment did not qualify for the manufacturing exemptions and denied the request.

13. On February 20, 2015,<sup>9</sup> CCE I sent the Director a refund request under § 144.190.4 in the amount of \$890,971.09 for the use tax it paid on the 2012 Cisco equipment (the 2015 refund request), and attached, in part, all applicable invoices that included the amount of the use tax paid for each item, a spreadsheet that summarized the invoices, and a notarized assignment of rights statement from Cisco allowing CCE I to seek the refund. CCE I sought the refund pursuant to §§ 144.030.2(5) and 144.054.2.

14. The Director determined that CCE I provided all necessary documentation for the Director to evaluate the 2015 refund request. On May 15, 2015, the Director determined the 2012 equipment did not qualify for the manufacturing exemptions and denied the request.

15. At hearing, CCE I conceded it was not entitled to a portion of its initial refund requests. It now seeks \$645,879.21 and \$849,773.09 for its 2014 and 2015 refund request, respectively, for a total of \$1,495,652.30, plus interest.<sup>10</sup>

#### *Charter's Network*

16. For the last four years, Will Larson served as Charter's Senior Manager of Engineering for Voice Operations. During 2011 and 2012, he served as Charter's Senior Network Engineer and supported the Charter Network by evaluating it, designing certain aspects of it, and selecting and physically installing new network equipment to replace outdated equipment. Larson has 20 years of experience in the telecommunications industry at Charter.

17. In 2011 and 2012, Charter's customers made hundreds of millions of phone calls.

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<sup>9</sup> The Director received the request on February 26, 2015.

<sup>10</sup> During the hearing, CCE removed items from its refunds requests that it purchased in 2010 because the items were beyond the three year statute of limitations, as well as a few other items it deemed non-qualifying.

18. Charter's internet and telecommunications services use internet protocols or IP with packets of digital data.

19. CCE I designed part of the Charter Network to ensure that telecommunications service works 99.99% of the time for its customers. This is done because telecommunications service is regulated by the Federal Communications Commission (FCC). Larson explained it as follows:

This causes me to build networks that include two routers in a location instead of one. It causes me to use two line cards instead of one. A lot of stuff that I put in the network isn't needed if I don't need the network to be redundant.

Tr. at 291-92.

20. The technology used to make and transmit telephone calls over the Charter Network is known as "Voice over Internet Protocol technology" or VoIP, which has been the standard in the telecommunications industry since the early 2000s.

21. Voice IP packets, as opposed to other IP data, receive the highest transit priority in the network; otherwise, a telephone call could be delayed, causing bad voice quality or lack of audio all together.

22. VoIP transports the audio and signaling over an internet protocol using packet switching.

23. Packet switching is a means of designing a network that allows voice to be transported across long distances. Voice contains a string of packets or bits of information regarding the sound. A packet is like an envelope that contains data on the inside and a header on the outside that identifies the type of information and address. Voice uses a quality service tag or QS tag to identify the packet as voice so that it receives the highest priority in the network.

24. An older alternative to VoIP is Time Division Multiplexing Technology or TDM, which transports voice over long distances using an electronic method and circuit switching with dedicated circuits. In the 1950s, TDM used one line to support one telephone call. By the 1990's, the technology had advanced to allow one line for up to 100,000 telephone calls. In contrast, VoIP can carry millions of calls on one line.

25. Other than the increase in the number of calls that the current technology can handle, the process or technology for a telephone call is basically the same. The switches are also similar. Both technologies allow the sound waves of one's voice to be converted into a signal that travels long distances over a network, the signal undergoes multiple conversions, and then it is finally converted back into sound waves so that individuals initiating and receiving the phone call can have a conversation.

26. When necessary, VoIP can interact with TDM to allow calls initiated or received to work through a gateway that converts a TDM network signal into a VoIP signal, also known as protocol conversion. Protocol conversion is necessary because TDM is still used today in certain areas. It does not affect what the person making or receiving a call does or hears.

27. The Charter Network still has TDM wires.

28. For areas of the country or world where Charter does not have its own network, it has agreements to have access to other telephone companies' networks so that Charter customers can place telephone calls anywhere in the world. These peering or interconnection agreements are known as Public Switched Telephone Networks or PSTN. CCE I's equipment connects to other telephone companies' networks so that voice service does not travel over the open Internet.

### *Mechanics of a Telephone Call*

29. The equipment and process required to generate a telephone call starts with a handset that converts the sound waves of a human voice into electrical impulses that are

transmitted into an Enhanced Multimedia Terminal Adapter (EMTA) that is located in a customer's home. CCE I rents that EMTA to Fiberlink customers.

30. The EMTA converts the electrical signals into voice packets, places the voice packets into an Ethernet format, and then turns them into radio signals (RF signal), converting the voice and encapsulating the pitch and sound. The EMTA is connected to a coaxial cable in the customer's house, which is in turn connected to a tap outside of the house.

31. The tap connects the customer's home coaxial cable to a larger coaxial cable located on a telephone pole or underground. The larger coaxial cable transports the RF signal to an amplifier station some distance away where the signal is regenerated<sup>11</sup> and then continues to travel on the larger coaxial cable to a node.

32. At the node, the RF signal is converted to a light signal and then transmitted using an optical transceiver—a combination of transmitter and receiver.<sup>12</sup> This allows the signal to be transmitted along a fiber optic cable that covers more distance than a coaxial cable. The Charter Network has thousands of nodes.

33. The fiber optic cable connects to a hub, which is a physical building with air conditioning, power, and other equipment. In this space, optical transceivers convert the signal back into an RF signal, the signal is then transmitted back through a coaxial cable to a splitter/combiner where the radio signal is split or combined and then transmitted to a Cable Modem Termination System or CMTS that converts the radio frequency to Ethernet. The CMTS "talks" to all of the EMTAs and coordinates the communication like a traffic cop to direct the signal to the right place, allowing multiple signals to move along shared lines. Tr. at 149. The

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<sup>11</sup> The radio signal is regenerated because it loses power over distance on the coaxial cable. The radio signal may go through several amplifiers as it moves along the coaxial cable toward the node.

<sup>12</sup> A signal can be deemed transmitting or receiving depending upon whether the signal is upstream or downstream. When the signal is traveling from the customer's house to Charter's network, this is referred to as "upstream." Tr. at 143. When the signal travels from Charter's network to the customer's house this is referred to as "downstream." *Id.*

voice packets are given QS tags to prioritize them as voice signals. A Time Domain Multiple Access is used to keep track of the signals so they do not collide.

34. The signal, which is now an Ethernet packet traveling over fiber optic cable, is routed to a core router within the same hub. Core routers are modular devices (a chassis) with several slots for linecards, route processor cards, power supplies, and a fan.

35. A core router reviews the voice packet and header to determine where to send it. Once determined, the core router sends the voice packet in an interface as an electrical signal, where it again is converted to a light signal to go onto the optical transport, which changes the light signal's frequency and possibly amplifies it greatly. Telephone calls pass through multiple hubs and routers.

36. Similar to multiplexing in a TDM system, a VoIP system uses a Dense Wave Division Multiplexing (DWDM) where the light signal is changed into colors using a device similar to a prism and is combined into a fiber optic cable. This occurs in the optical transport node. This Ethernet signal is traveling over light on a fiber optic cable until it reaches another optical transport. The system on each end is like a bookend where similar equipment reconverts the signal.

37. After leaving the optical transport equipment, the signal goes into a core router on a fiber optic cable. The core router converts the signal into electrical signal processes that then go, if a Missouri customer, into a Switch in Overland, Missouri.<sup>13</sup> The Switch handles setting up the calls and determines the identity of the call recipient via a large database; it determines if the call should go onto the Charter Network, the PSTN, or a long-distance provider. The Switch starts signaling the other end of the telephone call to ring and then waits for the call to

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<sup>13</sup> Charter later removed the Switch after the time period relevant to this case. At all relevant times, all outgoing calls made by Charter's Missouri customers were controlled by the Switch.



be answered. When the call is answered, the signal moves to a core router that follows a routing protocol in order to find the correct IP address. At this point, the signal is moving downstream, and the reverse process occurs until the voice is converted by the recipient's handset into a reproduction of the caller's voice that the recipient can hear.

38. The entire process takes a couple of seconds.

39. If the call recipient is on a TDM network, the only difference is that the voice signal travels downstream through a Media Gateway connected to the Switch and out to the PSTN. If the call is long distance (i.e., a Charter customer in St. Louis is calling someone in Florida), it travels from a Media Gateway to a long-distance peer in one of Charter's backbone locations. If a Charter customer called someone in California on her cell phone, the call would go to a Media Gateway to a cell phone company peer.

#### *Equipment at Issue*

40. The 2011 and 2012 Cisco equipment at issue (disputed items) are itemized in 352 invoices, which accurately reflect the amount of money CCE I paid to Cisco for the disputed items, including the amount of use tax paid.<sup>14</sup>

41. All of the disputed items were purchased as replacement parts for the Charter Network in Missouri and were used for voice, internet, and cable services, except for certain equipment identified below.

42. Each disputed item was required and directly used in the creation of telephone calls. Charter's customers could not make telephone calls without all or part of the disputed items, depending upon the call being made.<sup>15</sup> The items work together in a coordinated and synchronized fashion to provide telephone service to Charter customers.

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<sup>14</sup> See Ex. I, which is incorporated herein by reference.

<sup>15</sup> For example, not all telephone calls utilized TDM equipment, but Charter was required to maintain such technology because Charter's customers required it, depending on where the call was being routed.

43. The disputed items fall within the following ten categories, with the corresponding amount of use tax paid by CCE:

- a. *Tap* –
  - Items listed in Ex. O-1
  - Total refund request for 2011 and 2012 - \$308.10
  - All items pertain to voice, internet, and cable
  
- b. *Splitter/Combiner* -
  - Items listed in Ex. O-2
  - Total refund request for 2011 and 2012 - \$3,575.62
  - All items pertain to voice, internet, and cable
  
- c. *Router* –
  - Items listed in Ex. O-3
  - Total refund request for 2011 and 2012 - \$56,382.46
  - All items pertain to voice, internet, and cable
  
- d. *Router Linecard* –
  - Items listed in Ex. O-4
  - Total refund request for 2011 and 2012 - \$687,627.19
  - All items pertain to voice, internet, and cable
  
- e. *Router Commons* –
  - Items listed in Ex. O-5
  - Total refund request for 2011 and 2012 - \$182,243.67
  - All items pertain to voice, internet, and cable
  
- f. *Optical Transport Linecard* –
  - All items listed in Ex O-6
  - Total refund request for 2011 and 2012 - \$128,818.74
  - All items pertain to voice, internet, and cable
  
- g. *Optical Transport Pluggable Transmitter/Receiver* –
  - All items in Ex O-7
  - Total refund request for 2011 and 2012 - \$275,835.07
  - All items pertain to voice, internet, and cable
  
- h. *Optical Transport Commons* -
  - All items in Ex O-8

- Total refund request for 2011 and 2012 - \$1,482.41
  - All items pertain to voice, internet, and cable, except certain equipment identified below that is used only for voice
- i. *Switch* –
- All items in Ex O-9
  - Total refund for 2011 and 2012 - \$187.80
  - All equipment pertains to voice only
- j. *Software* –
- All items in Ex 0-10
  - Total refund for 2011 and 2012 - \$159,191.24
  - All items pertain to voice, internet, and cable unless the item is labeled switch then it pertains to voice only

44. In the Tap category, CCE I purchased surge-gap taps of various sizes. This equipment connects to the coaxial cable coming from a customer's home to a larger coaxial cable located on a telephone pole or underground. It connects multiple customers. It is located between the signal coming from the customer's home to an amplifier.

45. The Splitter/Combiner category contains rack-mounted chassis (9900 Chassis) that hold the various splitter/combiner modules. There are also various splitter/combiner modules (9902FFs) with incoming and outgoing connectors, Quad Shield RF cable bundles that connect the splitter/combiner network to the CMTS and relay rack mountings and RF switches that are rack mounting for the RF switches.

46. The Router Equipment category contains multiple pieces of equipment purchased separately and then incorporated into a core router that serves to route reflectors in the network or aggregate business customer connections or traffic. These pieces of equipment include such items as ASR 1001 System Crypto (crypto routers), ASR 1002 chassis, Catalyst switches, Metro Ethernet 3400 series routers, Metro Ethernet 3600 series switch routers, Metro Ethernet 4900 series switch routers, and Catalyst 4900 series switch routers.

47. The Router Linecard category contains equipment found in the core routers that have interfaces or are route processors that allow the core routers to connect with other equipment. They have different capacities. These pieces of equipment include such items as 1000 series module 6-port linecards, 16-port 10-gig medium queue linecards, 20-port linecards, 32-port 10-gig linecards, 40-port linecards, 48-port 10/100/1000 linecards, 4-port 10-gig linecards, 80-gig modular linecards, deep-port 10-gig linecards, 20-port 1-gig linecards MPAs, 24-port 10-gig linecards, 2-port 100-gig linecards module, 4-port 10-gig modules for a Mod 80 router linecards, blank covers that cover a hole in the Mod 80 so routers will not overheat, linecards for catalyst series routers, linecards for CRS series routers or backbone routers, and linecards with a parenthetical CMTS.

48. The Router Commons category contains equipment that allows the core routers to function properly and such items as parenthetical air filters to prevent debris from going into the chassis, chassis that hold all of the linecard modules, rack mount kit for Metro series routers, CRS backbone router chassis, router commons with parenthetical chassis and parenthetical CMTS/Cisco uBR10K chassis, router commons door kits to keep the chassis from overheating, router commons fan trays to keep routers cool, router commons mounting kits used to install an ASR 9010 into a telecom rack, power supply modules inserted into router chassis to allow for power (DC or AC power), power modules for a uBR10L CMTS that allows the CMTS to operate, and modules that go into routers to provide the management and switch fabric functions for the routers.

49. The Optical Transport Linecard category contains equipment linecards that go into the optical transport loads, DWDM modules to assist with the multiplexing function, 2.5-gig Multi-rate Muxponder linecards that carry TDM traffic and are used only for voice, 20-gig Enhanced Crossponders that aggregate 1-gig connections and put them onto the DWDM

transport, 2-port OC12 and OC3 linecards used to carry TDM traffic and used only for voice traffic, OTN linecards for getting 10-gig circuits onto the DWDM transport, 4-port 10-gig linecards used to get 10-gig circuits onto the DWDM transport, cross-connect module used to cross-connect TDM circuits with the DWDM transport platform that is used only for voice services, DS3 transmux 12-circuit for accepting DS3 TDM circuits onto the transport platform that is used only for voice service, FlexMod 8 channel linecards, OC3 linecards that transport TDM circuits on the optical platform that is used only for voice service, and a 12-port card.

50. The Optical Transport Pluggable Transmitter/Receiver category contains equipment found in the core routers and the optical transport nodes in the linecards that convert optical connections into electrical interfaces that go into the routers, and include such items as 100-gig LR4 pluggables for a backbone router, 10-gig capable modules of varying sizes, 1-gig CWDM 1490 nanometer pluggables that is a Coarse Wave Division Multiplexing pluggable for connecting a business customer, CWDM – Coarse Wave Division Multiplexing pluggables used to connect business customers, 1-gig SFPs, OC12 modules that plug into the Sonnet transport cards (optical transport shelf) for transporting TDM over Sonnet, SFPs used to carry TDM, XFP form factor 10-gig modules used to plug into XFP cards, optical transport pluggable transmitter receiver with parentheses DWDM tuneable to color, DWDM pluggables tuneable to color, and DWDM XFP Multi-rate tuneable.

51. The Optical Transport Commons category contains items located inside the optical transport shelf and include such items as optical transport commons chassis, optical transport commons controller, and optical transport commons with a parenthetical fan tray used to supply the fans for cooling the optical transport node.

52. The Switch category contains items that are remote components of the voice switch that go into a public service access point to connect to 911 calls and are used only for voice.

53. The Software category contains software to run the replacement parts contained in the other above categories containing the hardware equipment. The software is delivered to Charter via download.

54. All of the equipment described above works together in a synchronized manner and is necessary for Charter to provide telecommunications service to its customers. At one point or another, Charter customers' voice signals must be converted multiple times and pass through all of the equipment described above. In addition to the equipment described above, Charter owns other equipment that works in conjunction with the above-described equipment to generate telephone calls.

### **Evidentiary Ruling**

At the hearing, CCE I objected to the testimony and presentation of the Director's witness, Morris Woodruff – the chief regulatory judge, secretary, and custodian of records for the Public Service Commission (PSC) – and to the exhibits proffered during his testimony – Exhibits 13-25. The objections were based upon relevance, failure to produce the information in discovery, and the timing of the subpoena duces tecum (SDT) that was served on Woodruff in connection with the hearing appearance.

The Director sought to show that because CCE I was not registered with the PSC as a telecommunications service provider, it could not avail itself of the manufacturing exemptions for the disputed items. CCE I argues that §§ 144.030 and 144.054 are independent of the statutes that govern the PSC, and they do not preclude CCE I from claiming the manufacturing exemptions under §§ 144.030 and 144.054. As reflected in our decision, we agree with CCE I and sustain its objections.

### **Conclusions of Law**

This Commission has authority over appeals from the Director's final decisions. Section 621.050.1. Our duty in a tax case is not merely to review the Director's decision, but to find the

facts and to determine, by the application of existing law to those facts, the taxpayer's lawful tax liability for the period or transaction at issue. *J.C. Nichols Co. v. Dir. of Revenue*, 796 S.W.2d 16, 20-21 (Mo. banc 1990). We may do whatever the law permits the Director to do, and we are bound to do what he must do. *State Bd. of Regis'n for the Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo. App. W.D. 1974).

Statutes imposing a tax are construed strictly in favor of the taxpayer. Section 136.300, RSMo Supp. 2014. However, "[t]ax exemptions or exclusions, on the other hand, must be strictly construed against the taxpayer, and any doubt must be resolved in favor of the application of the tax." *Dreyer Electric Co. LLC v. Dir. of Revenue*, 603 S.W.3d 297, 301 (Mo. banc 2020), quoting *Bartlett Int'l, Inc. v. Dir. of Revenue*, 487 S.W.3d 470, 472 (Mo. banc 2016). While it is the Director's burden to establish a tax liability, "[t]he burden is on the taxpayer seeking the exemption to show that the transaction at issue fits the statutory language exactly." *Bartlett Int'l, Inc.* 487 S.W.3d at 472, citing *Cook Tractor Co. v. Dir. of Revenue*, 187 S.W.3d 870, 872 (Mo. banc 2006), see also *Kansas City Chiefs Football Club, Inc. v. Dir. of Revenue*, 602 S.W.3d 812, 818 (Mo. banc 2020).

The issue in this case is whether CCE I is entitled to a refund of the use tax<sup>16</sup> it paid on the disputed items, plus statutory interest. In its refund requests, CCE I cites §§ 144.030.2(4) and 144.054.2 in support. It reiterates this in its amended complaint and pleads that the Director's decision violates: a) the Missouri Constitution, art. X, § 3 that requires "[t]axes . . . shall be uniform upon the same class or subclass of subjects within the authority levying the tax;" b) CCE I's right to equal protection under the law pursuant to the U.S. Constitution Amendment XIV, § 1; and c) CCE I's right to due process pursuant to U.S. Constitution

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<sup>16</sup> Section § 144.610.1, RSMo 2000, required the payment of use tax "in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020."

Amendment XIV, § 1. CCE I also pleads that the Director’s decision was a change in policy or interpretation affecting a particular class of persons and should “only be applied prospectively” under § 32.053, and to the extent *IBM Corp. v. Dir. of Revenue*, 491 S.W.3d 535 (Mo. banc 2016), is applicable, it was an “unexpected decision” that should only be applied prospectively pursuant to § 143.903.2.<sup>17</sup>

Before considering these arguments, we must discuss the legislative history of §§ 144.030 and 144.054 and related statutes. During 2011 and 2012, the applicable statutes were routinely amended, which we discuss below.

A. Sections 144.030.2(4) and 144.054.2

Section 144.030.2, RSMo Supp. 2010, stated, in relevant part:

There are also specifically exempted from the provisions of the local sales tax law as defined in section 32.085, section 238.235, and sections 144.010 to 144.525 and 144.600 to 144.761 and from the computation of the tax levied, assessed or payable pursuant to the local sales tax law as defined in section 32.085, section 238.235, and sections 144.010 to 144.525 and 144.600 to 144.745:

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**(4) Replacement machinery, equipment, and parts** and the materials and supplies solely required for the installation or construction of such replacement machinery, equipment, and parts, **used directly in** manufacturing, mining, fabricating or producing a product **which is intended to be sold ultimately for final use or consumption** and machinery and equipment, and the materials and supplies required solely for the operation, installation or construction of such machinery and equipment, purchased and used to establish new, or to replace or expand existing, material recovery processing plants in this state. . .[.]

(Emphasis added). During the purchase period, the legislature enacted changes to § 144.030.2 effective August 28, 2011 and 2012, but these changes did not amend the above language except

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<sup>17</sup> The 2018 legislative changes to § 144.030.2 abrogated *IBM*, to the extent the case disapproved the application of the manufacturing exemption for telecommunications service as addressed in *Southwestern Bell Tel. Co. v. Dir. of Revenue*, 78 S.W.3d 763 (Mo. banc 2002) (hereinafter referred to as “Bell I”) and *Southwestern Bell Tel. Co. v. Dir. of Revenue*, 182 S.W.3d 226 (Mo. banc 2005) (hereinafter referred to as “Bell II”). See *Dreyer*, 603 S.W.3d at 303, n.2.



that in 2012, subdivision (4) was moved to subdivision (5), which was later moved back to subdivision (4) in 2018.<sup>18</sup> Also, during the purchase period, § 144.010.1(15), RSMo Supp. 2011,<sup>19</sup> defined the phrase “Product which is intended to be sold ultimately for final use or consumption” as “. . . tangible personal property, or any service that is subject to state or local sales or use taxes, or any tax that is substantially equivalent thereto, in this state or any other state[.]”

Subsequent to the purchase period, the legislature amended § 144.030.2 through Senate Bill 768 (SB 768), effective August 28, 2018, and added the following language, as represented in bold text:

(4) Replacement machinery, equipment, and parts and the materials and supplies solely required for the installation or construction of such replacement machinery, equipment, and parts, used directly in manufacturing, mining, fabricating or producing a product which is intended to be sold ultimately for final use or consumption . . . **For the purposes of this subdivision, subdivision (5) of this subsection, and section 144.054, as well as the definition in subdivision (9) of subsection 1 of section 144.010, the term "product" includes telecommunications services and the term "manufacturing" shall include the production, or production and transmission, of telecommunications services. The preceding sentence does not make a substantive change in the law and is intended to clarify that the term "manufacturing" has included and continues to include the production and transmission of "telecommunications services", as enacted in this subdivision and subdivision (5) of this subsection, as well as the definition in subdivision (9) of subsection 1 of section 144.010. The preceding two sentences reaffirm legislative intent consistent with the interpretation of this subdivision and subdivision (5) of this subsection in *Southwestern Bell Tel. Co. v. Director of Revenue*, 78 S.W.3d 763 (Mo. banc 2002) and *Southwestern Bell Tel. Co. v. Director of Revenue*, 182 S.W.3d 226 (Mo. banc 2005), and accordingly abrogates the Missouri supreme court's interpretation of those exemptions in *IBM Corporation v. Director of Revenue*, 491 S.W.3d 535 (Mo. banc 2016) to the extent inconsistent with this section and *Southwestern Bell Tel. Co. v.***

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<sup>18</sup> For clarity, we only reference § 144.030.2(4) unless we specifically cite to § 144.030.2(5), RSMo Supp. 2012.

<sup>19</sup> Section 144.010 was amended effective August 28, 2011. Because part of the applicable purchase period predates this change, § 144.010, RSMo Supp. 2005, is also applicable. The cited definition remains the same, except in § 144.010, RSMo Supp. 2005, the definition is found in subdivision (14).

***Director of Revenue*, 78 S.W.3d 763 (Mo. banc 2002) and *Southwestern Bell Tel. Co. v. Director of Revenue*, 182 S.W.3d 226 (Mo. banc 2005). The construction and application of this subdivision as expressed by the Missouri supreme court in *DST Systems, Inc. v. Director of Revenue*, 43 S.W.3d 799 (Mo. banc 2001); *Southwestern Bell Tel. Co. v. Director of Revenue*, 78 S.W.3d 763 (Mo. banc 2002); and *Southwestern Bell Tel. Co. v. Director of Revenue*, 182 S.W.3d 226 (Mo. banc 2005), is hereby affirmed . . . ;**

(5) Machinery and equipment, and parts and the materials and supplies solely required for the installation or construction of such machinery and equipment, purchased and used to establish new or to expand existing manufacturing, mining or fabricating plants in the state if such machinery and equipment is used directly in manufacturing, mining or fabricating a product which is intended to be sold ultimately for final use or consumption. **The construction and application of this subdivision as expressed by the Missouri supreme court in *DST Systems, Inc. v. Director of Revenue*, 43 S.W.3d 799 (Mo. banc 2001); *Southwestern Bell Tel. Co. v. Director of Revenue*, 78 S.W.3d 763 (Mo. banc 2002); and *Southwestern Bell Tel. Co. v. Director of Revenue*, 182 S.W.3d 226 (Mo. banc 2005), is hereby affirmed[.]**

Section 144.054.2, RSMo Supp. 2009 stated:

In addition to all other exemptions granted under this chapter, there is hereby specifically exempted from the provisions of sections 144.010 to 144.525 and 144.600 to 144.761, and from the computation of the tax levied, assessed, or payable under sections 144.010 to 144.525 and 144.600 to 144.761, electrical energy and gas, whether natural, artificial, or propane, water, coal, and energy sources, chemicals, machinery, equipment, and materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product, or used or consumed in the processing of recovered materials, or used in research and development related to manufacturing, processing, compounding, mining, or producing any product. The exemptions granted in this subsection shall not apply to local sales taxes as defined in section 32.085 and the provisions of this subsection shall be in addition to any state and local sales tax exemption provided in section 144.030.

Section 144.054.2 was also amended by SB 768 to state, in part, “The construction and application of this subsection as expressed by the Missouri supreme court in *DST Systems, Inc. v. Director of Revenue*, 43 S.W.3d 799 (Mo. banc 2001); [*Bell I* and *Bell II*] . . . is hereby affirmed.” In addition, § 144.054.1(2) and (3) were added, which state, “Producing” includes, but is not limited to, the production of, including the production and transmission of,

telecommunication services;” and "Product" includes, but is not limited to, telecommunications services,” respectively.<sup>20</sup>

SB 768’s changes to §§ 144.030 and 144.054 apply retroactively to the manufacturing exemptions for telecommunications service consistent with the Supreme Court’s interpretation in *Bell I* and *Bell II* because of the following language in § 144.030.2(4), RSMo Supp. 2018:

For the purposes of **this subdivision**, subdivision (5) of this subsection, and **section 144.054**, as well as the **definition in subdivision (9) of subsection 1 of section 144.010**, the term **"product"** includes telecommunications services and the term **"manufacturing"** shall include the production, or production and transmission, of telecommunications services. The preceding sentence does not make a substantive change in the law and is intended to clarify that the term "manufacturing" *has included and continues to include* the production and transmission of "telecommunications services . . . The preceding two sentences reaffirm legislative intent consistent with the interpretation of this subdivision and subdivision (5) of this subsection in [*Bell I* and *Bell II*.]

(Emphasis added). Missouri Const. Art. I, sec. 3 prohibits the enactment of any law “retrospective in its operation.” However, “[b]ecause the retrospective law prohibition was intended to protect citizens and not the state, the legislature may constitutionally pass retrospective laws that waive the rights of the state.” *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo.*, 950 S.W.2d 854 (Mo. banc 1977), citing *State ex rel. Meyer v. Cobb*, 467 S.W.2d 854, 856 (Mo. 1971); *Graham Paper Co. v. Gehner*, 59 S.W.2d 49, 51–52 (Mo banc 1933);

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<sup>20</sup> During all applicable times, § 144.010(13), RSMo Supp. 2005, and § 144.010(15), RSMo Supp. 2011, defined telecommunications services as:

. . . the transmission of information by wire, radio, optical cable, coaxial cable, electronic impulses, or other similar means . . . Telecommunications service does not include the following if such services are separately stated on the customer's bill or on records of the seller maintained in the ordinary course of business:

(a) Access to the Internet, access to interactive computer services or electronic publishing services, except the amount paid for the telecommunications service used to provide such access;

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(d) Cable or satellite television or music services[.]

see also *Meehan v. PNC Fin. Servs. Group, Inc.*, 2018 WL 2117655 (E.D. Mo., May 8, 2018), citing *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 349 (Mo. App. E.D. 2007). The General Assembly made it clear that the term “product” and “manufacturing” “has included and continues to include” “telecommunications services” and “the production, or production and transmission, of telecommunications services,” respectively. This non-substantive change in the law applies retroactively to both §§ 144.030.2(4) and 144.054.2 per the language in § 144.030.2(4).

#### B. Application of the Manufacturing Exemptions

Having discussed the legislative history and retroactive applicability of the manufacturing exemptions, we turn to the merits of CCE I’s refund claims. We discuss each exemption in turn before discussing CCE I’s other claims for relief.

##### *Section 144.030.2(4)*

CCE I is entitled to a tax exemption under § 144.030.2(4) if it can establish: a) each disputed item was purchased as replacement equipment; b) each disputed item was used directly in manufacturing or fabricating a product (telephone calls); and c) the product was intended to be sold ultimately for final use or consumption.

#### a. The Disputed Items were Replacement Equipment for a Product Intended to be Sold Ultimately for Final Use or Consumption

The disputed items clearly satisfy the first and third elements of CCE I’s § 144.030.2(4) claim. In the context of the manufacturing exemptions, “equipment” includes “all the fixed assets other than land and buildings of a business enterprise.” *Walsworth Pub. Co. v. Dir. of Revenue*, 935 S.W.2d 39, 40 (Mo. banc 1996), quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 768 (3rd ed.1976). Therefore, such items require “a degree of permanence to the business.” *Walsworth*, 935 S.W.2d at 40. The record establishes that the disputed items are such equipment. They exist as part of a lasting system essential to internet, cable, and phone services.

All of the disputed items were purchased as replacement parts for the Charter Network in Missouri. This system creates a voice service that is intended to be sold ultimately for final use or consumption. The parties agree that Fiberlink is a telecommunications provider, and CCE I provides the infrastructure that allows Fiberlink to provide such service to its customers. Fiberlink bills and receives payment from its customers for the telecommunications service. Fiberlink also collects and remits sales tax on its telecommunications service. This is all done under Charter's corporate umbrella.

Moreover, telecommunications service is a product. Section 144.030.2(4), RSMo Supp. 2018, makes clear that "the term 'product' includes telecommunications services and the term 'manufacturing' shall include the production, or production and transmission, of telecommunications services." In addition, the Missouri Supreme Court held in *Bell I* that telecommunications service constitute manufacturing a product under § 144.030. *Bell I*, 78 S.W.3d at 768. The court specifically stated:

Although the human voice may not be unsuitable for common use, it is unsuitable for communication that must occur over any appreciable distance. It cannot be heard from residence to residence, from office to office, or from town to town. The listener requires that the voice be "manufactured" into electronic impulses that can be transmitted and reproduced into an understandable replica. The end "product" is not the same human voice, but a complete reproduction of it, with new value to a listener who could not otherwise hear or understand it.

*Id.* The court reaffirmed its holding in *Bell II*. *Bell II*, 182 S.W.3d at 230.

b. The Disputed Items were Used Directly  
in the Manufacturing or Fabricating of a Product

In order to determine if the disputed items were used directly in manufacturing telecommunications service for purposes of § 144.030.2(4), we must examine the "integrated plant doctrine," which hinges on three factors:

(1) Is the disputed item necessary to production? (2) How close, physically and causally, is the disputed item to the finished product? (3) Does the disputed item

operate harmoniously with the admittedly exempt machinery to make an integrated and synchronized system?

*Dreyer*, 603 S.W.3d at 302, citing *Floyd Charcoal Co. v. Dir. of Revenue*, 599 S.W.2d 173, 177 (Mo. banc 1980), *abrogated on other grounds by Al-Tom Inv., Inc. v. Dir. of Revenue*, 774 S.W.2d 132 (Mo banc 1989).<sup>21</sup>

The evidence establishes that the disputed items satisfy all three prongs of the integrated plant doctrine. The first question is satisfied because all of the disputed items are necessary for the production, or the “production and transmission, of telecommunications services” to Charter’s customers. Section 144.030.2(4), RSMo. Supp. 2018. As discussed in CCE I’s brief, it is undisputed that Fiberlink’s telecommunications service requires multiple conversions/transformations of the human voice into voice signals that are transmitted over long distances utilizing both VoIP and TDM technologies. The voice signals are ultimately reproduced into an end product that is a reproduction of the caller’s voice. Fiberlink’s customers could not have made telephone calls in 2011 and 2012 without the use of all of the disputed items. Therefore, the disputed items were necessary for the production and transmission of Fiberlink’s telecommunication services via CCE I’s equipment.

The second question asks how close, physically and causally,<sup>22</sup> the disputed items are to the finished product. The disputed items interact with each other and cause changes in the voice signal as it moves along the network to ensure a telephone call reaches the desired recipient. The items are both physically and causally close to the finished product, as they are required to create the reproduction of the human voice.

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<sup>21</sup> In *Floyd*, the court for the first time considered the meaning of “used directly in manufacturing . . . a product” under § 144.030(3), RSMo 1969. The court analyzed a line of cases in which courts determined that exempt machinery and equipment had to perform a function involving a change in raw material into a final product and could not be used in preparation for manufacturing or after its completion. The court rejected this line of cases and adopted the integrated plant doctrine instead.

<sup>22</sup> The word “causal” is defined as, “1: expressing or indicating cause . . . 2: of, relating to, or dealing with a cause . . . 3a: constituting or acting as a cause <whether any one of the factors is as predominant that it is the – force . . . b: containing or involving cause or a cause; marked by cause and effect . . . c: arising from a cause: ensuing according to cause . . .[.]” WEBSTER’S THIRD NEW INT’L DICTIONARY at 355-356.

Moreover, the disputed items do not need to be located in the same building or owned by the same entity to qualify for the manufacturing exemption in order to be deemed physically and causally connected. In *Concord*, the court stated:

“If the statute’s purpose is to exempt materials and equipment used in the manufacture of items ultimately sold at retail then it makes no difference whether the manufacturing process is contracted out to various parties who never obtain title to or ownership of the product being manufactured and items ultimately sold.”

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The Department of Revenue’s regulations instruct us to consider physical location when deciding whether machinery is “directly used” in manufacturing. 12 CSR 10–3.326(2). However, physical distance alone is not determinative . . .

The composition and editing process is as essential to manufacturing a newspaper as the printing press, regardless of whether it is located in the same building or across town. We find the physical distance between the operations in this case does not break the direct tie between the composition and printing . . .[.]

*Concord Publ’g House, Inc. v. Dir. of Revenue*, 916 S.W.2d 186, 192 (Mo. banc 1996), quoting *Central Paving Co. v. Idaho Tax Comm’n.*, 879 P.2d 1107, 1110 (Idaho 1994); see also *Bell II*, 182 S.W.2d at 233 (“[T]he manufacturing of telephone services occurs throughout the entire telephone system, not only at the customer’s locations. . . the entire system operates continuously along pathways formed by much of the equipment at issue in this case . . . like *Concord*, two distinct entities are working together to create a single product in an integrated and coordinated process.”); *DST*, 43 S.W.3d at 803; *Dreyer*, 603 S.W.3d at 303. Moreover, the General Assembly reaffirmed *Bell I*, *Bell II* and *DST* through SB 768. While there have been many changes to telecommunications technology over time, the basic structure as discussed in *Bell I* and *II* remains and is applicable here.

As in *Bell I* and *II*, the evidence in this case establishes that Fiberlink manufactures a product, with the assistance of CCE I’s equipment, as required in § 144.030.2, and such manufacturing takes place throughout the entire Charter Network. Accordingly, the fact that

Fiberlink is the telecommunications company and CCE I provides the infrastructure does not prevent the disputed items from being exempt. We do not accept the Director's argument that because CCE I is not a telecommunications company it cannot benefit from the manufacturing exemption pursuant to § 144.030.2(4).

Finally, the fact that CCE I does not use its network exclusively for VoIP is not dispositive. The third question asks whether the "disputed item operates harmoniously with admittedly exempt machinery to make an integrated and synchronized<sup>[23]</sup> system?" *Bell II*, 182 S.W.3d at 230. The disputed items do just this. As discussed in CCE I's brief, the electrical impulses created by the caller's handset from the caller's voice could not reach the recipient and be reproduced in a way that can be heard and understood by the call recipient without EMTAs, Taps, Amplifiers, Optical Transceiver Equipment, Splitter/Combiners, CMTSSs, Core Routers, Optical Transport Equipment, coaxial cable, fiber optic cables, Switches, and Software along with Charter's other network equipment. The disputed items operate harmoniously with Charter's other exempt equipment in order to make an integrated and synchronized system used to manufacture telephone calls within seconds of someone picking up a handset.

The fact that most of the disputed items were also used for internet and cable services does not make them less a part of a harmonious system that is integrated and synchronized to manufacture voice service. Moreover, the Charter Network is specifically designed to ensure VoIP receives priority over cable and internet so that voice works 99.99% of the time. CCE I's system also has enhanced features (duplicate equipment) for this very reason.

The Director does not necessarily disagree with this contention. Instead, the Director appears to argue that while the disputed items are directly used in the manufacturing of telephone

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<sup>23</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "synchronize" as "to happen or take place at the same time[.]" *Id.* at 2319.



calls, they are primarily used for the non-taxable services of internet and cable, and not voice. The Director relies on *DST* in which the court noted that the computers and other equipment in question were “not used exclusively for the manufacture of the products in question, they are substantially so used.” *DST*, 43 S.W.3d at 803. This Commission already addressed this argument in our July 23, 2020, protective order.

CCE I has met its burden that all disputed items satisfy all three requirements of the integrated plant doctrine and are therefore “used directly in manufacturing” pursuant to § 144.030.2(4). It has also established the other required elements for an exemption under § 144.030.2(4).

Accordingly, CCE I is entitled to a refund of use tax paid on the disputed items in 2011 and 2012 pursuant to § 144.030.2(4), in the amount of \$ 645,879.21 for its 2014 refund request and \$849,773.06 for its 2015 refund request for a total of \$1,495,652.30, plus statutory interest in accordance with §§ 144.190.2, RSMo Supp. 2012<sup>24</sup> and 32.065.

#### C. Section 144.054.2

Section 144.054.2, RSMo Supp. 2009, states:

In addition to all other exemptions granted under this chapter, there is hereby specifically exempted from the provisions of sections 144.010 to 144.525 and 144.600 to 144.761, and from the computation of the tax levied, assessed, or payable under sections 144.010 to 144.525 and 144.600 to 144.761, electrical energy and gas, whether natural, artificial, or propane, water, coal, and energy sources, chemicals, **machinery, equipment, and materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product**, or used or consumed in the processing of recovered materials, or used in research and development related to manufacturing, processing, compounding, mining, or producing any product. The exemptions granted in this subsection shall not apply to local sales taxes as defined in section 32.085 **and the provisions of this subsection shall be in addition to any state and local sales tax exemption provided in section 144.030.**

(Emphasis added.)

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<sup>24</sup> Section 144.696 explicitly makes § 144.190 applicable to a use tax refund request.

Sections 144.054.2 and 144.030.2(4) provide sales and use tax exemptions for manufacturing, with notable differences. *See E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 317 (Mo. banc. 2011) (“The legislature intended to provide additional exemptions [in section 144.054] that are not allowed by section 144.030”). Section 144.054.2 excludes the requirements that a product be “intended to be sold ultimately for final use or consumption” and that the machinery or equipment be used directly in the manufacturing process. Another notable difference is the lack of a definition in Chapter 144, RSMo, for the term “product” as used in § 144.054.2, unlike the phrase “a product which is intended to be sold ultimately for final use or consumption,” which is specifically defined in § 144.010.1(9). The Director applies the same arguments addressed above to the application of § 144.054.

Section 144.054.2 requires CCE I to establish the disputed items were used or consumed in the manufacturing of a product, not that they were “directly used” as required by § 144.030.2. The evidence establishes that the disputed items are “used or consumed in the manufacturing” of telecommunications service. Section 144.030.2, RSMo Supp. 2018. The items are required for Charter’s customers to make and receive telephone calls. In addition, SB 768 made it clear that a product for purposes of §144.054.2 includes telecommunications service.<sup>25</sup> *See also* 12 CSR § 10-111.011(3)(B), which is applicable to § 144.054, and states, “The exemptions...do not require...that the purchaser be the one who uses the equipment in an exempt fashion. All that is required is that the equipment is used in a tax-exempt manner.” Accordingly, and as more fully discussed above, CCE I is also entitled to a refund for the use tax it paid on the disputed items in 2011 and 2012 under § 144.054.2, in the amount of \$645,879.21 for its 2014 refund request and

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<sup>25</sup> The definition of “product” for purposes of § 144.054 has also been more generally defined to mean “an output with a market value” in which the term “market” is “a sphere within which price-making forces operate and in which exchange in title tend to be followed by actual movement of goods.” *Fenix Constr. Co. of St. Louis v. Dir. of Revenue*, 449 S.W.3d 778, 780 (Mo. banc. 2014). Telecommunications service also falls within this definition.

\$849,773.06 for its 2015 refund, for a total of \$1,495,652.30, plus statutory interest in accordance with §§ 144.190.2 and 32.065.


D. CCE I's Other Claims

In its amended complaint, CCE I pleads that the Director's decision to deny its refund claims violated both United States and Missouri constitutional provisions. This Commission does not have authority to decide constitutional issues. *See Cass County v. Dir. of Revenue*, 550 S.W.3d 70, 74 (Mo. banc 2018); *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 76 (Mo. banc 1982). The issues have been raised and may be argued before the courts if necessary. *Tadrus v. Missouri Bd. of Pharmacy*, 849 S.W.2d 222 (Mo. App. W.D. 1993). In addition, because we find that CCE I is entitled to a refund on the use tax it paid on the disputed items pursuant to §§ 144.030.2(4) and 144.054.2, we need not consider the application of §§ 32.053 and 143.903.2, as pled by CCE I.

**Summary**

CCE I is entitled to a refund for the use tax it paid on the disputed items in 2011 and 2012 under §§ 144.030.2(4) and 144.054.2, in the amount of \$645,879.21 for its 2014 refund request and \$849,773.06 for its 2015 refund, for a total of \$1,495,652.30, plus statutory interest.

SO ORDERED on January 18, 2022.

  
RENEE T. SLUSHER  
Commissioner