IN THE SUPREME COURT OF MISSOURI

UNION ELECTRIC CO. D/B/A AMEREN MISSOURI, Appellant (Petitioner below), v. DIRECTOR OF REVENUE, Respondent.	)	Case No. SC93083

APPELLANT/PETITIONER UNION ELECTRIC CO. D/B/A AMEREN MISSOURI'S REPLY BRIEF

On Petition for Review from the Administrative Hearing Commission
Hon. Sreenivasa Rao Dandamudi, Commissioner

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SUMMARY OF REBUTTAL

Appellant/Petitioner Union Electric Co. d/b/a Ameren Missouri's Opening Brief focused almost entirely on the effect of a regulation that allows a sales tax exemption for retail bakeries under 12 CSR 10-110.621(4)(O) (the "Bakery Regulation"). Respondent Department of Revenue's Brief barely touches on this issue, discussing it in three pages at the end of its Brief. The Department does not even address Ameren's key points.

Ameren's core position can be briefly summarized: (1) the Department of Revenue has told taxpayers that retail bakeries qualify for the processing exemption enacted in 2007 in Section 144.054, (2) the Administrative Hearing Commission found that the production (non-retail) part of Schnucks' bakery departments are "bakeries" for the purposes of the Bakery Regulation, and (3) therefore, the processing exemption is available for energy used in the production area of Schnucks' bakery departments.

The Department's response is that *Aquila* held that the processing exemption does not apply to retail food sellers, and, therefore, Schnucks' bakery operations are not exempt, regardless of what the Department told taxpayers in its regulations.

Consider what a remarkable position the Department is taking: the Department is stating that it promulgated a regulation that the Department believes is illegal and the Department has done nothing to repeal or modify that regulation under the Administrative Procedure Act. Instead, the Department is asking this Court to join it in making an end-run around the Administrative Procedure Act (and the legislature's role under that Act) by judicially invalidating the Bakery Regulation. The Department does not explain why it has not acted to revise or revoke the Bakery Regulation.

The Department fails to address *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346 (Mo. banc 2001), where this Court rejected a prior effort by the Department of Revenue to avoid being bound by its own regulations.

Other points made in Ameren's Opening Brief to which the Department does not respond include: (1) that *Aquila* did not state that the exclusion from the exemption for food sales "for retail consumption" applied to food sales by retailers that (unlike the store in *Aquila*) cannot be considered a restaurant, (2) *Aquila* could not have invalidated the Bakery Regulation given the fact that *Aquila* did not mention the Bakery Regulation and the *de facto* taxpayer in *Aquila* (Casey's General Stores) never argued that it was a bakery covered by the Bakery Regulation, and (3) the Bakery Regulation cannot be "plainly inconsistent" with a statute that *Aquila* held is ambiguous, *i.e.*, not plain.

Finally, the Department uses the wrong legal standard to attack the Commission's finding that Schnucks' bakeries are bakeries under the Bakery Regulation. The Department merely makes conclusory arguments that the Schnucks bakeries are not covered by the Regulation. But the Department's Brief does examine the whole record to assess whether the Commission's finding is "supported by substantial evidence on the whole record." *PF Golf, LLC v. Dir. of Revenue*, No. SC92663, 2013 Mo. LEXIS 39, at *3 (Mo. banc July 16, 2013). This Court should not conduct a *de novo* review of the factual record, much less a review that focuses on only a few pieces of evidence. The Commission's finding is actually supported by overwhelming evidence.

Ameren and Schnucks are entitled to the benefit of the tax exemption in the Bakery Regulation. The Commission's ruling should be reversed.

ARGUMENT

The core issue is whether the Department must follow its own regulation, discussed below in Section I. But Section II makes the point that even if one were to examine the record as if there were no regulation (the approach taken by the Department), a review of the whole record would show that the degree of transformation that takes place in the production part of Schnucks' bakeries qualifies as "processing" under Section 144.054.

I. The Department is Bound by its Own Regulation (Responding to Respondent's Brief, Section II, pages 18-20).

Ameren's position is straight-forward: the Department's Bakery Regulation allows an energy exemption for bakeries, the Commission found that Schnucks' bakery departments are "bakeries" under the Bakery Regulation, and therefore Ameren is entitled to a refund pursuant to the Regulation. The Department acknowledges that the Bakery Regulation is central to Ameren's argument, but does not address this issue until Section II of its Brief, wherein it mischaracterizes the facts, the law, and Ameren's position. (Resp. Br., at 18.)

A. The Evidence and Unassailable Findings of the Commission Show that Schnucks' Bakery Production Areas are "Bakeries" that Qualify for an Exemption Pursuant to the Bakery Regulation.

The Commission made a factual finding that the non-retail portions of Schnucks' bakery departments **are** bakeries for purposes of the Bakery Regulation. The Department addresses this finding only in a footnote, wherein it claims that the Commission's finding

is merely "an aside", implies that the finding is incorrect, and argues that "just because a person or entity bakes something does not mean it is a bakery in accordance with the regulation . . . ." (Resp. Br., at 18-19 n.3.)

The Department does not and could not argue that the Commission's finding is not "supported by substantial evidence on the whole record." *PF Golf,* 2013 Mo. LEXIS 39, at *3; *see also Concord Publishing House, Inc. v. Dir. of Revenue,* 916 S.W.2d 186, 189 (Mo. banc 1996). The finding must be upheld so long as there is "substantial evidence" to support it, which means "evidence that if true has probative force" and "from which the trier of fact reasonably could find the issues in harmony therewith." *Preston v. Dir. of Revenue,* 202 S.W.3d 608, 609 (Mo. banc 2006).

The Department makes no effort to delve into the "whole record." If it had, it would have to describe the part of the record with extensive evidence produced over two days showing that Schnucks' bakeries are, indeed, "bakeries". That evidence includes the uncontroverted evidence that a Department official working on Ameren's refund application agreed with the merits of Ameren's application and admitted that the Department was only conducting a "square foot" analysis to determine the amount due. (Tr., Vol. 1, at 124, describing the statements of Department of Revenue official Roger Freudenberg.) The Department did not produce Mr. Freudenberg at the hearing, or anyone else, to either deny or explain why the Department changed its position, presumably because that testimony would have not have helped the Department's case.

The Department argues that there will be an avalanche effect of adopting Ameren's position, claiming that if the Bakery Regulation applied to retailers (as the

Regulation expressly does), then it would apply to "any person or entity" that described itself as a bakery and "put in a toaster". (Resp. Br., at 20.) That claim is absurd. The Commission made a finding, based on the "whole record," that Schnucks' bakeries are covered by the Bakery Regulation on the basis of extensive evidence, including uncontroverted evidence that Schnucks' bakery operations are far more extensive than that of its competitors. (See Section II below, including specific reference to Schnucks' bakery operations being different from that of competitors at Tr., Vol. 1, at 62-63.)

Moreover, if the Department thinks there is a problem in applying the processing exception to any retailer, the Department should try to change the Bakery Regulation (and a retail hobby shop regulation) using the Administrative Procedure Act, rather than the judiciary.

The Department also tries to support its position by mischaracterizing Ameren's position. According to the Department, Ameren's position is that a refund is appropriate merely because Schnucks allegedly (1) "heats up or bakes items to be sold directly to customers," (2) "made the marketing decision to designate a particular retail section of its grocery stores as 'the bakery department,'" and (3) "bakes something." (Resp. Br., at 18, 19 n.3.)

Ameren has never made such absurd straw-man arguments. Ameren has made clear that it is only seeking a refund for the **non-retail** sections of Schnucks' bakery departments, which are separated by a wall from the retail sections, and contain the retarders, proofers, ovens and other equipment that is used by Schnucks to create baked goods. (Tr., Vol. 1, at 24-72, 78-125, 143-153; Exs. 1, 21, 23, 24, 25.) Furthermore, this

is not a "marketing" device by Schnucks to re-label or redesign store areas to fall within the Bakery Regulation. Schnucks' bakery production areas were distinct when the stores were built. (Tr., Vol. 1, at 133-137, 147; Exs. 22-23.)

A summary of the extensive evidence in the record showing the transformation that takes place in the Schnucks' bakeries is found below in Section II, establishing that more than "substantial evidence" exists to support the finding that Schnucks' bakery departments qualify as "bakeries" under the Bakery Regulation. As a result, Ameren is entitled to a refund.

B. The Bakery Regulation was Not Addressed in, Much Less Invalidated By, *Aquila*.

Once it is determined that Schnucks' bakery operations are within the scope of the Bakery Regulation, the only question is whether the Bakery Regulation was invalidated by *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1 (Mo. banc 2012) . The Department did **not** argue to the Commission that the Bakery Regulation was trumped by *Aquila*. (AHC Op. at 8, App. A8.) Nonetheless, the Commission concluded that the Bakery Regulation was invalidated by *Aquila*, and now, for the first time, the Department makes the same argument. (Resp. Br., at 19-20.)

The Department asserts that the "the lynchpin of Schnucks' argument" is that *Aquila* did not invalidate the Bakery Regulation because the *Aquila* Court held that the term "processing", as used in Section 144.054, is ambiguous. (Resp. Br., at 19.) That is incorrect. There are numerous other threshold reasons why *Aquila* did not invalidate the Bakery Regulation, many of which are not addressed in the Department's Brief.

First, the Department (and the Commission) assumed that the statement in *Aquila* that "the preparation of food for retail **consumption** is not 'processing'" was meant to apply to the preparation of food for retail **sale**. But the context of that statement in *Aquila* indicates that "retail consumption" was referring to restaurant-type consumption or immediate consumption: the *Aquila* Court specifically noted that Casey's is a restaurant insofar as to serves food to customers. (*See* Ameren's Opening Br., at 17-18 (*citing Aquila*, 362 S.W.3d at 5, n.9.) The uncontroverted evidence is that Schnucks' baked goods are sold primarily for later consumption off the premises. (Tr., Vol. 1, at 29:25-30:7, 51:8-11, 54:14-17, 57:4-7, 59:17-19, 62:7-9, 65:9-11, 69:23-70:1.) The Department does not address this issue at all. If the Court finds that "retail consumption" as used in *Aquila* did not mean "retail sale," there is no basis for saying the Bakery Regulation was invalidated in *Aquila.*

Second, even if "retail consumption" is deemed synonymous with "retail sale," the question remains whether *Aquila* intended to apply the "retail consumption" standard even when doing so would contradict an interpretative regulation of the Department of Revenue. The issue of first impression is how to interpret the word "processing" in the context of food preparation **when the regulating agency has addressed that issue in a regulation?** *Aquila* did not address, much less rule on, that question.

Nevertheless, the Department implies that this question was directly or implicitly addressed in *Aquila*. That is incorrect. The *Aquila* opinion **did not** mention the Bakery Regulation, much less conclude that the regulation was "not...controlling". (*Compare Aquila,* 362 S.W.3d 1, *with* Resp. Br., at 13, 20.) Casey's General Stores **did not**

"describe its business as a bakery", or claim that its stores were "bakeries", or rely on the Bakery Regulation in seeking a refund from the State, as the Department suggests. (Resp. Br., at 13, 20.) The authority that the Department cites for these statements is merely the Administrative Hearing Commission's statement that Casey's listed "bakery" as part of the nature of its business (along with "convenience store", "grocery items" and "fuel") to obtain a business license from the City of Greenwood, Missouri. *See* Decision of the Administrative Hearing Commission, *Aquila Foreign Qualifications Corp. v. Dir. of Revenue,* No. 09-0376 RS (Apr. 28, 2011), at ¶7.

Moreover, Aquila/Casey's Supreme Court Brief did not claim that Casey's was covered by the Bakery Regulation. Aquila merely cited the Bakery Regulation (and a hobby shop example also appearing in 12 CSR10-110.621) for the proposition that retailers may qualify for processing exemptions under Section 144.054. *See* Brief of Respondent, *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, No. SC91784, 2011 WL 7004828, at *16 (Nov. 25, 2011).

Third, regarding the issue now before the Court—whether the Bakery Regulation is invalid—the Court should answer that question by holding that the agency regulation remains valid. As explained in Ameren's Opening Brief, this Court should give "substantial deference" to the Department's regulation unless it is shown by a challenger (who here is also the promulgator, the Department of Revenue) to be "unreasonable and plainly inconsistent" with the statute under which it was promulgated. *State ex rel. Mo. Pub. Def. Comm'n v. Waters,* 370 S.W.3d 592, 602 (Mo. banc 2012); s*ee also* Ameren's Opening Br., at 21-24.

The Department's Brief does not address the most similar case, *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346 (Mo. banc 2001), which held that the Department of Revenue was required to follow its own regulation despite its contention that the regulation was inconsistent with a statute. (*See* Ameren's Opening Br., at 19-21.) The Department should adhere to *Greenbriar's* instruction: follow the requirements of Missouri's Administrative Procedure Act to modify a regulation. *Greenbriar*, 47 S.W.3d at 357.

As *Greenbriar* further explained, even when the Department believes that its regulations are "plainly inconsistent" with the underlying statute, the Department cannot retroactively repudiate its regulation. Even if the tax was assessable, the taxpayer could not be liable for past taxes. 47 S.W.3d at 354, 356-57 (*citing* Mo. Rev. Stat. § 143.903).[1] This statute was put in place in reaction to two decisions handed down by this Court in

[1] "[A]n unexpected decision by or order of a court of competent jurisdiction or the administrative hearing commission shall only apply after the most recently ended tax period of the particular class of persons subject to such tax imposed by chapters 143 and 144 and any credit, refund or additional assessment shall be only for periods after the most recently ended tax period of such persons."

Mo. Rev. Stat. § 143.903.1. The statute goes on to state that the term "unexpected" shall mean "that a reasonable person would not have expected the decision or order based on prior law, previous policy or regulation of the department of revenue." Mo. Rev. Stat. § 143.903.2.

the late 1980s – one of which involved a ruling that, despite Department regulations exempting newspapers from sales tax, the regulations were beyond the scope of the underlying statute and outside the scope of the Department's authority. *See Lloyd v. Dir. of Revenue*, 851 S.W.2d 519, 523 (Mo. banc 1993) (referencing *Hearst Corp. v. Dir. of Revenue*, 779 S.W.2d 557 (Mo. banc 1989)). The Court noted that the two cases that prompted Section 143.903's enactment

> involved situations where a . . . regulation . . . established an expectation relied on by . . . the taxpayer . . . that a particular . . . exemption was . . . permissible…. Unquestionably the enactment was a legislative response to the far reaching impact of those two decisions, which overruled or invalidated a prior case, regulation or statute relied on by the state or the taxpayer in their fiscal planning.

Lloyd, 851 S.W.2d at 523; *See also Laciny Bros., Inc. v. Dir. of Revenue*, 869 S.W.2d 761 (Mo. 1994) (finding that Administrative Hearing Commission decision assessing additional taxes was "unexpected" under Section 143.903 in view of regulations promulgated by and policies previously followed by the Department of Revenue, and ruling that taxpayer only liable for assessment on a prospective basis pursuant to statute).

Greenbriar and Section 143.903 apply here: Ameren, Schnucks, and Schnucks' consultant reasonably relied on the Bakery Regulation in pursuing a refund under Section 144.054. (Tr., Vol. 1, at 79:6-7, 80:9-19, 81:19-83:5, 83:14-84:11, 86:10-18.)

Fourth, the Department does not (and cannot) address the point that the cases cited by the Commission in which regulations were invalidated because they went beyond statutory authority are those that impinge on citizens' rights or freedom, rather than those

granting them a benefit. (*See* Ameren's Opening Br., at 24-26). The Department cites a case for the proposition that regulations that attempt to expand or modify statutes are invalid. *Hansen v. State*, 226 S.W.3d 137 (Mo. banc 2007) (cited in Resp. Br., at 19). But that case further holds that the correct way to have a regulation declared invalid is through an action for a declaratory judgment. 226 S.W.3d at 144. A declaratory judgment **would** be the proper way for the Department to challenge the Bakery Regulation, but for the fact that the Administrative Procedure Act directs agencies how to properly change a regulation if an agency believes it acted unlawfully in enacting a regulation.

Fifth, the Department argues that the Bakery Regulation is "merely" one of 16 examples contained in 12 CSR 10-110.621(4), and a "stray" example at that, suggesting that therefore the Bakery Regulation should not count. (Resp. Br., at 4, 5, 18.) The Department cites no authority for the proposition that examples in a regulation deserve the adjectives "mere" or "stray," whether there are 2 or 20 examples. The examples in the regulation are as valid as any other part of the regulation. *See, e.g., Dolan v. Powers*, 260 S.W.3d 376 (Mo. Ct. App. 2008) (treating examples contained in regulation as valid part of regulation); *Four Rivers Home Health Care, Inc. v. Dir. of Revenue*, 860 S.W.2d 2 (Mo. Ct. App. 1993) (same).

Finally, we reach what the Department calls Ameren's "lynchpin" argument: the ambiguity of the statute. But the Department has it backwards. If all of the analyses above were to fail, the Department would still have to establish that its Bakery Regulation is "plainly inconsistent" with the statute. This Court said in *Aquila* that the

processing statute is "ambiguous." *Aquila*, 362 S.W.3d at 3. How can a regulation be "plainly inconsistent" with a statute that is not plain? The Department cites no cases in which a court declared a regulation to be "plainly inconsistent" with an ambiguous statute.

II. Allowing Ameren to Claim an Exemption Under Section 144.054 Does Not Conflict With Section 144.054 or *Aquila.* (Responding to Respondent's Brief, Section I).

Section I of Respondent's Brief is written more as if there is a *de novo* review or this Court was the trier of fact. Regardless, the Department's conclusory assertions are contrary to the record. In this Section, Ameren provides a more complete view of the record.

A. Schnucks' Bakery Departments Engage in "Processing" under Section 144.054.

Throughout its Brief, the Department grossly mischaracterizes the evidence contained in the record regarding Schnucks' operations and production of baked goods.

The record does not reflect that Schnucks merely "heats up frozen items" as claimed by the Department. As established through the extensive evidence presented by Ameren during the hearing before the Administrative Hearing Commission, Schnucks' bakery departments take what are essentially raw, inedible, and unsellable frozen dough products and transform them into consumable and sellable baked goods. (*See* Tr., Vol. 1, at 24-72, Exs. 1-2, 4-5.)

Due to space constraints, Ameren is unable to fully recount the production process used for each of the 12 types of baked goods discussed at the hearing. However, even a few examples show that the Department's characterization of Schnucks' baked goods as "pre-made" is belied by the evidence.

For example, as discussed at the hearing, Schnucks produces stollens by taking raw, inedible, frozen dough and placing it in a retarder overnight. The next day, the dough is taken out and allowed to reach room temperature. Next, the dough is placed in a proofer at 110 degrees and 75 percent humidity for 30 minutes. The dough is then removed, topped with assorted fruit, and sprinkled with crumbs. The dough is then placed in the oven to bake for 25 to 30 minutes. Finally, it is removed, allowed to cool, and drizzled with icing prior to packaging. (Exs 1, 4; Tr., Vol. 1, at 42:25-48:13.)

Ameren also presented evidence that Schnucks produces danishes by taking raw, inedible frozen dough and placing it on a baking pan in a retarder overnight. The next day, the dough is placed in a proofer at 110 degrees with 75 percent humidity for 30 minutes, or until it doubles in size. The dough is then taken out of the proofer, topped with fruit or other toppings, and placed in the oven at 350 degrees for approximately 15 minutes. After baking, the dough is sometimes glazed. (Ex. 1, Tr. Vol. 1, at 47:8 – 48:2.)

Likewise, Ameren presented evidence that Schnucks produces rolls by taking raw, inedible, frozen dough and placing it on a bread screen in a retarder overnight. The next day, the dough is removed and allowed to sit out until it reaches room temperature. Depending on the type of roll, the dough may then be topped. The dough is then placed in a proofer at 100 degrees and 90 percent humidity for 35 to 40 minutes, until the dough

is 2 ½ or 3 times its original size. Next, the dough is steamed in the oven for 30 seconds, and then baked for approximately 20-25 minutes or until golden brown. The rolls are finished off with Baker's Bright spray. (Ex. 1, Tr., Vol. 1, at 54:22-56:3.)

Finally, as the Department highlights in its brief, the evidence shows that Schnucks makes donuts by taking raw dough and placing it overnight in a retarder. The next day, the donuts are placed in a proofer at 100 degrees with 75 percent humidity for approximately 20 to 30 minutes. After sitting out for an additional 20 minutes, they are then fried in the fryer for 35 to 45 seconds on each side. When cool, they are iced, topped, or glazed. (Ex. 1, Tr., Vol. 1 at 30:13-42:24.)

The aforementioned activities fit the statutory definition of "processing" included in Section 144.054. Per the statute, "processing" constitutes "any mode of treatment, act, or series of acts performed upon materials to transform or reduce them to a different state or thing." Mo. Rev. Stat. § 144.054.1(1). It is indisputable that taking raw dough and converting it into various baked goods, as detailed above and in the record, constitutes a series of acts performed upon materials (raw dough, fillings, toppings, glazes, oil, etc.) to transform them or reduce them to a different state or thing (i.e. a finished baked good). In fact, there was testimony that was not contradicted or objected to that the bakery production functions transformed products "into a different state or thing." (Tr., Vol. 1, at 30:8-12, 51:12-15, 54:18-21, 57:11-14, 59:20-23, 62:10-13, 65:12-15, 70:2-5.)

Contrary to the Department's implications, processing at a bakery occurs whether or not the production starts by mixing flour and water. The Department offered no

evidence at the hearing that "from scratch" production is common or predominant at retail bakeries, or that the types of bakeries the Department had in mind in issuing the Bakery Regulation were different from Schnucks' bakeries. Nor is there anything in the Bakery Regulation or processing statute suggesting that such a requirement exists. *See* Mo. Rev. Stat. § 144.054; 12 CSR 10-110.621(4)(O). This is merely an after-the-fact argument made without any evidence. This argument does not provide an alternative basis for affirming the Commission's decision, especially in light of the Commission's factual finding that Schnucks' bakeries are within the scope of the Bakery Regulation.

B. Schnucks' Bakery Operations are Not Akin to Baking Brownies in the "Average Home Kitchen."

The Department also argues that Ameren is not entitled to a refund under Section 144.054 because Schnucks has "appliances" that "perform the same functions as those found in the average home kitchen." (Resp. Br., at 2, Statement of Facts.) This assertion is false.

The Department offered no evidence (and could offer no evidence) that the average home kitchen contains the same type of freezer, oven, mixer, or fryer that is included in Schnucks' bakery production areas (much less a proofer and a retarder), that the functionality of Schnucks' machines is similar to that owned by the average person, or that the appliances used by Schnucks are "not sophisticated" or "specialized". (Resp. Br., at 2, 14.) Nor did Schnucks' witnesses indicate so, as claimed by the Department. (Resp. Br., at 2.) Also, unlike the "average home kitchen," the Schnucks bakery

production areas generate so much heat that they have a separate air conditioning unit just for the bakery production areas. (Tr., Vol. 1, at 139.)

In addition, the Department argues that processing does not occur because Schnucks employees are only given "24 hours of training" by other employees and paid on an "hourly" basis (Resp. Br., at 2). But the Department has presented no evidence that "industrial" employers, "manufacturers", or any other entities that the Department deems eligible for refunds under Section 144.054 do not pay their employees on an hourly basis, have more training than Schnucks' employees do, are trained by non-employees, or are more "skilled" than Schnucks' employees. Nor does the Department provide a reason why hourly workers cannot engage in processing.

C. The Foreign Authorities Cited by the Department are Irrelevant or Support Ameren's Position.

The Department also cites cases from Connecticut, Arizona, Oklahoma, Massachusetts, Ohio, Virginia, and North Carolina that it claims support the conclusion that "retail establishments" that prepare food "for immediate sale" cannot qualify for an exemption under Section 144.054. (Resp. Br., at 9, 16.) These cases do not support the Department's argument because they turn on language that does not appear in Section 144.054, and that do not involve regulations similar to the Bakery Regulation at issue in this case.

In *Stop 'n Save, Inc. v. Dep't of Revenue Servs*., 562 A.2d 512 (Conn. 1989), a supermarket chain claimed a tax exemption associated with its in-store bakery operations. *Stop 'n Save*, 562 A.2d at 514. The court was asked to interpret a Connecticut statute that

exempted "[s]ales of and the storage, use or other consumption of machinery used directly in manufacturing or agricultural production process." *Id.* at 513 n.2 (citing Conn. Gen. Stat. § 12-412(34)). Connecticut regulations stated that the "'manufacturing production process' *shall occur solely at an industrial plant.*" *Id.* (citing Conn. Reg. 12-426-11b(a)(11))(emphasis in original). The court found that because the taxpayer's baking activities took place at a supermarket rather than at an "industrial plant," it could not qualify for the exemption. *Id.* at 515.

In *Stop 'n Save,* a regulation barred the exemption for a retail store. Here, a Missouri regulation grants an exemption to bakeries which "[create] baked goods for sale directly to the public." 12 CSR 10-110.621(4)(O). *Stop 'n Save* is relevant here only in that it follows what Missouri law requires: adhere to the regulations. Doing so here mandates a refund for Ameren.

The Department also insinuates that it is appropriate based on *Stop 'n Save* for the Court to consider "the primary purpose" of Schnucks' stores in determining whether Ameren qualifies for an exemption. (Resp. Br., at 16-17.) But the "primary purpose" discussion in *Stop 'n Save* was tied to a repealed definition of "industrial plant". *See Stop 'n Save,* 562 A.2d at 515 n.8. **No similar "primary purpose" test appears in Section 144.054 or in associated state regulations.** By contrast, the Missouri Legislature chose to include such a test in other tax exemption statutes. *See, e.g.,* Mo. Rev. Stat. § 144.030.2(4) (applying a primary purpose test to the determination of whether a facility qualifies as a "material recovery processing plant"). The Legislature is presumed to have made this choice purposefully. *Jantz v. Brewer,* 30 S.W.3d 915, 918 (2000) ("[T]he

legislature is presumed to have intended what the law states directly, and to act intentionally when it includes language in one section of a statute but omits it from another.") The same can be said of the Legislature's choice not to include the term "plants" in Section 144.054, while such language appears in other Missouri exemptions, like Section 144.030.2.

In *Arizona Dept. of Revenue v. Blue Line Distributing, Inc.*, 43 P.3d 214 (Ariz. Ct. App. 2002), the court found that the taxpayer did not qualify for an exemption because Arizona's statute required a general recognition that the operation was deemed a **"manufacturing or processing" operation**. The *Blue Line* decision included language indicating that while a restaurant would not qualify for an exemption under Arizona's statute (like the restaurants in *Brinker*), **a bakery would**. *Id.* at 215 n.2 (stating that bakeries "are generally a business which, at the completion of their processing, have available to the public an inventory of a product, much like a manufacturer.") The distinction appeared to be that restaurants (like pizzerias) only prepare food for one customer at a time, whereas other establishments (like bakeries) do not. *Id.* In this regard, the *Blue Line* decision also undercuts rather than supports the Department's argument.

In *McDonald's Corp. v. Okla. Tax Comm'n,* 563 P.2d 635, 636 (Okla. 1977), the court denied an exemption on the basis that the taxpayer (a McDonald's restaurant) did not meet the statutory definition of **"manufacturing plants"** – *i.e.* establishments "primarily engaged in manufacturing or processing operations, and generally recognized as such." Again, "plant" was in the statute, and here, it is not.

In *Roberts v. Bowers*, 162 N.E.2d 858 (Ohio 1959), the taxpayer classified restaurant equipment as "manufacturing" equipment in a personal property tax return. The relevant Ohio statute defined a "manufacturer" as "a person who purchases, receives, or holds personal property for the purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing." *Id.* at 859. Again, this statutory language is far different from that included in Section 144.054.

In *Golden Skillet Corp. v. Commonwealth*, 199 S.E.2d 511 (Va. 1973), the court found that a restaurant that cooked and served chicken did not qualify for an exemption because the statute used the word "industrial," and therefore provided an exemption for "machinery and tools used in processing, manufacturing, refining, mining, or conversion of products for sale or resale **only in the industrial sense**." *Id.* at 513-514 (emphasis added). Again, Section 144.054 does not use the word "industrial", even though the Department used that term repeatedly in its Brief.

In *HED, Inc. v. Powers*, 352 S.E.2d 265 (N.C. Ct. App. 1987), the court found that equipment sold by the taxpayer to Hardee's did not qualify as a **"manufacturing industry or plant,"** per North Carolina's statute. *Id.* at 266 (emphasis added).

Finally, in *York Steak House Systems, Inc. v. Comm'r of Revenue,* 472 N.E.2d 230 (Mass. Sup. Judicial Ct., 1984), the court indeed found that thawing and cooking of a steak did not constitute processing under Massachusetts law. What it did not find was that all retail establishments that prepare food for sale to the public do not qualify for tax exemptions.

In sum, the decisions cited by the Department are tied to the wording of the particular statutes and regulations present in those states. Such wording – including "industrial plants" and "manufacturing plants" - does not similarly appear in Section 144.054. This language was key to these out-of-state decisions, rendering them inapposite. As a result, the Court should disregard the Department's reliance on these authorities.

D. The Department Ignores Missouri Precedent and Department Regulations Allowing Retailers Exemptions Under Section 144.054.

In arguing that retailers cannot engage in processing, the Department ignores Missouri Supreme Court precedent as well as its own regulations indicating that retailers **may** claim an exemption under Section 144.054 based on their production activities.

In *E & B Granite v. Dir. of Revenue*, 331 S.W.3d 314 (Mo. 2011), this Court found that an entity that sold granite countertops and other granite products at retail as well as installation services to customers qualified for an exemption under Section 144.054.2. The sole dispute in *E & B Granite* was over whether E & B Granite was entitled to a tax exemption related to the purchase of raw materials (i.e. granite slabs) used to make countertops. *Id.* at 315. Interestingly, the Department **did not dispute** that countertops that E & B Granite **"sold at retail** that are not installed receive the tax exemption under *section* 144.054.2." *Id.* at 315 n.1 (emphasis added).

The Department similarly recognizes in its regulations that retail activity does not *per se* disqualify a taxpayer from seeking a refund under Section 144.054. Aside from the Bakery Regulation at issue in this case (which permits a refund for bakeries who

create baked goods "for sale directly to the public or through retailers"), the Department also has issued regulations allowing hobby shops who build frames for sale to customers, commercial printers who sell their services to customers, and cabinetmakers who create cabinets or counter tops "for sale to contractors or customers" to claim exemptions under Section 144.054. *See* 12 CSR 10-110.621(4)(H), (K), (M), (O).

CONCLUSION

The Administrative Hearing Commission erroneously failed to allow Ameren a refund under Section 144.054 based on the Bakery Regulation promulgated by the Department of Revenue. This Court should reverse the Commission's decision and remand this case to the Commission to apply the Bakery Regulation to the record in this case to determine the appropriate refund.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with Rule 55.03 and the requirements of Rule 84.06(b), and contains 6,087 words (excluding the cover, signature block and this certificate); has been prepared in proportionally spaced typeface using the software application for Microsoft Word 2010 in 13 point Times New Roman font.

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