

SC95785

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IN THE SUPREME COURT OF MISSOURI

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TRACFONE WIRELESS, INC.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

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On Petition for Review from the Administrative Hearing Commission

Hon. Sreenivasa Rao Dandamudi, Commissioner

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APPELLANT'S OPENING BRIEF

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# **TABLE OF CONTENTS**

	<u>Page</u>
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF FACTS.....	2
A.    TracFone sells nationwide prepaid wireless service to Missouri residents from Florida .....	2
B.    It is physically impossible for TracFone to furnish wireless service or handsets in Missouri.....	3
C.    Procedural History.....	4
POINTS RELIED ON .....	6
I.    SALES IN COMMERCE BETWEEN THE STATES .....	6
II.   UNIFORMITY .....	7
SUMMARY OF THE ARGUMENT .....	8
ARGUMENT.....	11
Standard of Review .....	11
I.    SALES IN COMMERCE BETWEEN THE STATES .....	12
A.    The interstate commerce exemption applies because there is no dispute that all of TracFone’s sales were from Florida to Missouri .....	14
B.    By its express terms, the interstate commerce exemption applies to all subsections of § 144.020, including the telecommunications subsection .....	15

C.	The fact that telecommunications service purchased from TracFone can be used in Missouri does not change the fact that TracFone’s sales were made in commerce between Florida and Missouri .....	16
D.	None of the decisions upon which the Commission relied support the conclusion that TracFone’s sales from Florida to Missouri are not made “in commerce between this state and another state” .....	17
E.	The interstate commerce exemption would apply even if this Court treated TracFone as a Missouri seller.....	18
II.	UNIFORMITY .....	20
	CONCLUSION .....	22
	CERTIFICATE OF SERVICE.....	24
	CERTIFICATE OF COMPLIANCE .....	24

# **TABLE OF AUTHORITIES**

	<u>Page</u>
<b>Cases</b>	
<i>Acme Royalty Co. v. Dir. of Revenue,</i> 96 S.W.3d 72 (Mo. banc 2002).....	11
<i>Am. Healthcare Mgmt., Inc. v. Dir. of Revenue,</i> 984 S.W.2d 496 (Mo. 1999) .....	8
<i>American Bridge Co. v. Smith,</i> 179 S.W.2d 12 (Mo. 1944) .....	<i>passim</i>
<i>Associated Indus. of Missouri v. Lohman,</i> 511 U.S. 641 (1994).....	14, 20
<i>Binkley Coal, Co. v. Smith,</i> 179 S.W.2d 17 (Mo. 1944) .....	<i>passim</i>
<i>Branson Scenic Railway v. Dir. of Revenue,</i> 3 S.W.3d 788 (Mo. App. W.D. 1999).....	17, 18
<i>Curtis Publishing Co. v. Bates,</i> 250 S.W.2d 521 (Mo. 1952) .....	<i>passim</i>
<i>Eilian v. Dir. of Revenue,</i> 402 S.W.3d 566 (Mo. banc 2013).....	11
<i>Lynn v. Dir. of Revenue,</i> 689 S.W.2d 45 (Mo. banc 1985).....	1, 17, 18

<i>Mavar Shrimp &amp; Oyster Co. v. Stone,</i>	
221 Miss. 519, 73 So. 2d 109 (1954).....	19
<i>Mgmt. Servs., Inc. v. Spradling,</i>	
547 S.W.2d 466 (Mo. banc 1977).....	22
<i>Missouri Pac. RR. Co. v. Dir. of Revenue,</i>	
345 S.W.2d 52 (Mo. banc 1961).....	7, 10, 20, 21
<i>Overland Steel, Inc. v. Dir. of Revenue,</i>	
647 S.W.2d 535 (Mo. banc 1983).....	2, 17
<i>Ronnoco Coffee Co., Inc. v. Dir. of Revenue,</i>	
185 S.W.3d 676 (Mo. banc 2006).....	22
<i>Six Flags Theme Parks, Inc. v. Dir. of Revenue,</i>	
102 S.W.3d 526 (Mo. banc 2003).....	1, 17, 18
<i>Street v. Dir. of Revenue,</i>	
361 S.W.3d 355 (Mo. banc 2012).....	3
<i>Sw. Bell Tel. Co. v. Morris,</i>	
345 S.W.2d 62 (Mo. banc 1961).....	21
<i>Western Trailer Services, Inc. v. LePage,</i>	
575 S.W.2d 173 (Mo. banc 1978).....	18
 <b>Statutes</b>	
§ 32.200, RSMo.....	14
§ 144.020, RSMo.....	<i>passim</i>

§ 144.030, RSMo.....	<i>passim</i>
§ 144.610, RSMo.....	1, 2, 7, 20
§ 621.193, RSMo.....	11

**Other Authorities**

Article X, § 3 of the Missouri Constitution.....	<i>passim</i>
Missouri Supreme Court Rule 84.06(b) .....	24

### **JURISDICTIONAL STATEMENT**

The parties dispute whether TracFone Wireless, Inc.'s ("TracFone") sales from Florida to Missouri "are made in commerce between this state and any other state of the United States" and therefore exempt from the Missouri Sales Tax under § 144.020.1, RSMo.

TracFone does not contend that it should be remitting no taxes. Rather, TracFone believes that it should be remitting Missouri Use Taxes—i.e., TracFone should be remitting Missouri's interstate complement to its Sales Taxes on intrastate sales.

On December 19, 2012, TracFone sought a refund for the difference between the Sale Taxes it erroneously remitted and the Missouri Use Taxes it should have remitted under § 144.610.1, RSMo. Respondent Director of Revenue denied TracFone's refund claims on March 18, 2013, for the period December 2009 through January 2010; on July 30, 2014, for the period March 2010 through December 2011; and on September 3, 2014, for the period of February 2010 through December 2011. TracFone filed complaints with the Administrative Hearing Commission challenging those denials on May 14, 2013 and September 24, 2014.<sup>1</sup> After a hearing, the Commission upheld the Director's denial of TracFone's refund claims, basing its decision on this Court's opinions in *Lynn v. Director of Revenue*, 689 S.W.2d 45 (Mo. banc 1985), *Six Flags Theme Parks, Inc. v. Director of*

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<sup>1</sup> The Administrative Hearing Commission consolidated the cases on September 29, 2014. L.F. 1598.

*Revenue*, 102 S.W.3d 526 (Mo. banc 2003), and *Overland Steel, Inc. v. Director of Revenue*, 647 S.W.2d 535 (Mo. banc 1983).

The first question presented—are TracFone’s sales from Florida to Missouri made in interstate commerce under § 144.020.1, RSMo.—requires construction of Missouri’s revenue laws. The second question presented—are TracFone’s sales subject to Missouri’s Use Tax under § 144.610.1, RSMo. and the uniformity clause contained in Article X, § 3 of the Missouri Constitution—also requires construction of Missouri’s revenue laws. Therefore, this Court has exclusive jurisdiction over this appeal under Article V, § 3 of the Missouri Constitution.

### **STATEMENT OF FACTS**

#### **A. TracFone sells nationwide prepaid wireless service to Missouri residents from Florida.**

TracFone is a national prepaid wireless company located in Miami, Florida.<sup>2</sup> Tr. 24:14-15; 26:4-12, 27:24-28:3, 29:19-25, 32:4-5; A2, ¶ 1 (Decision). As the Commission recognized, the Director of Revenue “does not dispute that TracFone made all sales in this case from its headquarters in Miami, Florida to customers in Missouri.” A5.

TracFone sells cellular telephone handsets and prepaid “Airtime” (i.e., access to

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<sup>2</sup> References to the hearing transcript are as “Tr. \_\_\_”; references to the attached hearing exhibits are as “P.Ex. \_\_\_” for Petitioner’s/Appellant’s Exhibits and “R.Ex. \_\_\_” for Respondent’s Exhibits. References to the Legal File are as “L.F. \_\_\_,” and references to the Appendix are as “A\_\_\_.”



nationwide network facilities owned or operated by national wireless carriers) A2, ¶ 5.<sup>3</sup> TracFone purchases “Airtime” from national wireless carriers such as AT&T, Verizon and T-Mobile and resells it in prepaid packages. Tr. 26:4-12; A2, ¶¶ 3-4. Not one of the national carriers that TracFone buys Airtime from is located in Missouri. Tr. 79:10-80:1.

TracFone only sells nationwide service. R.Ex. R, p. 1; R.Ex. S, p. 6; R.Ex. T, p. 3. It does not sell Missouri-only service. *Id.* Missouri residents who purchase handsets or Airtime from TracFone are not required to use those handsets or Airtime in Missouri. R.Ex. T, p. 3. By purchasing handsets or Airtime, TracFone’s customers agree to TracFone’s terms and conditions, which provide that the sales of handsets and Airtime occur in “interstate commerce.” R.Ex. R, p. 12; R.Ex. S, p. 12; R.Ex. T, p. 9.

**B. It is physically impossible for TracFone to furnish wireless service or handsets in Missouri.**

TracFone has no involvement in the post-sale transmission of its customers’ calls. Tr. 27:6-13. TracFone does not own, lease, or operate any cellular transmission facilities on antennae in Missouri. Tr. 30:1-11; A2, ¶ 2. TracFone does nothing in Missouri to provide its customers access to the network facilities owned or operated by national carriers. Tr. 78:7-9.

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<sup>3</sup> “If the evidence supports either of two opposing findings of fact, deference is afforded to the administrative decision.” *Street v. Dir. of Revenue*, 361 S.W.3d 355, 357 (Mo. banc 2012) (citation omitted).

TracFone does not maintain any offices, stores, warehouses, or any other facilities in Missouri. Tr. 27:10-13, 30:5-7, 33:8-9, 45:6-14; A2, ¶ 2. When a Missouri customer purchases a handset or Airtime from TracFone, TracFone approves that order and accepts payment from outside Missouri. Tr. 32:21-25; A3, ¶ 7. It is physically impossible for TracFone to approve or accept an order for a handset or Airtime from inside Missouri because TracFone has no Missouri facilities from which to do so. Tr. 27:10-13, 30:5-7, 33:8-18; A2, ¶ 2. All handsets or Airtime orders submitted to TracFone by Missouri customers are fulfilled and shipped from outside Missouri. Tr. 33:1-18, 77:2-7.

**C. Procedural History.**

TracFone filed Sales Tax returns with the Director of Revenue for the taxable periods beginning November 2009 through December 2011. L.F. 18-99, 158-1597; A3-4, ¶ 8-10, 12, 14. In 2012, TracFone determined that its practice of collecting from its customers and remitting Missouri state and local Sales Taxes on its sales of handsets and Airtime was not correct under Missouri law, and that it should have in fact been collecting and remitting Missouri state and local Use Taxes. Accordingly, on December 19, 2012, TracFone began submitting amended Sales Tax returns, Use Tax returns, and applications for refunds to the Director of Revenue. L.F. 11-13, 100-137, 158-1597; A3-4, ¶¶ 9-10, 12, 14. The Director of Revenue denied TracFone's refund claims on March 18, 2013, for the period December 2009 through January 2010; denied TracFone's refund claims on July 30, 2014, for the period March 2010 through December 2011; and denied TracFone's refund claims on September 3, 2014, for the period of February 2010 through December 2011. A4, ¶¶ 11, 13, 15.

TracFone filed complaints with the Administrative Hearing Commission challenging the denial of TracFone's tax refund claims for the period of November 2009 through January 2010 on May 14, 2013, and challenging the denial of TracFone's tax refund claims for the period of February 2010 through December 2011 on September 24, 2014. L.F. 1-138, 142-1597. The Commission consolidated TracFone's appeals on September 29, 2014. L.F. 1598. On May 26, 2015, the Commission conducted a hearing where the parties submitted evidence through exhibits and witness testimony, followed by briefs. Tr. 1. On June 1, 2016, the Commission issued its decision in favor of Respondent. L.F. 1604-1615. This is an appeal from that decision.

**POINTS RELIED ON**

**I.**

**SALES IN COMMERCE BETWEEN THE STATES**

The Administrative Hearing Commission erred in holding that TracFone's retail sales from Florida to Missouri are not exempt from Missouri's Sales Tax as sales made "in commerce between this state and any other state of the United States" under § 144.030.1, RSMo. because denying the interstate commerce exemption's application to TracFone's interstate sales is contrary to Missouri law in that sales taxes on the sale of telecommunications services are necessarily subject to the interstate commerce exemption and both the plain language of the exemption and the uniform decisions of this Court confirm that the exemption applies.

§ 144.020.1, RSMo.

§ 144.030.1, RSMo.

*American Bridge Co. v. Smith*, 179 S.W.2d 12 (Mo. 1944)

*Binkley Coal, Co. v. Smith*, 179 S.W.2d 17 (Mo. 1944)

*Curtis Publishing Co. v. Bates*, 250 S.W.2d 521 (Mo. 1952)

## II.

### UNIFORMITY

The Administrative Hearing Commission erred in holding that TracFone's sales were not subject to Missouri's Use Tax because failing to apply the Use Tax to TracFone's sale of telecommunications service from Florida to Missouri violates the uniformity clause contained in Article X, § 3 of the Missouri Constitution in that the Missouri Use Tax cannot constitutionally exempt from taxation the interstate complement to intrastate sales that are subject to the Missouri Sales Tax and this Court's precedent mandates an interpretation of the Use Tax statute that comports with the Missouri Constitution.

Missouri Constitution, Article X, § 3

§ 144.610, RSMo.

*Missouri Pac. RR. Co. v. Dir. of Revenue*, 345 S.W.2d 52 (Mo. banc 1961)

## SUMMARY OF THE ARGUMENT

Every time this Court has considered whether retail sales by out-of-state sellers are exempt from the Missouri Sales Tax as sales “made in commerce between this state and any other state of the United States,” it has found that those sales are exempt. *See American Bridge Co. v. Smith*, 179 S.W.2d 12, 13 (Mo. 1944); *Binkley Coal, Co. v. Smith*, 179 S.W.2d 17, 19 (Mo. 1944); *Curtis Publishing Co. v. Bates*, 250 S.W.2d 521, 523 (Mo. 1952). This Court’s consistent recognition that a sale between an out-of-state seller and a Missouri customer is made in commerce between the states under § 144.030.1, RSMo., comports with its equally consistent instruction that the “primary rule of statutory construction is to ascertain the intent of the lawmakers by construing words used in the statute in their plain and ordinary meaning.” *Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999). A retail sale between Florida and Missouri is unquestionably made in commerce between Missouri and another state. Therefore, the exemption applies.

The parties do not dispute the fact “that TracFone made all sales in this case from its headquarters in Miami, Florida to customers in Missouri.” A5. Nevertheless, the Commission found that the retail sales between TracFone in Florida and its customers in Missouri are not made in commerce between the states because the “true object of TracFone’s sales consisted of selling telecommunications services to its Missouri customers.” A9. The Commission erred because its “true object” finding provides no basis for departing from the plain language of § 144.030.1 or this Court’s unbroken line of decisions applying the interstate commerce exemption to sales by out-of-state sellers.

The Commission's finding that the object of TracFone's sales was the sale of telecommunications service under § 144.020.1(a) does not preclude the application of an exemption that expressly governs sales under "sections 144.010 to 144.525." See § 144.030.1, RSMo.; A15. The "true object" of the sales in *American Bridge* was the sale of steel to Missouri customers. 179 S.W.2d at 13. In *Binkley Coal*, the "true object" was the sale of coal to Missouri customers. 179 S.W.2d at 18. Like the sales in those controlling decisions, TracFone's sale of telecommunications service is a retail sale under § 144.020, RSMo. A13. The Commission's finding regarding the "true object" of TracFone's sales is irrelevant to the question of whether those sales from Florida to Missouri are made in commerce between Missouri and another state.

The Commission's decision may have been based on the fact that TracFone's Missouri customers can use telecommunications service in Missouri. In *American Bridge*, the subject steel was sold "to customers for use of consumption in this state." 179 S.W.2d at 13. Consumption in Missouri did not change the fact that the retail sale was made by an out-of-state company to a Missouri customer. *Id.* at 17. Likewise, the fact that prepaid telecommunications service purchased from TracFone can be used or consumed in Missouri does not change the fact that the sales were made in commerce between Florida and Missouri.

The fact that handsets and Airtime purchased from TracFone can be used in Missouri suggests that Missouri's Use Tax should apply to those sales—just as it applies to the interstate complement to every other intrastate sale subject to Missouri's Sales Tax. The Commission found otherwise. In so finding, the Commission erred because it failed

to recognize that Article X § 3 of the Missouri Constitution prohibits disparate treatment of similarly situated taxpayers and that this Court's decision in *Missouri Pacific Railroad Company v. Director of Revenue*, 345 S.W.2d 52, 59 (Mo. banc 1961) requires a construction of the Use Tax statute under which that statute would apply equally to taxable services sold in commerce between the states.

For these reasons, this Court should reverse the decision of the Administrative Hearing Commission, hold that TracFone's retail sales to Missouri customers are subject to the Missouri Use Tax, not the Sales Tax, and order the Commission to grant TracFone's refund claim for the difference.



## **ARGUMENT**

### **Standard of Review**

A decision of the Administrative Hearing Commission cannot be affirmed unless it is (1) authorized by law; (2) supported by competent and substantial evidence on the whole record; (3) not in violation of any mandatory procedural safeguards; and (4) not contrary to the reasonable expectations of the General Assembly. *See* § 621.193, RSMo.; *Eilian v. Dir. of Revenue*, 402 S.W.3d 566, 567-68 (Mo. banc 2013). In deciding whether a decision is “authorized by law,” this Court reviews the Commission’s construction of a revenue statute *de novo*. *Acme Royalty Co. v. Dir. of Revenue*, 96 S.W.3d 72, 74 (Mo. banc 2002).

I.

**SALES IN COMMERCE BETWEEN THE STATES**

**The Administrative Hearing Commission erred in holding that TracFone’s retail sales from Florida to Missouri are not exempt from Missouri’s Sales Tax as sales made “in commerce between this state and any other state of the United States” under § 144.030.1, RSMo., because denying the interstate commerce exemption’s application to TracFone’s interstate sales is contrary to Missouri law in that sales taxes on the sale of telecommunications services are necessarily subject to the interstate commerce exemption and both the plain language of the exemption and the uniform decisions of this Court confirm that the exemption applies.**

TracFone’s retail sales of handsets and Airtime from Florida to Missouri are exempt from Missouri’s Sales Tax because those sales are “made in commerce between this state and any other state in the United States.” § 144.030.1, RSMo.; A15. This case is controlled by the plain and ordinary language of § 144.030.1 and this Court’s decision in *American Bridge Company v. Smith*, 179 S.W.2d 12 (Mo. 1944).

In *American Bridge*, this Court held that the interstate commerce exemption applied to the retail sale of prefabricated steel products sold “to customers for use and consumption in this state” by a Pennsylvania seller. 179 S.W.2d at 13, 17. This Court rejected the argument that the interstate commerce exemption should apply only to retail sales that could not constitutionally be taxed under the Commerce Clause of the United States Constitution. *Id.* at 16. In so doing, the Court noted its obligation under the “primary rule of construction of statutes” to “put upon the words language of the

Legislature, honestly and faithfully, its plain and rational meaning.” *Id.* at 15.

On the same day that it decided *American Bridge*, this Court also held that the retail sale of coal “to customers for use or consumption within this state” was exempt from the Missouri Sales Tax where the sellers had their home offices and principal places of business outside of Missouri. *See Binkley Coal Co.*, 179 S.W.2d at 18-19.

In *Curtis Publishing Company v. Bates*, this Court again confirmed that retail sales by out-of-state sellers to Missouri customers were exempt from the Missouri Sales Tax under § 144.030.01. 250 S.W.2d at 523-24. The Curtis Publishing Company sold magazine subscriptions using “many agents in Missouri” and provided its magazines to Missouri customers via freight and postal shipments in Missouri. *Id.* at 522. This Court upheld the trial court’s determination that the Curtis Publishing Company’s magazine subscriptions were exempt from the Sales Tax under § 144.030. *Id.* at 524. The trial court also found that Curtis Publishing was not selling tangible personal property but was instead engaged in the “dissemination of news and information news and information” to its Missouri subscribers. *Id.* Recognizing that whatever Curtis Publishing was selling was sold in commerce between the states, this Court determined that it did not need to consider that issue to affirm the trial court’s decision. *Id.*

In *Curtis Publishing*, this Court also declined the Director of Revenue’s invitation to overturn its *American Bridge* decision. 250 S.W.2d at 523. The Court noted that General Assembly had declined four opportunities to change § 144.030.1 in response to the *American Bridge* decision: “If the legislature had been dissatisfied with the construction placed on the statute by the opinion of this court in the *American Bridge*

*Company* case, it, no doubt, would have changed the law.” *Id.* The General Assembly has now declined more than seventy opportunities to modify the interstate commerce exemption to the Missouri Sales Tax.

Since *Curtis Publishing*, no Missouri Court has found that that an out-of-state seller’s retail sales to Missouri customers were not “made in commerce between this state and any other state of the United States.”

**A. The interstate commerce exemption applies because there is no dispute that all of TracFone’s sales were from Florida to Missouri.**

As the Commission recognized, “[t]he Director does not dispute that TracFone made all of the sales in this case from its headquarters, in Miami, Florida, to customers in Missouri.” A5. Thus, under the express terms of § 144.030.1, TracFone’s sales to Missouri customers should be exempt from the Missouri Sales Tax.<sup>4</sup> A15.

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<sup>4</sup> Missouri is a member of the Multistate Tax Commission and has adopted the Multistate Tax Compact. *See* § 32.200, RSMo. The Multistate Tax Commission has recognized that services sold by out-of-state sellers that contract with third parties to provide the services in question are subject to use taxes—i.e., subject to the interstate complement of a sales tax on intrastate commerce. *See* MTC Bulletin NB 95-1 (Sept. 10, 1996), A24. *See also Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 647 (1994) (recognizing that use taxes are the interstate companion to sales taxes on intrastate commerce); § 32.200(8) (defining a use tax as “complementary to a sales tax” under the Multistate Tax Compact). In MTC Bulletin NB 95-1, the Multistate Tax Commission discussed a

The Commission found that the exemption did not apply because “the true object of TracFone’s sales consisted of selling telecommunications services to its Missouri customers.” L.F. 1618. It is not clear why the Commission’s “true object” determination led it to conclude the exemption did not apply. Apparently, the Commission either determined that § 144.030.1 does not apply to the retail sale of telecommunications service or it does not apply because the service sold by TracFone can be consumed in Missouri. Neither rationale is persuasive.

First, by its express terms, the interstate commerce exemption covers the retail sale of telecommunications services. Second, where a purchaser may or may not use the goods or service purchased has no bearing on whether a purchase occurs between states. The fact that telecommunications service sold by TracFone could be consumed in Missouri no more precludes application of the interstate commerce exemption than did the fact that American Bridge’s steel, Binkley Coal’s coal, and Curtis Publishing’s news and information would be used in Missouri.

**B. By its express terms, the interstate commerce exemption applies to all subsections of § 144.020, including the telecommunications subsection.**

Section 144.030.1 instructs that the interstate commerce exemption applies to “the provisions of sections 144.010 to 144.525.” A15. Section 144.020.1 (4) falls between § 144.010 and § 144.525. The statutory analysis is as straightforward as recognizing that  


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situation where an out-of-state seller contracts with third parties to provide warranty services to in state customers. A24.

the number 3 is included in the “numbers 1 to 5.” Indeed, this Court recognized the broad scope of the interstate commerce exemption more than seventy years ago when it concluded that the exemption applied to “all sales at retail in the sales transactions of interstate commerce.” *American Bridge Co.*, 179 S.W.2d at 17 (emphasis added).

It is not possible to find that the objective of selling telecommunications service to Missouri customers precludes application of the interstate commerce exemption without adopting the illogical conclusion that § 144.020.1(4) does not fall between § 144.010 and § 144.525 in the Missouri Revised Statutes. Applying the “plain and ordinary meaning” of the statutes, the interstate commerce exemption must necessarily apply to “all sales at retail” that would otherwise be subject to the Sales Tax statute. *Id.*

**C. The fact that telecommunications service purchased from TracFone can be used in Missouri does not change the fact that TracFone’s sales were made in commerce between Florida and Missouri.**

Everyone agrees that TracFone’s Missouri customers can use telecommunications service purchased from TracFone in Missouri. A5. They can also use telecommunications service purchased from TracFone in Illinois, Kansas, California, or Maine. R.Ex. R, p. 1; R.Ex. S, p. 6; R.Ex. T, p. 3. The fact that TracFone’s customers can use telecommunications service in Missouri puts TracFone on equal footing with the American Bridge Company (which sold steel products “to customers for use and consumption in this state”), 179 S.W.2d at 13, the Binkley Coal Company (which sold coal “to customers for use or consumption within this state”), 179 S.W. 2d at 18, and the Curtis Publishing Company (which sold news and information in the form of magazine

subscriptions that were delivered to subscribers throughout Missouri), 250 S.W.2d at 522. It provides no basis for overlooking the fact that TracFone's sales are made between Missouri and Florida.

**D. None of the decisions upon which the Commission relied support the conclusion that TracFone's sales from Florida to Missouri are not made "in commerce between this state and another state."**

In concluding that the out-of-state seller's sales to Missouri customers are not made in commerce between the states, the Commission did not rely on (or distinguish) any of this Court's decisions where an out-of-state seller like TracFone sought to invoke the interstate commerce exemption. Rather, the Commission relied exclusively on decisions involving sellers "in Missouri." *See Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 102 S.W.3d 526, 528 (Mo. banc 2003) ("The transaction in this case is between the customer and an amusement park in Missouri for admission to the amusement park in Missouri."). *See also, Lynn v. Dir. of Revenue*, 689 S.W.2d 45 (Mo. banc 1985) (appeal by a Missouri seller where charter contracts for riverboat excursions were approved in Missouri, admission fees were collected in Missouri, and customers embarked and disembarked from same Missouri location); *Branson Scenic Railway v. Dir. of Revenue*, 3 S.W.3d 788 (Mo. App. W.D. 1999) (appeal by Missouri seller where tickets for scenic train excursion were sold in Missouri and passengers embarked and disembarked from train in Missouri); *Overland Steel, Inc. v. Dir. of Revenue*, 647 S.W.2d 535 (Mo. banc 1983) (appeal by Missouri taxpayer seeking exemption for material allegedly purchased in contemplation of Kansas contracting projects).

TracFone is not “in Missouri”; it is in Florida. There is no TracFone-owned or TracFone-operated equipment analogous to the Missouri roller coasters in *Six Flags*, the Missouri railroad tracks in *Branson Scenic Railway*, the Missouri riverboats in *Lynn*, or the Missouri headquarters of the Overland Steel Corporation.

TracFone contracts with national wireless carriers—all of whom are headquartered outside of Missouri (Tr. 79:10-80:1.)—that provide nationwide wireless services to TracFone’s customers. There are no TracFone cellular towers, offices, or transmission facilities in Missouri. Tr. 27:10-13, 30:5-7, 33:8-9, 45:6-14; A2, ¶ 2. Just like the American Bridge Company’s customers could use steel in Missouri, TracFone’s customers can use handsets and consume Airtime in Missouri. But they are under no obligation to do so. Indeed, unlike the customers of Six Flags (who had no choice but to travel to Eureka, Missouri, to consume the service they purchased from a Missouri seller), TracFone’s customers can use every minute of prepaid telecommunications service they purchase from TracFone, placing calls from Michigan to Ohio, or any other state in the continental United States. R.Ex. R, p. 1; R.Ex. S, p. 6; R.Ex. Tr., p. 3.

**E. The interstate commerce exemption would apply even if this Court treated TracFone as a Missouri seller.**

If this Court were to ignore its decisions involving out-of-state sellers, the closest analog to the circumstances presented here would be *Western Trailer Services, Inc. v. LePage*, 575 S.W.2d 173 (Mo. banc 1978). There, this Court found that a Missouri corporation’s sale of trailer replacement parts (installed in Missouri) to a company in Kansas were exempt from Sales Tax under the interstate commerce exemption. This



Court recognized that even a Missouri seller could properly invoke § 144.030.1 in transactions involving “dealings between persons of different states” where “importation formed a component of the transaction.” 575 S.W.2d at 174. Given that TracFone is located in Florida and has no presence in Missouri, there is no question that TracFone’s Airtime sales constitute “dealings between persons of different states” where “importation formed a component of the transaction.” *Id.* TracFone is physically incapable of providing services in Missouri. If its services were not imported, they could never be consumed in Missouri.<sup>5</sup>

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<sup>5</sup> There is, of course, nothing novel about the concept of importing services. *See, e.g., Mavar Shrimp & Oyster Co. v. Stone*, 221 Miss. 519, 523, 73 So. 2d 109, 111 (1954) (noting that the “avowed purpose of **the use tax**, as set forth in Section 10146-01, Code of 1942, is to complement the sales tax in order both to raise revenue and to protect persons engaged in business in Mississippi ‘against the unfair competition of **importations of** goods and **services** into Mississippi’”); *See also* MTC Bulletin NB 95-1 (discussing nexus issues for use tax on imported warranty service), A24.

## II.

### UNIFORMITY

**The Administrative Hearing Commission erred in holding that TracFone's sales were not subject to Missouri's Use Tax because failing to apply the Use Tax to TracFone's sale of telecommunications service from Florida to Missouri violates the uniformity clause contained in Article X, § 3 of the Missouri Constitution in that the Missouri Use Tax cannot constitutionally exempt from taxation the interstate complement to intrastate sales that are subject to the Missouri Sales Tax and this Court's precedent mandates an interpretation of the Use Tax statute that comports with the Missouri Constitution.**

TracFone is seeking a partial refund rather than a complete refund because in its view § 144.610, RSMo., necessarily applies to TracFone's interstate sales of handsets and Airtime. A23. Missouri's Use Tax is "designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 647 (1994). It must therefore be read to include the interstate version of all intrastate retail sales subject to tax under § 144.020 pursuant to Article X, § 3 of the Missouri Constitution.

Article X, § 3 of the Missouri Constitution requires that all taxes "shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax." Section 3 requires uniform taxes among the same class of subjects, including the same class of subjects under the Use Tax and Sales Tax laws. *See Missouri Pac. RR. Co. v. Dir. of Revenue*, 345 S.W.2d 52, 59 (Mo. banc 1961).

In *Missouri Pacific Railroad Company v. Director of Revenue*, this Court severed and struck down three exemptions under the Use Tax as being void for indefiniteness and vagueness and as discriminatory under Article X, Section 3 of the Missouri Constitution. 345 S.W.2d at 59-60. This Court reasoned that these exemptions were invalid because they could be construed to thwart the original intent of the Use Tax by exempting items from the Use Tax that would have been subject to the Sales Tax if purchased in Missouri. *Id.* at 59. This Court affirmed the constitutionality of the remaining provisions of the Use Tax Act, severed from the unconstitutional provisions, by relying on the expressed legislative intent of the enactment of the Use Tax:

If any provision of this act, including any provision exempting the use of property from the tax...is found to be unconstitutional the remaining provisions are to be treated as being in full force and effect. The legislature hereby declares that, if any exemption of the use of property from taxation contained in this act is invalid under the constitution, it intended to and does hereby impose the same tax on such exempted use as is imposed on the use of all other property made subject to the tax imposed by this act.

*Id.* at 60-61. By this language, the Missouri General Assembly plainly intended that the Use Tax apply to *all* property because there is no limitation in this provision of the Use Tax requiring that it apply only to *tangible* personal property.

This Court has consistently held that if Sales Tax is applicable to a Missouri purchase, a similar purchase is also subject to Use Tax if the taxable item is purchased from a non-Missouri seller for storage, use, or consumption in Missouri. *See Sw. Bell*

*Tel. Co. v. Morris*, 345 S.W.2d 62 (Mo. banc 1961); *Mgmt. Servs., Inc. v. Spradling*, 547 S.W.2d 466 (Mo. banc 1977); *Ronnoco Coffee Co., Inc. v. Dir. of Revenue*, 185 S.W.3d 676 (Mo. banc 2006). Any attempt to interpret the Use Tax as inconsistent and unequal to the Sales Tax would be unconstitutional. Reading the Use Tax statute to exempt items that would be subject to the Sales Tax if purchased from a Missouri seller also runs contrary to Missouri Supreme Court precedent.

To the extent that the term “tangible personal property” in the Use Tax statute creates a situation in which Airtime would be subject to the Sales Tax if TracFone sold it from Missouri, but not subject to the Use Tax if sold from Florida, this Court should (1) sever the term “tangible personal property” wherever it appears as a limitation in the Use Tax statutes, or (2) otherwise follow the precedent cited above and interpret the Use Tax as imposing a tax on any item that would otherwise be subject to the Sales Tax had it been purchased in Missouri.

### **CONCLUSION**

For the forgoing reasons, Appellant TracFone Wireless, Inc. respectfully requests that this Court reverse the decision of the Administrative Hearing Commission and order Respondent Director of Revenue to refund to TracFone the difference between the Sales Taxes erroneously remitted and the Use Taxes that TracFone should have been collecting and remitting.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this brief complies with the limitations in Rule 84.06(b), and it contains 4,984 words, excluding the parts of the brief exempted; and has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 13 point Times New Roman font.

/s/ John S. Kingston

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing was served through the Missouri CaseNet electronic filing system this 12th day of September, 2016, upon the following:

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