STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
XO COMMUNICATIONS SERVICES, LLC	:	DETERMINATION DTA NOS. 826686
for Revision of Determinations or for Refund of Sales Use Taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2011 through May 31, 2014.	:	AND 827014

Petitioner, XO Communications Services, LLC, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2011 through May 31, 2014.

A hearing was held before Barbara J. Russo, Administrative Law Judge, in Albany, New York, on April 21, 2016 at 10:30 A.M., with all briefs to be submitted by September 20, 2016, which date began the six-month period for the issuance of this determination. Petitioner appeared at the hearing by Gulotta Law Group, P.C. (Anthony C. Gulotta, Esq., of counsel), and subsequent to the hearing was represented by Van Allen, LLC (John E. Van Allen, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUE

Whether petitioner's purchases of electricity used to provide telecommunications services are subject to sales tax.

FINDINGS OF FACT [1]

1. Petitioner, XO Communications Services, LLC, is a national provider of telecommunication services.[2]

2. Petitioner provides telecommunications services to small, medium and large businesses, as well as wholesalers and governmental entities such as public schools.

3. Petitioner provides intrastate, interstate, and international telecommunication services. Petitioner used geocoding and service categories to determine and track the various categories of telecommunication services provided.

4. Petitioner filed two separate claims for refund of the sales tax it paid on its purchases of electricity. The first claim, assigned claim number 2013-11-0387 and dated November 11, 2013, requested a refund in the amount of $15,023.75, and pertained to petitioner's purchases of electricity at its premises located at 32 Sixth Avenue, New York, New York, for the period May 21, 2012 through July 5, 2013. The second claim, assigned claim number 2014-08-0255 and dated August 7, 2014, requested a refund in the amount of $1,108,350.21, and pertained to petitioner's purchases of electricity at its premises located at 111 Eighth Avenue, 60 Hudson Street, and 75 Broad Street, New York, New York, for the period September 1, 2011 through May 31, 2014.

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[1] Pursuant to State Administrative Procedure Act (SAPA) § 307(1), petitioner submitted 32 proposed findings of fact. Petitioner's proposed findings of fact 1, 2, 5 - 8, 10 - 14, 16, 17, 21 - 25, 27, and 31 are supported by the record and have been consolidated, condensed, combined, renumbered and substantially incorporated herein. Petitioner's proposed findings of fact 3, 4, 9, 15, 18 - 20, 26, 28 - 30 and 32 have been modified to more accurately reflect the record and remove conclusions of law. Additional Findings of Fact have been made.

[2] Petitioner was formed as a result of the following transactions: on July 29, 1998, Nextlink New York, LLC merged and changed its name to Nextlink New York, Inc.; on September 27, 2000, Nextlink New York, Inc., changed its name to XO New York, Inc.; on January 14, 2005, XO New York, Inc., merged into XO Communications Services, Inc.; and on August 30, 2011, XO Communications Services, Inc., converted and changed its name to XO Communications Services, LLC. XO Communications, LLC is the sole member of XO Communications Services, LLC.

5. By letter dated January 6, 2014, the Division of Taxation (Division) denied the refund sought on claim number 2013-11-0387. By letter dated September 3, 2014, the Division denied the refund sought on claim number 2014-08-0255. The basis for the Division's denials was that the electricity purchased was used by petitioner to provide telecommunication services, was not purchased for resale and was not resold as such.

6. Petitioner used the eighth floor of the building located at 32 Sixth Avenue, also known as 32 Avenue of Americas, to house a "Central Office." That Central Office is the subject of DTA number 826686. Petitioner used the fifth and twelfth floors of the building located at 111 Eighth Avenue, the ninth and thirteenth floors of the building located at 60 Hudson Street, and the seventh floor of the building located at 75 Broad Street to house "Central Offices." Those Central Offices are the subject of DTA number 827014.

7. Petitioner's Central Offices house equipment used to provide interstate and intrastate telecommunication services, including voice services, internet services, optical services and private data networks. Specifically, petitioner's Central Offices contain voice switches that provide basic voice services, routers for voice and internet services, and long haul optical transport equipment to provide connectivity over a fiber optic network.

8. The Central Office equipment is used to deliver services to the demarcation point. At the demarcation point, the service transfers to customer premise equipment (CPE). A common example of CPE is a router that can be purchased at a retail store.

9. At the demarcation point, the electrical voltage flowing through the line can be measured. However, petitioner does not measure the voltage and current received at the customer location. Petitioner does not have a measurement of how much electricity each customer used for each of the communication services.

10. Petitioner also provides colocation services, whereby petitioner's customers install their own equipment in petitioner's facility. Under such arrangements, petitioner provides the physical environment for the colocation customer's equipment, including cooling and power to maintain the equipment. Colocation services do not traverse over petitioner's network.

11. The electricity purchased by petitioner originates from power companies as alternating current (AC).

12. The electricity then travels to meters located at petitioner's Central Offices that measure the total consumption of electricity. The electricity purchased in the form of AC was used in petitioner's Central Offices for purposes such as powering office systems and support systems, including providing cooling for equipment, powering the lights, computers, coffee makers and other office equipment.

13. Electricity flows from the meter to an automatic transfer switch, which senses electricity flowing through it. If there is an interruption in the flow of electricity, the automatic transfer switch switches to a backup generator to provide electricity. Because there is a time lag from the interruption until the generators can produce adequate power, battery strings are used to provide immediate, interim electricity.

14. From the automatic transfer switch, electricity flows to the DC Power Plants, which convert AC to direct current (DC). As is the industry standard, petitioner's Central Office network electronics equipment operates off DC, and electricity from the DC Power Plants flows to Central Office network electronics equipment and battery strings so that they remain charged.

15. Administrative and colocation facilities located within the Central Offices operate off AC; therefore, electricity from DC Power Plants does not flow to them, except when power from the DC Power Plants stored in the battery strings is used for interim power.

16. The DC Power Plants are metered so that petitioner can determine how much electricity flows through them. Petitioner reads the meter readings on a monthly basis. Those readings indicate that there is little variance in the amount of electricity flowing through the DC Power Plants from month to month.

17. During the hearing, petitioner stipulated to a reduction of the amount of refund claimed based on a calculation of the percentage of electricity passing through its DC Power Plants. Petitioner calculated the percentage of electricity passing through the DC Power Plants based on the amount of electricity entering each facility and the amount of electricity flowing through each DC Power Plant. The electricity passing through the DC Power Plants was used to power petitioner's network electronics that transmit telecommunication signals and keep the battery strings charged for backup power.

18. For the period at issue, petitioner calculated the percentage of electricity measured at the DC Power Plants in the Central Offices compared to the total amount of electricity purchased at the Central Offices as follows:

Site Location	DC Power Plants' Load Share of Total Electricity
32 Sixth Avenue, New York, NY	18.00%
111 Eighth Avenue, 5th Floor, New York, NY	37.60%
111 Eighth Avenue, 12th Floor, New York, NY	21.30%
60 Hudson Street, New York, NY	36.10%
75 Broad Street, New York, NY	22.80%

During the hearing, petitioner stipulated to reduce the refund amount claimed to $303,667.09 based on the percentage of the electricity metered at the DC Power Plants.[3]

19. The automatic transfer switches, generators, and battery strings are used in the event of power failure because the network equipment instantaneously stops operating and telecommunication services are immediately interrupted if the flow of electricity is disturbed.

20. In order to deliver end-to-end, or origination-to-destination, telecommunication services, petitioner's telecommunication network interacts with the network of other carriers. For example, a customer of petitioner located in New York City may place a call to Albany. If petitioner's local network in New York City does not extend to Albany, petitioner will lease the use of another carrier's network that services Albany, an incumbent local exchange carrier (ILEC). Likewise, petitioner also leases the use of its network to other carriers.

21. Throughout the entire path of the transmitted signal, including petitioner's network and the networks of other carriers, electricity is applied to keep the signal transmitting and receiving. The signal will be lost if the flow of electricity is interrupted anywhere along the end-to-end signal path.

22. Central Offices, whether owned by petitioner or leased facilities, need to connect with end-user CPE. The portion of the network that makes the connection from the Central Office to the CPE is known as the "Last Mile." In New York City, two-thirds of the Last Mile solutions are ethernet over copper and one-third of petitioner's Last Mile solutions are fiber to building. Both of these solutions provide a two-way transmission path that allows (i) the transmission of the telecommunication signal and (ii) the reception of the telecommunication signal.

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[3] Petitioner further reduced the refund claim in its post-hearing brief to $143,664.90 based on other factors discussed below.

23. For ethernet over copper, copper is the physical layer, or actual medium, that the signal runs through, referred to as "layer one." Ethernet is a signaling protocol that runs over layer one. Such signaling protocols are referred to as "layer two."

24. Ethernet over copper solutions use digital signal processors to turn audio streams into a coded series of ones and zeros. The coded stream of ones and zeroes is represented by different voltage levels of electricity running through the copper line (i.e., ones measure a certain voltage level and zeros measure a different level). Electricity continues to run back and forth through the line, even when there is no one talking into the telephone or there is no message being transported.

25. The electricity is an embedded part of the signal that acts as a two-way conveyor belt. The electricity, or conveyor belt, carries the customer's information on top of it, both to and from the customer's CPE. The Central Offices act as hubs where multiple conveyor belts come together.

26. For fiber to building, information from petitioner's network to the customer's equipment (i.e., a telephone or computer), is decoded by equipment such as an "Ethernet NID" (a device that terminates the optical signal from the XO network, and decodes the information riding over that signal and presents it to the customer). Electricity powers lasers within the equipment, and the lasers generate light pulses of varying intensity and frequency. Specifically, the light pulses consist of photons, or photonic energy. A metro optical receiver node receives optical light from another metro optical receiver node and converts the laser light to electrical pulses of ones and zeros, and also sends out a certain frequency to the customer location.

27. For both ethernet over copper and fiber to building, if there is an electricity failure, the transmission path is lost for the section where the power is lost.

28. When electricity flows uninterrupted through the network, customers hear a dial tone when they pick up the telephone because the electricity is constantly and consistently powering the equipment providing the dial tone. However, petitioner does not provide power for all of a customer's telecommunications. A customer uses his own electricity, purchased separately from a utility, to send the signal to petitioner for a telephone call or internet search that the customer is sending out. Petitioner provides power for the communications *to* the customer, or at some point assists with the rest of the customer's communications once the customer powers to petitioner.

29. At the customer end of the network, the electricity is in the form of DC. The DC powered equipment in petitioner's network sends a signal to the customers' locations and the DC is associated with a certain constant level of voltage and current. Petitioner's customers cannot use the DC power for anything else; it can only be used for receiving or transmitting the telecommunication signal.

30. A portion of electricity is lost during transmission over the network. The amount lost could be more than 50%.

31. Petitioner does not have a measurement of how much electricity each customer uses for each of the communications.

32. Petitioner sells, and its customers purchase, telecommunication services from petitioner. Petitioner does not advertise anything other than telecommuncations.

33. Petitioner's customers are billed, and pay, for telecommunications. There is no separate charge on the customers' bills for electricity. There is no delineation on the bill for electricity. On cross-examination, petitioner's witness admitted that customers are not paying for electricity.

34. Petitioner did not provide resale certificates to its vendors for the purchase of electricity. Petitioner provided no evidence that it received resale certificates from any of its customers.

35. On petitioner's tax returns, petitioner reported its electricity purchases as a business expense and deducted the expense. Petitioner did not include its electricity purchases as inventory.

36. At the hearing, petitioner provided copies of invoices for its purchases of electricity at the Central Offices. Invoices for the Central Office at 75 Broad Street list a landlord fee and charge sales tax on that fee. Petitioner has included the tax on the landlord fee in its computaion of the refund sought.

37. During the hearing, petitioner submitted a one-page chart that listed sales revenue percentages broken down by category as follows: 16.6% for interstate and international telecommunication services; 27.5% for internet services; 22.6% for intrastate telecommunication services; 17% for "reseller revenue;" and 16.3% for "colocation and other services." Petitioner provided no back-up documentation to support the claimed percentages for sales revenue categories.[4]

SUMMARY OF PETITIONER'S POSITION

38. Petitioner argues that the portion of the electricity it purchased that powers equipment necessary to provide telecommunications and carries the signal to its customers is exempt from state and local sales tax as a purchase for resale. Petitioner contends that 39.6% of its revenue

[4] Petitioner attached to its brief Appendix A, which was not submitted into the hearing record. While the Division correctly notes that evidence may not be submitted after the hearing record is closed, Appendix A appears to be based on the information contained in Exhibit 4 of the hearing record. Appendix A contains calculations based on the percentages indicated in Exhibit 4 and petitioner's arguments based thereon. As such, Appendix A sets forth argument and not additional evidence.

qualifies for resale through the following categories: (1) telecommunications subject to sales tax at the time they are sold by petitioner (18.4%); (2) reseller revenue (17%); and (3) exempt entities (4.2%). In its brief, petitioner recalculated the amount of refund claimed to be $143,664.90 in tax, plus interest. Petitioner further argues that finding the electricity it purchased is subject to tax will result in multiple taxation which should be avoided.

CONCLUSIONS OF LAW

A. Tax Law § 1105(b)(1)(A) imposes tax on, among other things, the receipts from every sale of electricity, other than sales for resale. Petitioner argues that the portion of the electricity it purchased to power equipment and carry the signal for its telecommunication services was purchased for resale, and as such, was exempt from sales tax.

An analysis of this argument begins with the well-settled proposition that statutes and regulations authorizing exemptions from taxation are to be strictly and narrowly construed (***see Matter of International Bar Assn. v. Tax Appeals Tribunal***, 210 AD2d 819 [3d Dept 1994], ***lv denied*** 85 NY2d 806 [1995]; ***Matter of Lever v. New York State Tax Commn.***, 144 AD2d 751 [3d Dept 1998]). Moreover, Tax Law § 1132(c) provides that all sales described in Tax Law § 1105(b) are subject to tax until the contrary is established. In order to qualify for the exemption, petitioner bears the burden of clearly proving its entitlement to the exemption sought (***see Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193 [1975], ***lv denied*** 37 NY2d 816 [1975]).

B. The controlling regulation for the imposition of tax and the resale exemption for sales of electricity states as follows:

> "(a) Imposition. (1) Section 1105(b) of the Tax Law imposes a tax on the receipts from every sale, except a sale for resale or a sale specifically exempt under section 1115(b)(i) and (ii), (c) or (e) of the Tax Law, of

> (i) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature; and
>
> (ii) telephony and telegraphy and telephone and telegraph service of whatever nature, except interstate and international telephony and telegraphy and telephone and telegraph service.
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> ***
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> (e) Sales for resale. Purchases of utility services by a utility for resale as such may be made without payment of the sales tax. The purchaser must furnish the supplier of the utility to be resold with a resale certificate (Form ST-120). When the utility services are resold by the purchaser he must collect the sales tax on the receipts from his sales as imposed under section 1105(b) of the Tax Law. A purchase of a utility service which is not resold is subject to tax as a purchase at retail" (20 NYCRR 527.2[a][1][i], [ii] and [e]).

It must first be noted that petitioner's predecessor presented the same argument, among others, before the Appellate Division, contending that the electricity it purchased should not be subject to sales tax because it was a component part of the product it sold to its customers and, as such, qualifies as a resale of the electricity which should be excluded from sales tax liability (***Matter of XO New York, Inc. v. Commissioner of Taxation and Finance***, 51 AD3d 1154 [3d Dept 2008]).[5] The court noted that because the resale argument had not been raised before the administrative law judge or the Tax Appeals Tribunal, it was not preserved for review in the Article 78 proceeding. Nevertheless, the court addressed the issue, stating that:

> "Moreover, even if we were to consider this argument, the fact is that petitioner did not purchase electricity 'for resale as such' as is required to receive the exemption under this statute (20 NYCRR 527.2[e]). Instead, it used the electricity to produce telecommunications services that it actually sold" (***id.*** at 1155).

Petitioner argues that the court's statement is dictum and is not controlling here. Dicta is defined as "[o]pinions of a judge which do not embody the resolution or determination of the

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[5] The taxpayer in that matter, XO New York, Inc., a provider of telecommunication services, was a predecessor to petitioner, and sought an exemption from sales tax on its purchases of electricity similar to the purchases at issue here.

court. Expressions in court's opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases" (Black's Law Dictionary 408 [5th ed 1979]). While not binding precedent, such expressions may provide guidance on an issue (***see Paramount Pictures Corp. v. Allianz Risk Transfer AG***, 141 AD3d 464 [1st Dept 2016]; ***People v. Waters***, 123 Misc.2d 1057, [County Court, Suffolk County 1984], ***aff'd*** 125 AD 2d 615 [2d Dept 1986]), and are properly considered for subsequent construction of the same statute (***see Niagara & Erie Power Co. v. Public Service Commission***, 171 App Div 361 [3d Dept 1916]).

In addition to rejecting, arguendo, the taxpayer's resale argument, the court explicitly rejected two arguments raised by XO New York, Inc. that are identical to those raised by petitioner here: (1) that electricity is tangible personal property, and (2) that failure to provide an exemption would result in multiple taxation.

C. First, central to petitioner's argument is its contention that electricity is tangible personal property. Petitioner argues that electricity is a critical element of its telecommunication service and as such qualifies for the resale exclusion pursuant to 20 NCYRR 526.6(c)(1). Section 526.6 pertains to retail sales and provides as follows:

> "Retail Sale. (a) The term "retail sale" or "sale at retail" means the sale of tangible personal property to any person for any purpose except as specifically excluded.
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> ***
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> (c) Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or service which he has purchased will be considered as purchased for resale and therefore not subject to tax until he has transferred the property to his customer." 20 NYCRR 526.6.

Relying on this regulation, petitioner goes to great lengths in arguing that the electricity it purchased is a component part of its telecommunication services, and cites ***Matter of Burger King, Inc. v. State Tax Commn.*** (51 NY2d 614 [1980]) in an attempt to support its position.[6] The fallacy of petitioner's argument is that both § 526.6 of the regulations and ***Burger King*** deal with purchases of tangible personal property. Petitioner's purchases of electricity at issue here are simply not purchases of tangible personal property, and therefore the resale exclusion under 20 NYCRR 526.6(c) and the holding in ***Burger King*** do not apply.

Petitioner's argument fails to take into account the clear language of the exemption. On its face, the exemption set forth in § 526.6(c) of the regulations expressly pertains to purchases of tangible personal property. That exemption does not make any reference to, or have any impact upon, the tax at issue in this matter which is imposed by Tax Law § 1105(b)(1). Rather, that exemption refers to retail sales of tangible personal property pursuant to Tax Law § 1101(b)(4), which are taxable under Tax Law § 1105(a).

Tangible personal property is "[c]orporeal personal property of any nature." (Tax Law § 1101[b][6]). As held by the Appellate Division:

> "Electricity, simply stated, is not a tangible piece of property that has a material existence or physical form. As such, for reasons more fully stated below, it does not qualify as tangible personal property . . . . To expand the definition of tangible personal property to include such intangible services is a decision which must be left to the Legislature. Until the Legislature sees fit to make such a determination, this Court is left with no choice but to conclude that the telecommunications services provided by petitioner are not tangible personal property and, as such, do not entitle petitioner to an exemption to the sales tax provisions of the Tax Law." (***XO New York, Inc.*** at 1157 - 1158).

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[6] In ***Burger King***, the court held that purchases of wrappers of hamburgers, cups for beverages, and "sleeves" for french fries qualified as purchases for resale where those items were to be transferred to retail purchasers of food, deeming such items to be a "critical element of the final product sold to customers" (***Burger King*** at 623).

Since it is clear that the exemption set forth in 20 NYCRR 526.6(c) does not apply to petitioner's purchases of electricity, petitioner's argument that its purchases of electricity are exempt as a purchases for resale is rejected.

D. Contrary to petitioner's argument, the controlling section that pertains to sales of electricity is Tax Law § 1105(b)(1) and § 527.2 of the regulations. Those provisions provide a resale exclusion for the purchase of electricity "for resale *as such*" (20 NYCRR 527.2[e]; emphasis added). The "component part" language relied on by petitioner as set forth in the regulation for the resale of tangible personal property (20 NYCRR 526.6[c]) is absent and thus inapplicable to purchases and sales of electricity. The plain language of the resale exclusion under § 527.2(e) requires that the electricity purchased by petitioner must be purchased *for resale as such* for the exclusion to apply.

Petitioner is a provider of telecommunication services. The record clearly establishes that petitioner did not purchase electricity "for resale as such." Rather, it purchased electricity, in part, to produce the telecommunication services it sold (***see Matter of XO New York, Inc.*** at 1155). While a portion of the electricity petitioner purchases is used to power its network electronics that transmit telecommunication signals, it is not selling that electricity "as such" to its customers. The electric signals transmitted over petitioner's systems are only incidental to the ultimate contractual purpose between petitioner and its customers, namely, telecommunications (***see Matter of Holmes Elec. Protective Co. v. McGoldrick***, 262 App Div 514 [1st Dept 1941], ***affd*** 288 NY 635 [1942]). Petitioner's customers are not purchasing and paying for electricity. Indeed, petitioner does not bill its customers separately for electricity; charges for electricity are not invoiced, charged, or delineated on the customers' bills. Petitioner's witness conceded that the customers are not really paying for electricity. Petitioner does not measure the voltage and

current received at the customers' locations, and does not have a measurement of how much electricity each customer used for their communications.

Additionally, the electricity petitioner purchases is in the form of AC. Petitioner converts the electricity purchased from AC to DC for its telecommunications equipment. The DC powered equipment in petitioner's network sends a signal to the customer with a certain constant level of voltage and current. The direct current received by the customer cannot be used for anything other than the telecommunication signal.

Petitioner's purchases of electricity was simply an overhead expense. Notably, petitioner did not report its electricity purchases as inventory; rather, petitioner reported its purchases of electricity as a business expense and deducted them. Based on the foregoing, petitioner has not met its burden of proving that it purchased electricity for resale as such and, accordingly, is not entitled to the resale exclusion.

E. Petitioner further argues that if the electricity it purchased should be found subject to tax, then it will result in multiple taxation which should be avoided. The same argument was addressed and rejected by the court in ***XO New York, Inc.***:

> "Finally, petitioner contends that the failure to provide it with an exemption will result in multiple taxation that should be avoided. There is nothing inherently improper in taxing petitioner's purchase of electricity and imposing a second tax on those individuals who purchase its telecommunications services (***see*** II J. Hellerstein & W. Hellerstein, State Taxation ¶ 14.01 [3rd ed.]). Stated another way, simply because a purchase is made to produce or provide a product that will ultimately be sold to a consumer, does not automatically exclude or exempt that transaction from application of the sales tax (***see Celestial Food of Massapequa Corp. v. New York State Tax Commn.***, 63 N.Y.2d 1020, 1022, 484 N.Y.S.2d 509, 473 N.E.2d 737 [1984])" (***XO New York, Inc.*** at 1158)."

Petitioner's argument is likewise rejected here.

F. Finally, as the Division correctly notes, petitioner's evidence is insufficient to support the amount of its refund claim. Even if petitioner were entitled to the resale exclusion on a portion of its electricity purchases, it would bear the burden of establishing the amount of purchases that would qualify for the exclusion:

> "Where the question is whether certain purchases are entitled to the resale exemption, the purchaser must show, to avoid imposition of the sales tax on the entire transaction, 'that each of the [items] was purchased for one and only one purpose: resale' (***Matter of Savemart Inc. v. State Tax Commn.*** 105 AD2d 1001, 1002–1003, 482 NYS2d 150, ***appeal dismissed*** 64 NY2d 1039, 489 NYS2d 1029, 478 N.E.2d 212, ***lv. denied*** 65 NY2d 604, 493 NYS2d 102, 482 N.E.2d 926; ***see also, Matter of Micheli Contr. Corp. v. New York State Tax Commn.***, 109 AD2d 957, 958, 486 NYS2d 488)" (***Matter of P-H Fine Arts Ltd. v. New York State Tax Appeals Tribunal***, 227 AD2d 683, 685 [3d Dept 1996]).

Petitioner concedes in its brief that the resale exclusion only applies to services that are subject to tax and that not all of the services it provides are subject to tax. Accordingly, petitioner claims to seek a refund only for sales tax paid on electricity that it contends was resold to customers as part of a telecommunication service subject to New York State tax. At hearing, petitioner stipulated to reduce the refund amount claimed to $303,667.09 based on the percentage of the electricity metered at the DC Power Plants (***see*** Finding of Fact 18). In its brief, petitioner further reduced the amount of refund claimed to $143,664.90 in tax (plus interest) "[b]ased on geocoding, service categories, and taxable revenue reports" (petitioner's brief at p. 15). Petitioner's calculations for this amount are based on percentages of its overall sales revenue. According to petitioner, 16.6% of its sales are nontaxable interstate telecommunication services and 27.5% are internet services, and the resale exclusion would not apply to electricity associated with those transactions. Petitioner contends, however, that 39.6% of its revenue qualifies for resale through the following categories: (1) telecommunications subject to sales tax at the time they are sold by petitioner (18.4%); (2) reseller revenue (17%); and (3) exempt entities (4.2%).

Petitioner is faced with multiple problems in supporting its contention. First, contrary to petitioner's contention that all of the power used by the DC Power Plants is used to power its telecommunication services (and hence, according to petitioner, constitutes electricity resold to its customers), the record shows that a portion of the power from DC Power Plants is used to power the battery strings, which would provide power to both petitioner's facilities for ordinary office equipment and its telecommunication network in the event of a power failure until the generators power-up. As such, petitioner's calculation fails in the first instance by failing to show the amount of electricity that "was purchased for one and only one purpose: resale" (***id.***). Petitioner's proof also falls short because the record lacks underlying support for the claimed percentages of sales for resale, other than a one-page conclusory chart submitted at hearing. Petitioner provided no back-up documentation to support the claimed percentages for sales revenue categories. Finally, and perhaps most importantly, there is no evidence that the percentage of sales for each category correlates to the actual amount of energy used to provide service to customers within each category. Indeed, petitioner's witness conceded that the voltage and current received at the customer location was not measured, and petitioner does not have a measurement of how much electricity each customer would use for each of the communication services provided. As such, assuming a portion of the electricity purchased was for resale, petitioner fails to meet its burden of proving how much of the electricity was purchased solely for resale. Accordingly, petitioner's refund claim was properly denied.

G. The petition of XO Communications Services, LLC is denied.

DATED: Albany, New York
March 9, 2017

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE