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8 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

9 SOUTHERN CALIFORNIA EDISON,)

10 Petitioners,)

11 vs.)

12 STATE OF NEVADA ex rel. Department of)
13 Taxation,)

14 Respondent.)
15)
16)

Case No. 09 OC 00016 1B

Department No. 1

Docket No. 55228

17 **ANSWER TO SOUTHERN CALIFORNIA EDISON'S**
18 **PETITION FOR WRIT OF MANDAMUS**
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SOUTHERN CALIFORNIA EDISON,)	
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STATE OF NEVADA ex rel. Department of)	Docket No. 55228
Taxation,)	
)	
Respondent.)	
)	
)	

**ANSWER TO SOUTHERN CALIFORNIA EDISON'S
PETITION FOR WRIT OF MANDAMUS**

Comes now, Respondent State of Nevada ex rel. Department of Taxation (Department), by and through its attorney, Catherine Cortez Masto, Attorney General, and Gina C. Session, Chief Deputy Attorney General, and hereby submits its Answer to Petitioner's Petition for Writ of Mandamus as follows:

**MEMORANDUM OF POINTS AND AUTHORITES OPPOSING
PETITION FOR WRIT OF MANDAMUS**

I. STATEMENT OF FACTS

This case began as an administrative matter regarding Southern California Edison's ("Edison") request for refund on use taxes paid on coal slurry product between March 1, 1998 and December 31, 2000. See Respondent's Appendix, BS p. 27. The Nevada Tax

1 Commission ("Commission") first held an administrative hearing on the case on December 8,
2 2003 and remanded the case to an Administrative Law Judge ("ALJ"). See Respondent's
3 Appendix, BS p. 36. The matter was heard by the ALJ on December 22, 2003 and January
4 28, 2004 and the ALJ issued a written decision on July 14, 2004. See Respondent's
5 Appendix, pp. 1-25.

6 Edison appealed the ALJ's decision to the Commission and a series of administrative
7 hearings was held by the Commission on November 1, 2004, February 7, 2005, April 5, 2005
8 and May 9, 2005. See Petitioner's Appendix, BS p. 12-13. Clark County and the City of
9 Henderson were permitted by the Commission to intervene and became parties to the
10 administrative proceedings opposing the refund request. The Commission issued a decision
11 granting the refund dated November 29, 2006 in a closed session. Clark County and City of
12 Henderson as parties to an administrative proceeding aggrieved by a final decision in a
13 contested case filed a petition for judicial review in the Eighth Judicial District. The original
14 decision by the Commission, however, was subsequently voided by this Court in *Chanos v.*
15 *Nevada Tax Commission*, 181 P.3d 675 (Nev. 2008) for violation of the Open Meeting Law.

16 After its first decision was rendered void, the Commission held further evidentiary
17 hearings on September 9, 2008 and December 1, 2008. At the December 2008 meeting the
18 Commission voted to deny the refund. The Commission issued Finding of Fact, Conclusions
19 of Law and Decision as required by NRS 233B.125 on February 27, 2009. Respondent's
20 Appendix, BS 26-28. There exists an administrative and evidentiary record of documents,
21 agendas and transcripts in this case well in excess of 3,000 pages. Respondent's Appendix,
22 BS 29-33¹.

23 Pursuant to NRS 233B.130 an party aggrieved by a final decision in an administrative
24 proceeding has 30 days after service of the final decision of the agency to file a petition for
25 judicial review. Edison's deadline for filing a petition was on or about April 1, 2009. No
26 petition for judicial review was ever filed in this matter.

27
28 ¹ The Administrative Record Index only includes the record up to the point the decision of the Commission was
voided in the *Chanos* case. Today the Administrative Record would be supplemented by additional briefs,
evidence and transcripts of the hearings held before the Commission in 2008.

1 Edison filed a Complaint in the First Judicial District on or about January 15, 2009 that
2 was served on the agency on or about February 26, 2009. Edison filed an Amended
3 Complaint on or about March 27, 2009. Edison initiated a civil action based on a theory that it
4 is entitled to a trial de novo pursuant to NRS 372.680. The Complaint and Amended
5 Complaint named the Department of Taxation ("Department"), but did not include the other
6 parties to the administrative proceeding, Clark County and City of Henderson.

7 On or about April 20, 2009 the Department filed a Motion to Dismiss and argued that
8 because no Petition for Judicial Review was filed, the decision of the Commission was final
9 and preclusive and that administrative res judicata applied. The District Court denied the
10 Department's motion, but reserved the right to treat the Amended Complaint as a petition for
11 judicial review of the February 27, 2009 final decision of the Commission pursuant to NRS
12 360.245(5), and *Campbell v. State, Dept of Taxation*, 108 Nev. 215, 219, 827 P.2d 833, 835
13 (1992).

14 After further briefing on the issue, the District Court issued the Order to Proceed as
15 Petition for Judicial Review that is the subject of the Writ of Mandamus filed with this Court by
16 Edison.

17 **II. STATEMENT OF ISSUES AND RELIEF SOUGHT**

18 **A. ISSUES PRESENTED**

- 19 1. Is the District Court's jurisdiction after a final decision by an administrative
20 agency subject to NRS Chapter 233B exclusively limited to judicial review?
21 2. Is there a specific grant of authority in NRS 372.680 allowing the District Court to
22 order a trial de novo after a matter has been subject to an extensive NRS
23 Chapter 233B administrative and evidentiary proceeding?
24 3. Does administrative res judicata apply to the NRS 372.680 action if the action is
25 a trial de novo and not an appellate review of the final decision by the
26 Commission?
27 4. Does Edison have a plain, speedy and adequate remedy at law?

28 ///

1 **B. RELIEF SOUGHT**

2 The Department asks that the Court deny Edison's Petition for Writ of Mandamus and
3 permits the case to go forward as a petition for judicial review in the First Judicial District.

4 **III. LEGAL AUTHORITIES SUPPORTING THE DISTRICT COURT DECISION**

5 **A. THE DISTRICT COURT'S JURISDICTION AFTER A FINAL DECISION BY AN**
6 **ADMINISTRATIVE AGENCY IS EXCLUSIVELY LIMITED TO JUDICIAL**
7 **REVIEW.**

8 The issue at the heart of this case is whether it is proper for the District Court to
9 proceed pursuant to NRS Chapter 233B, according to a judicial review standard, in a case
10 that was subject to an extensive administrative evidentiary proceeding and a final decision by
11 the Nevada Tax Commission before being filed as a civil suit in District Court. An
12 extraordinary writ should only issue if the District Court is acting outside of its jurisdiction or
13 has manifestly abused its discretion. *Sonia F. v. Eighth Judicial District Court*, 125 Nev. 38,
14 215 P.3d 705, 707 (2009). An extraordinary writ should not issue if there is a plain, speedy
15 and adequate remedy at law. *Id.*

16 With the adoption of the Administrative Procedure Act ("APA") in 1965, NRS 233B.010
17 *et seq.*, and with subsequent amendments, the Legislature has stated its intention that the
18 provisions in that chapter "are the exclusive means of judicial review of, or judicial action
19 concerning, a final decision in a contested case involving an agency to which this chapter
20 applies." NRS 233B.130(6).

21 The APA was enacted to "establish minimum procedural requirements
22 for...adjudication procedure of all agencies of the Executive Department of State Government
23 and for judicial review of both functions..." NRS 233B.020(1). NRS 360.245(5) states in
24 pertinent part: "A decision of the Nevada Tax Commission is a final decision for the purposes
25 of judicial review." When it is read together with NRS 233B.130(6) it is clear that it was the
26 intent of the legislature that all final decisions by the Commission are subject exclusively to the
27 provisions of NRS Chapter 233B.

28 Both the Department and the Commission fall within the definition of "agency" provided

1 in NRS 233B.031. NRS 233B.039 sets out not only the agencies that are completely exempt
2 from the application of NRS Chapter 233B, but also specific statutory provisions in other
3 chapters that prevail over the more general provisions of NRS Chapter 233B. See NRS
4 233B.039(3). The carve-out does not include any statutory provisions applicable to the
5 Department or the Commission.

6 Nevada law provides that omissions of subject matters from statutory provisions are
7 presumed to be intentional. *State, Dep't of Taxation v. DaimlerChrysler Services North*
8 *America, LLC*, 121 Nev. 541, 548, 119 P.3d 135, 138 (2005)(citing *Galloway v. Truesdell*, 83
9 Nev. 13, 26, 422 P.2d 237, 246 (1967) for the maxim *expression unius est exclusion alterius*,
10 the expression of one thing is the exclusion of another). The legislature could have easily
11 included NRS 372.680 and the Commission's decisions regarding tax refunds in the list
12 specifically exempt from the application of judicial review pursuant to NRS Chapter 233B, but
13 the legislature did not do so. The Commission is not exempt from NRS Chapter 233B
14 therefore NRS Chapter 233B applies to the Commission and all of its decisions.

15 Prior to 1989 NRS Chapter 233B specifically provided that a trial de novo was
16 available, if provided for by an agency's statutes outside of NRS Chapter 233B. At that time
17 NRS 233B.130 (1) read in pertinent part:

18 Any party aggrieved by a final decision in a contested case is
19 entitled to judicial review thereof under this chapter. Where appeal
20 is provided within an agency, only the decision at the highest level
21 is reviewable unless otherwise provided by statutes. This chapter
22 does not limit utilization of trial de novo to review a final decision
23 where provided by statute, but this chapter provides an alternative
24 means of review in those cases.

25 Act of May 30, 1989, ch. 716, § 6, 1989 Nev. Stat. 3. *Hearing on A.B. 884 Before the*
26 *Assembly Committee on Government Affairs*, 1989 Leg., 65th Sess. 3 (June 24, 1989)

27 The 1989 legislature in *A.B. 884* removed this language and replaced it with the current
28 language in NRS 233B.130(6) which states that the provisions of NRS Chapter 233B are the
exclusive means of judicial review or judicial action concerning a final decision in a contested
case involving an agency to which the chapter applies. The legislature specifically removed
the authorization to use a trial de novo and replaced it with language stating that the exclusive

1 means for a court to exercise jurisdiction over a final agency decision was by way of judicial
2 review.

3 In testimony before the Assembly, *Hearing on A.B. 884 Before the Assembly*
4 *Committee on Government Affairs*, 1989 Leg., 65th Sess. , 7, 8 & 9 (June 6, 1989) Mr. Richard
5 Campbell ("Campbell"), Chairman of the State bar's Administrative Law Committee, explained
6 the reasoning for the changes made by *AB 884*. In the June 6, 1989 *hearing*, Campbell stated
7 as follows:

8 He indicated one problem with administrative law is that each
9 agency has its own judicial review provision but it is incomplete and
10 contains no provision for procedures before the courts. He also
11 pointed out it is not clear whether NRS 233 [sic] or the agency's law
12 applies thereby creating general confusion among practitioners and
the courts. He indicated he spoke with several judges who urged
the Administrative Law Committee to clarify such procedures...

13 As will be more fully discussed below, standing alone, NRS 372.680 fits the description from
14 the legislative history cited above of an agency provision that is incomplete and does not
15 specify the nature of the procedure in court.²

16 Edison suggests that a trial de novo is common in other states in tax cases involving a
17 request for refund. A review of recent case law indicates however that judicial review, not trial
18 de novo, is the common standard in other states for resolving tax refund cases coming to
19 district court from an administrative body. A recent decision by the Court of Appeals of North
20 Carolina is particularly on point. *In the Matter of the Denial of NC Idea's Refund of Sales and*
21 *Use Tax*, 675 S.E. 2d 88, 94 (N.C.App.)(April 21, 2009). The Court of Appeals held that the
22 Tax Review Board was not subject to pure de novo review. The Court of Appeals wrote:

23 According to well-established law, it is the responsibility of the
24 administrative body, not the reviewing court, 'to determine the
25 weight and sufficiency of the evidence and the credibility of the
witnesses, to draw inferences from the facts, and to appraise

26 ² Edison includes a number of refund cases in their appendix that have proceeded through the judicial system as
27 civil actions. These cases are illustrative of the confusion among practitioners and courts referred to by Mr.
28 Campbell in his testimony. None of the cases referenced by Edison involved an analysis of the interaction
between NRS Chapter 233B and NRS 372.680 that is before the Court in this matter. The Department, going
forward, is challenging refund actions filed as civil actions in district court after an administrative proceeding. See
Respondent's Appendix BS pp. 76-136.

1 conflicting and circumstantial evidence.

2 *Id.* at 4. See also *Comptroller of the Treasury v. J/Port, Inc.*, 184 Md. App. 608, 621, 967 A.2d
3 253, 261 (Md. 2009); *Comptroller of the Treasury v. Science Applications International*, 405
4 Md. 185, 192-193, 950 A.2d 766, 770 (Md. 2008); *Posner v. Comptroller of the Treasury*, 180
5 Md.App. 379, 383-384, 951 A.2d 112, 115 (Md. 2008); *Briggs Tax Service, LLC v. Detroit Pub.*
6 *Sch.*, 282 Mich.App. 29, 33, 761 N.W.2d 816, 819 (Mich. Ct. App. 2008); *Insurance Co. of*
7 *State of Pa. v. Director of Revenue and Director of Ins.* 269 S.W.3d 32, 34 (2008 In re Sales
8 Tax Claim for Refund of Home Depot 198 P.3d 902, 903 (Okla. Civ. App. 2008); *Becton,*
9 *Dickson and Co. v. Nebraska Dep't of Revenue*, 276 Neb. 640, 645, 756 N.W.2d 280,285
(Neb. 2008); *Goodyear Tire & Rubber Co. v. State*, 275 Neb. 594, 598-599, 748 N.W.2d 42,
47 (Neb. 2008); *TD Banknorth, N.A. v. Dep't of Taxes*, 185 Vt. 45, 56, 967 A.2d 1148, 1157-
1158 (2008); *US Xpress Leasing, Inc. v. The Department of Revenue*, 385 Ill.App.3d 378,
380-381, 894 N.E.2d 890, 892 (Ill App. 2008); *Sioux Falls Shopping News, Inc. v. Dep't of*
Revenue and Regulation, 749 N.W.2d 522, 524 (S.D. 2008).

10 Judicial review is thus routinely applied to tax refund cases across the United States.

11 When Edison was the prevailing party in the Order of the Commission that was
12 subsequently voided by the Nevada Supreme Court, and Clark County and City of Henderson
13 were aggrieved by the Commission decision, Clark County and City of Henderson
14 appropriately filed a Petition for Judicial Review which included Edison as a party to the
15 proceeding. Yet Edison argues that when Edison is the aggrieved party, NRS 233B no
16 longer applies and they are allowed to commence a civil action de novo and exclude Clark
17 County and City of Henderson from the suit.

18 Nothing in the law suggests that NRS Chapter 233B applies to some parties to an
19 administrative procedure and not to other parties. There is nothing to suggest that NRS
20 Chapter 233B applies to proceedings before a state agency and then stops applying when the
21 matter reaches district court. In fact the law in NRS Chapter 233B is clear that judicial review
22 is the "exclusive means" of "judicial action" concerning a "final decision" by "an agency to
23 which this chapter applies." The chapter applies to the Commission. The Commission
24 reached a final decision in this matter after an exhaustively contested administrative and
25 evidentiary proceeding. The exclusive means of judicial action by the District Court is through
26 judicial review. NRS 233B.130(6).

27 ///

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1 B. NRS 372.680 DOES NOT PREEMPT NRS CHAPTER 233B AND DOES NOT
2 INCLUDE ANY SPECIFIC LANGUAGE GRANTING JURISDICTION TO THE
DISTRICT COURT TO CONDUCT A TRIAL DE NOVO.

3 NRS 372.680 provides as follows:

4 1. Within 90 days after a final decision upon a claim filed pursuant
5 to this chapter is rendered by the Nevada Tax Commission, the
6 claimant may bring an action against the Department on the
7 grounds set forth in the claim in a court of competent jurisdiction in
8 Carson City, the county of this State where the claimant resides or
9 maintains his principal place of business or a county in which any
relevant proceedings were conducted by the Department, for the
recovery of the whole or any part of the amount with respect to
which the claim has been disallowed.

10 2. Failure to bring an action within the time specified constitutes a waiver of any
11 demand against the State on account of alleged overpayments.

12 The Nevada Supreme Court in *Hansen-Neiderhauser v. Nevada State Tax Com'n*, 81
13 Nev. 307, 308 402 P.2d 480, 481 (1965), discusses NRS 372.680 prior to the passage of the
14 Administrative Procedures Act. Clearly a civil remedy for claims of overpayment existed prior
15 to the enactment of NRS Chapter 233B. The legislative intent section of NRS Chapter 233B
16 states that "provisions of this chapter are intended to supplement statutes applicable to
17 specific agencies." NRS 233B.020(2). Because of the ambiguity regarding the remedy
18 available to a taxpayer seeking a refund that is aggrieved by a final decision of the
19 Commission, it is appropriate to look to the legislative history for clarification. See *Chanos v.*
20 *Nevada Tax Com'n*, 181 P.3d 675, 680-681 (Nev.2008).

21 A review of the legislative history from the 1999 changes to NRS 372.680 clears up any
22 ambiguity about the nature of the remedy available. In a memorandum dated May 7, 1999 to
23 Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm
24 Azevedo, Sr. Deputy Attorney General regarding *Senate Bill (S.B.) 362* and the changes to
25 NRS 372.680 it states:

26 With the exception of Section 13 of *S.B. 362*, the remaining
27 sections delineated above address the applicable procedures to
28 follow in a claim for refund. Prior to *S.B. 362*, refund claims had not
been subject to the requirements of chapter 233B of the Nevada
Revised Statutes. Historically, if a taxpayer filed a claim for refund

1 with the Nevada Department of Taxation, which was denied by the
2 Nevada Department of Taxation, the taxpayer was required to file
3 an action in district court in order to contest this denial. The
4 language of S.B. 362 now changes this procedural route. In the
5 event that S.B. 362 becomes law, a taxpayer whose claim for
6 refund is denied by the Department to [sic] Taxation will proceed
7 initially to an administrative hearing officer for an administrative
8 trial. In the event the taxpayer is aggrieved by the decision of the
9 administrative hearing officer, the taxpayer may appeal the hearing
10 officer's decision to the Nevada Tax Commission for an
11 administrative appellate review. In the event a taxpayer is still
12 aggrieved after a Tax Commission decision, the taxpayer may file a
13 petition with a district court in a judicial review proceeding. It is this
14 filing of a petition for judicial review which is the subject of the
15 venue provisions in S.B. 362. Thus, S.B. 362 contemplates a
16 change from past practice where refund claims upon passage of
17 S.B. 362 will now be subject to the requirements of Chapter 233B
18 of the Nevada Revised Statutes.

19 See Respondent's Appendix, BS p. 44.

20 Mr. Azevedo's explanation is reiterated by other documents from the legislative record.
21 Mr. Azevedo provided testimony. *Hearing on S.B. 362 Before the Senate Committee on*
22 *Taxation*, 1999 Leg., 70th Sess. 10 (March 23, 1999).

23 [T]his particular provision was addressed in NRS chapter 232B [sic]
24 and he did not see a problem with it being brought to other courts in
25 the state. He explained the purpose of this bill and what it would
26 achieve. He said the amendments clarified the language with great
27 specificity so that in almost every instance the sequence would be
28 hearing officer, the tax commission, and, if it went to a court, it
would be pursuant to NRS chapter 233B in the form of a petition for
judicial review. He said NRS chapter 233B would address most
sales- and use-tax statutes that go to the commission.

See Respondent's Appendix, BS p. 49.

The S.B. 362 explanation provided as Exhibit G to the *Hearing on S.B. 362 before the*
Assembly Committee on Taxation, 1999 Leg., 70th Sess (May 6, 1999) states further that
change to NRS 372.680 "[p]rovides that an action for judicial review of a claim for refund of
sales tax follows a decision of the tax commission, not the department of taxation, and that
such action may be brought in Clark County³ as well as Carson City." See Respondent's

³ Clark County was later dropped from the language. As adopted the venue language in NRS 372.680 mirrors the venue language in NRS 233B.130.

1 Appendix BS p. 54, Section 33.

2 Mr. Azevedo in his memorandum to Assemblyman Anderson succinctly stated the
3 procedure a taxpayer is required to follow pursuant to NRS 372.680. Edison was originally
4 heard by an ALJ. When Edison was aggrieved by the decision of the administrative hearing
5 officer, Edison appealed the hearing officer's decision to the Commission for an administrative
6 appellate review. When Edison was still aggrieved after a Commission decision, Edison had
7 the option to file a petition with a district court in a judicial review proceeding. It did not.

8 Nothing in the language of NRS 372.680 indicates that it pre-empts the application of
9 NRS Chapter 233B. When NRS 372.680 was amended in 1999 the legislature had the
10 opportunity to include language, that after a final decision by the Commission, an aggrieved
11 taxpayer had the right to file a civil suit de novo in lieu of a petition for judicial review. Instead
12 it changed the statute so that the action could only be filed after a decision by the
13 Commission, not based on a decision by the Department⁴, and brought the venue provisions
14 in line with the provisions in NRS Chapter 233B.

15 The practical effect of the change from a decision by the Department to a decision by
16 the Commission is that it ensures that in most cases a request for refund will be heard in an
17 administrative proceeding subject to NRS Chapter 233B. The Commission acts as an
18 appellate body reviewing the decisions of the Department or its agents. NRS 360.245(1)(a).
19 NRS 360.245(5) provides that "[a] decision of the Nevada Tax Commission is a final decision
20 for the purposes of judicial review."

21 Edison argues that NRS 372.680 is more specific and in effect should pre-empt the
22 judicial review provisions of NRS Chapter 233B. The APA, though, was enacted to "establish
23 minimum procedural requirements for...adjudication procedure of all agencies of the
24 Executive Department of State Government and for judicial review of both functions..." NRS
25 233B.020(1). NRS 233B.121 *et. seq.* sets out the minimum procedure that the Department
26 and the Commission are required to follow in the adjudication of all cases brought before
27 them. NRS 233B.125 sets out the specific requirements for a final decision by the

28 ⁴ As will be more fully discussed below, this change distinguishes this case from *Saveway Super Service Stations Inc. v. Cafferata*, 104 Nev. 402, 760 P.2d 127(1988) cited by Edison in its Petition.

Commission. A final decision must include findings of fact and conclusions of law and be supported by substantial evidence. NRS 233B.125. NRS 233B.130 sets out the procedure for filing a petition for judicial review. NRS 233B.131-140 provides very specific details regarding procedure before district court, transmittal of the record, briefing schedule, standard of review. Of particular importance in this case, NRS 233B.135(1)(b) confines the judicial action to a review of the record before the agency. Lastly, 233B.150 provides a party aggrieved by the District Court decision the right to appeal to the Nevada Supreme Court.

NRS Chapter 360 and the regulations in NRS Chapter 360 provide further detail regarding adjudicatory proceedings before the Commission that are consistent with the provisions of NRS Chapter 233B. Specifically NRS 360.245 describes the appeal process of Department decisions before the Commission. It also includes the information that the decision of the Commission is final for purposes of judicial review. NRS 360.245(5).

In comparison the availability of "an action against the Department" provided in NRS 372.680 is devoid of specific details regarding the nature of the action. There are many types of actions in the law including civil actions, actions in equity and judicial review actions. NRS 372.680 also provides that the action must be based "on the grounds set forth in the claim..." This requirement is consistent with NRS 233B.135(1)(b) which confines judicial review to the record below. The venue requirements are also consistent with the requirements in NRS 233B.130(2)(b). No conflict exists between NRS Chapter 233B and NRS 372.680 when the action in NRS 372.680 is read as an action for judicial review. There is nothing to suggest NRS 372.680 pre-empts the provisions of NRS Chapter 233B.

An article for the State Bar of Nevada, entitled THE BASICS OF ADMINISTRATIVE LAW (1990) sets forth the basis for applying judicial review as opposed to trial de novo to final administrative decisions. It states:

Judicial review is designed to expedite the passage of an administrative case through the judicial system. It is also meant to minimize the intrusion of courts into administrative functions, such as fact-finding, while relieving district courts of the burden and expense of trying an administrative case as if the case had been filed as an original matter in district court.

1 INTER ALIA, THE BASICS OF ADMINISTRATIVE LAW 8 (1990). See Petitioner's Appendix,
2 BS pp. 55-75.

3 The article goes on to discuss the reasons why trial de novo is disfavored in administrative
4 cases and why cases involving trial de novo have been frequently reversed by the Nevada
5 Supreme Court:

6 Litigants who have successfully convinced a district court to
7 dispense with a review of the administrative record and hold a trial
8 de novo have repeatedly had their original efforts reversed by the
9 Nevada Supreme Court. Those reversals are entirely salutary.
10 Trial de novo evades an administrative body's 'judgment based
11 upon its specialized experience and knowledge.' It is also a
12 particularly direct intrusion on an agency's fact-finding function.
13 Trial de novo further destroys the effectiveness of an administrative
14 body and the administrative process by relegating an administrative
15 hearing to 'a meaningless, formal, preliminary, which places 'upon
16 the courts the full administrative burden of factual determination.'
17 The waste of administrative and judicial resources inherent in a trial
18 de novo is obvious. The only time a trial de novo should occur is in
19 the rare instances where it is specifically provided for by statute.

20 *Id.* (citations omitted).

21 The article cites NRS 607.215 as an example of a specific statute that provides for trial de
22 novo. NRS 607.215(3) states "Upon a petition for judicial review, the court may order trial de
23 novo." There is no similar statute in the current case that specifically authorizes a trial de
24 novo. The language in the statute at issue, NRS 372.680, states a claimant "may bring an
25 action". There is no mention in NRS 372.680 to a right to trial de novo rather than judicial
26 review. The statute falls far short of the specific language that is required for granting
27 jurisdiction to the court to order a trial de novo.

28 Edison in earlier briefing of this matter cited several cases and state statutes for the
proposition that it is common for other states to allow for trial de novo for tax refund cases. A
review of those cases and statutes reveal that in all cases there is explicit language providing
for a trial de novo and the procedure to be followed. In some instances, the appeals are to tax
courts.

///

1 Rhode Island's statute reads:

2 Each appeal of a final decision of the tax administrator concerning
3 an assessment, deficiency, or otherwise shall be an original,
4 independent proceeding in the nature of a suit in equity to set aside
5 the final decision and shall be tried de novo and without a jury.
6 Every such matter shall have precedence over all other civil cases
on the calendar on the date to which it is assigned for trial and shall
continue to have precedence on the calendar on a day-to-day basis
until it is heard.

7 R.I. Gen. Laws § 8-8-24.

8 In Rhode Island the appeal is of an administrator's decision much like NRS 372.680 prior to
9 the change made by the legislature in 1999. Rhode Island's statute is notably more detailed
10 and explicit than NRS 372.680 from before or after the change in 1999.

11 Minnesota's statute states:

12 The Tax Court shall hear, consider, and determine without a jury
13 every appeal de novo. A Tax Court judge may empanel an
14 advisory jury upon the judge's motion. The Tax Court shall hold a
15 public hearing in every case. All such parties shall have an
16 opportunity to offer evidence and arguments at the hearing;
17 provided, that the order of the commissioner or the appropriate unit
18 of government in every case shall be prima facie valid. When an
appeal to the Tax Court has been taken from an order or
determination of the commissioner or from the appropriate unit of
government, the proceeding shall be an original proceeding in the
nature of a suit to set aside or modify the order or determination...

19 Minn. Stat. § 271.06(6).

20 In Minnesota the Tax Court appears to function as the Nevada Tax Commission does, hearing
21 appeals from lower bodies in a public hearing. Oregon also uses a tax court to review
22 decisions by the Department of Revenue. Or. Rev. Stat. 305.425. In New Hampshire, a
23 taxpayer can choose to have its appeal from a tax department decision heard by an
24 administrative body, the board of tax and land appeals, or by the superior court in the county
25 where the taxpayer resides. N.H. Rev. Stat. Ann. §21-J:28-b(IV). Arizona permits a trial de
26 novo in tax court by a taxpayer aggrieved by the decision of the state board of tax appeals.
27 Ariz. Rev. Stat. Ann. § 42-1254(D)(3).

28 ///

1 Edison argues that because NRS 372.680 was allegedly modeled after California law,
2 that California law should be persuasive. However, there have been many changes in
3 Nevada law in the years since the law was enacted. There is sufficient Nevada case law to
4 consider that take into considerations the legislative changes made over the years and to
5 resort to California law is neither advisable nor necessary.

6 The point is that each of the fifty states has unique approaches to taxation,
7 administrative procedure and systems of state government. A review of the state statutes
8 previously cited by Edison reveals that in the states that permit a trial de novo at some point in
9 the process, the statutes expressly state that a trial de novo is available and describe the
10 appropriate procedure to follow. There is no such explicit language in NRS 372.680. If there
11 are two legislative models regarding actions for refund--one being they are an administrative
12 proceeding subject to judicial review and one being they are an action in equity to correct a
13 wrong--with the changes made by the legislature, Nevada falls clearly in the first group.

14 There is nothing on the face of NRS 372.680 that suggests that the final decision by the
15 Commission is not subject to NRS Chapter 233B or that taxpayers are entitled to a trial de
16 novo. It does not indicate that a NRS 372.680 action is an action in equity. There is nothing
17 to distinguish a final decision by the Commission on a refund action, from any other final
18 decision by the Commission. The Commission and its final decisions are all subject to NRS
19 Chapter 233B.

- 20 1. GRANTING EDISON A TRIAL DE NOVO WOULD RENDER NRS CHAPTER
21 233B AND THE ADMINISTRATIVE PROCEEDING BEFORE THE
22 COMMISSION MEANINGLESS AND WOULD NOT PROMOTE JUDICIAL
ECONOMY.

23 One of the cases cited in the BASICS OF ADMINISTRATIVE LAW (1990) article,
24 *Nevada Tax Commission v. Hicks*, 73 Nev. 115, 310 P.2d 852 (1957) (NTC V. Hicks was
25 subsequently superseded by statute as stated in *M & R Inv. Co. v. Nevada*, 93 Nev. 35, 559
26 P.2d 829 (1979)) discusses the policy against a trial de novo after an agency decision. The
27 full quote from *Hicks*, parts of which were included in the citation to the article above, is as
28 follows:

1 It should be apparent that if trial de novo is permitted here it would
2 completely destroy the effectiveness of the tax commission as an
3 expert investigative board. The most perfunctory showing could be
4 made before the board by a licensee with knowledge that the
5 matter would ultimately be decided by the courts upon full
6 evidentiary consideration. Trial de novo, in effect, could relegate
the commission hearing to a meaningless, formal, preliminary and
place upon the courts the full administrative burden of factual
determination.

7 *Id.* at 123, 856. See also, *Las Vegas Valley Water District v. Curtis Park Manor Water Users*
8 *Association*, 98 Nev. 275, 277, 646 P.2d 549, 550 (1982).

9 *Hicks* and other cases recognize the value of having the administrative body with
10 expertise in an area responsible for weighing and considering the facts in fields where it has a
11 particular competence. *Id.*, see also, *Clark County Board of Commissioners v. Taggart*
12 *Construction Company Inc.*, 96 Nev. 732, 734-35, 615 P.2d 965, 967 (1980); *Spilotro v. State*
13 *ex r, Nevada Gaming Com'n*, 99 Nev. 187, 190, 661 P.2d 467, 469 (1983); *Sports Form, Inc.*
14 *v. LeRoy's Horse and Sports Place*, 108 Nev. 37, 41, 823 P.2d 901, 903 (1992)(discussing the
15 doctrine of primary jurisdiction); *Richardson Construction v. Clark County School District*, 123
16 Nev. 61, 65, 156 P.3d 21, 24 (2007)(discussing the doctrine of primary jurisdiction).

17 Edison participated in complex and lengthy administrative proceedings during which it
18 had the opportunity to present evidence and legal argument on its requests for refund. Edison
19 made its arguments before an administrative hearing officer. Edison made its arguments
20 before the Commission. When Edison prevailed before the Commission, Clark County and
21 City of Henderson filed a petition for judicial review of the Commission's decision. When that
22 decision was voided by the Nevada Supreme Court, Edison had a new opportunity to present
23 witnesses, file briefs and to argue its case before the Commission.

24 In the end, Edison did not prevail. Having lost in the administrative proceeding, Edison is
25 asking to begin anew in a civil action. Allowing Edison to go forward with a trial de novo
26 renders many hours of arguments, reams of briefs, difficult deliberation and decision making
27 by the Commission, and NRS Chapter 233B utterly meaningless. It does not promote judicial
28 economy to have a district court begin anew without deference to the extensive proceedings

1 that have already taken place.

2 2. THE COURT MUST HARMONIZE NRS 372.680 AND NRS CHAPTER 233B.

3 If the matter is treated as a trial de novo, the Court would have to find that NRS
4 372.680 preempts NRS Chapter 233B. NRS 233B.020(2) states that the "provisions of this
5 chapter are intended to supplement statutes applicable to specific agencies. This chapter
6 does not abrogate or limit additional requirements imposed on such agencies by statute or
7 otherwise recognized by law." When read as a whole NRS 233B.020, when applied to NRS
8 372.680, stands for the proposition that NRS Chapter 233B is supplemental to, not preempted
9 by, NRS 372.680. The District Court in this case properly applied the doctrine of *in pari*
10 *materia* in this case. See *Desert Irrigation, LTD. v. State*, 113 Nev. 1049, 1060, 944 P.2d 835,
11 844 (citing *SNEA v. Lau*, 110 Nev. 715, 718-19, 877 P.2d 531, 534 (1994)).

12 This Court was faced with a similar issue in a case against the State Board of
13 Equalization. *Mineral County v. State, Board of Equalization*, 121 Nev. 533, 536, 119 P.3d
14 706, 707, 708 (2005). The issue was whether counties aggrieved by a decision of the State
15 Board of Equalization could file for judicial review. *Id.* Resolution of the issue required an
16 analysis of how NRS Chapter 233B should be harmonized with specific agency statutes.

17 The statutes at issue in *Mineral County* discuss in specificity the rights of a property
18 owner protesting property taxes. NRS 361.410, NRS 361.420. The procedure in both
19 statutes is far more detailed than the procedure in NRS 372.680. NRS 361.420(2) states that
20 a taxpayer:

21 having been denied relief by the State Board of Equalization, may
22 commence a suit in any court of competent jurisdiction in the State
23 of Nevada against the State and county in which the taxes were
24 paid, and, in a proper case, both the Nevada Tax Commission and
25 the Department may be joined as a defendant for a recovery of the
difference between the amount of taxes paid and the amount which
the owner claims justly to be due, and the owner may complain
upon any of the grounds contained in subsection 4.

26 NRS 361.420 involves the refund or recovery of taxes wrongfully paid. The language in NRS
27 361.420(2) says the taxpayer may "commence a suit" and refers to joining the Commission
28 and the Department as a "defendant". However, because a final decision of the State Board

1 of Equalization is at issue, there is never a question that NRS Chapter 233B applies and that
2 judicial review is the standard applied. The Court wrote:

3 Thus, even though NRS 361.410(1) and NRS 361.420(2) include
4 specific provisions concerning taxpayer protections, these statutes
5 do not take precedence over the APA under these circumstances,
6 as they do not expressly govern the rights of a local government
7 such as Mineral County. Consequently, we conclude that the
8 provisions of NRS Chapter 361 supplement rather than preempt,
9 the provisions of NRS Chapter 233B, particularly NRS
10 233B.130(1)'s provision that an aggrieved party may petition for
11 judicial review of an agency decision. This interpretation is optimal
12 because it permits harmonious construction of NRS Chapter 233B
13 and NRS Chapter 361.

14 *Mineral County v. State Board of Equalization*, 121 Nev. 533, 536.

15 The District Court decided that a harmonious construction of the statutes in this case
16 would be to find that the "action" is an action for judicial review. NRS 372.680 only authorizes
17 an action after a final decision by the Commission. A final decision by the Commission is
18 subject to judicial review pursuant to NRS 360.245(5). Finally, under NRS 233B.130(6)
19 judicial review is the exclusive means for a court to exercise authority over a final decision by
20 an administrative agency. When all of the relevant statutes are read together it is clear that
21 this matter should proceed as a Petition for Judicial Review.

22 3. CASE LAW MUST BE READ IN RELATION TO LEGISLATIVE CHANGES TO
23 NRS CHAPTER 233B AND NRS 372.680

24 The following is a timeline of the relevant legislative changes to NRS Chapter 233B and
25 NRS 372.680 and tax refund cases relied upon by Edison:

26 1983

27 *State v. Obexer & Son Inc.*, 99 Nev. 233, 660 P.2d 981 (1983).

28 1988

Saveway Super Service. Stations, Inc. v. Cafferata, 104 Nev. 402, 760 P.2d 127 (1988)

1989

The legislature removes language authorizing original actions when a statute authorizes such
an action and replaces it with the language in NRS Chapter 233B.130(6) "The provisions of

1 this chapter are the exclusive means of judicial review of, or **judicial action** concerning, a
2 **final decision** in a contested case involving an agency to which this chapter applies."
3 [emphasis added].

4 1992

5 *Campbell v. Dep't of Taxation*, 108 Nev. 215, 827 P.2d 833 (1992).

6 1993

7 *Campbell v. Dep't of Taxation*, 109 Nev. 512, 853 P.2d 717 (1993).

8 1997

9 The legislature adds the language in NRS 360.245(5) that states "A decision of the Nevada
10 Tax Commission is a **final decision** for the purposes of judicial review." [emphasis added]

11 1999

12 Prior to 1999, NRS 372.680 permitted an action for a claim for refund to be filed once a refund
13 claim had been filed with the Department of Taxation without an administrative proceeding.

14 The legislature changed the language and it now reads in pertinent part: "Within 90 days after
15 **a final decision** upon a claim filed pursuant to this chapter is rendered by the **Nevada Tax**
16 **Commission**, the claimant may bring **an action** against the Department on the grounds set
17 forth in the claim..." [emphasis added]. "Thus, [the legislation] contemplates a change from
18 past practice where **refund claims** upon passage of [the legislation] will now be subject to the
19 requirements of Chapter 233B of the Nevada Revised Statutes." Memorandum dated May 7,
20 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from
21 Norm Azevedo, Sr. Deputy Attorney General. *Hearing Before the Assembly Committee on*
22 *Judiciary*, 1999 Leg. 70th Sess. (May 7, 1999) [emphasis added].

23 When reviewing the Nevada case law regarding tax refund actions, it is important to keep
24 these legislative changes in mind.

25 Two cases relied upon by Edison, *State v. Obexer & Son Inc.*, 99 Nev. 233, 660 P.2d
26 981 (1983) and *Saveway Super Service. Stations, Inc. v. Cafferata*, 104 Nev. 402, 760 P.2d
27 127 (1988) were both decided before any of the legislative changes noted above. *Obexer*
28 was decided in 1983 before the change in 1989 to NRS Chapter 233B making judicial review

1 the exclusive remedy after a final decision by an agency. The decision in *Obexer* stands for
2 the proposition that: "Actions to recover taxes paid are equitable in nature, and the burden of
3 proof is on the taxpayer to show that the taxing body holds money that in equity and good
4 conscience it has no right to retain." *Obexer*, 99 Nev. at 237, 66 P.2d at 984. As argued
5 above, many states including Nevada have moved away from this approach and actions for
6 refunds are now subject to administrative proceedings and to judicial review.

7 *Saveway*, decided in 1988, was also decided before the legislative changes in 1989
8 and 1997 and in particular the change in 1999 to NRS 372.680. Prior to the change in 1999, a
9 taxpayer seeking a refund could go directly to district court after a denial by the Department
10 without a contested case before the Commission. Edison argues that *Saveway* stands for the
11 proposition that taxpayer's claims for refund are not governed by NRS Chapter 233B. There
12 are several problems with Edison's reliance on *Saveway*. The first problem with Edison's
13 argument is that the facts in *Saveway* are easily distinguishable from the facts in this case. A
14 second problem is that the Nevada Supreme Court came to a conclusion in *Saveway* that
15 supports the application of NRS Chapter 233B to instances where, as in the current case,
16 there has been a full evidentiary hearing before an administrative agency.

17 The statute analyzed in *Saveway* is NRS 365.460.⁵ At the time of the decision NRS
18 365.460 read as follows:

19 After payment of any excise tax under protest duly verified, served
20 on the department, and setting forth the grounds of objection to the
21 legality of the excise tax, the dealer paying the excise tax may bring
22 an action against the state treasurer in the district court in and for
23 Carson City for the recovery of the excise tax so paid under protest.

24 *Saveway* at 404, 128.

25 There are notable differences between NRS 365.460 and NRS 372.680. Pursuant to
26 NRS 365.460 a taxpayer can bring an action after paying the tax under protest without any
27 further administrative proceeding. Additionally, the action the taxpayer can bring pursuant to
28 NRS 365.460 is not against an administrative body, but against the state treasurer in an
independent action for restitution for the return of money wrongfully held. *Id.*

⁵ At the time of the Court's decision in 1988, the fuel tax at issue here was administered by the Department. Today the fuel tax is administered by the Department of Motor Vehicles.

1 There is no requirement to exhaust administrative remedies in NRS 365.460. This is in
2 contrast to NRS 372.680 which requires a taxpayer to obtain a final decision from the
3 Commission. Only after exhausting its appeals before the Commission can the taxpayer bring
4 an action under NRS 372.680. The Court in *Saveway* thought this was an important
5 distinction. The Court wrote: We conclude that the district court erred in applying standards
6 of judicial review properly applied to **appeals** from administrative decisions. NRS 365.460
7 states that the taxpayer may bring the action to recover taxes illegally assessed. *Id.*
8 [emphasis in the original].

9 NRS 372.680 does not indicate that a taxpayer can bring an action to recover taxes
10 illegally assessed. It specifically states that the action is to be filed after a final decision by the
11 Commission. The action is not against the state treasurer for holding money rightfully
12 belonging to the taxpayer.

13 When the statute allowed an action against the Department after a decision by the
14 Department and not the Commission, it was more like the statute at issue in NRS 365.460
15 where there is no administrative proceeding. The legislative change made to NRS 372.680 in
16 1999 ensured there would be opportunity for an evidentiary hearing, findings of facts and
17 conclusions of law and opportunity for review by the Commission prior to a decision becoming
18 final. With the change, the legislature limited the scope of NRS 372.680 and brought it within
19 the umbrella of NRS Chapter 233B.

20 The Court in *Saveway* indicated that "authority from other jurisdictions supports
21 *Saveway's* contention that the statute gives the taxpayer a right to bring an independent
22 action for restitution." *Id.* As discussed above, judicial review is routinely applied to tax
23 refund cases across the United States. *Saveway* does not stand for the proposition that NRS
24 372.680 precludes application of NRS Chapter 233B when there has been a full and fair
25 administrative proceeding. As noted above, the *Saveway* court indicated judicial review would
26 be appropriate in an appeal from an administrative decision. *Saveway* at 404, 128.

27 Since *Saveway*, all of the steps taken by the legislature in regards to NRS 372.680
28 move it away from the type of procedure at issue in *Saveway* and ensure that a request for

1 refund is subject to an administrative proceeding. Had the legislature wanted the evidentiary
2 proceedings to occur before a district court, it would not have amended NRS 372.680 to
3 require a final decision by the Commission.

4 After the change in 1989 to NRS Chapter 233B making judicial review the exclusive
5 remedy for parties aggrieved by a final decision by an administrative agency, this Court
6 decided the *Campbell* cases in 1992 and 1993. *Campbell v. Dep't of Taxation*, 108 Nev. 215,
7 827 P.2d 833 (1992), *Campbell v. Dep't of Taxation*, 109 Nev. 512, 853 P.2d 717 (1993). The
8 *Campbell* cases provide important analysis regarding the interplay between NRS Chapter
9 233B and NRS 372.680. The decisions in *Campbell* came before the legislative changes to
10 NRS 360.245(5) in 1997 and to NRS 372.680 in 1999.

11 In 1990 the Campbells purchased an automobile and failed to pay sales tax. In May
12 1990 the Department issued a tax deficiency against the Campbells. *Id.* Based on the state
13 of the law in 1990, the Campbells had two options at this point. The first option pursuant to
14 NRS 372.680 was to pay the tax, request a refund from the Department, and file an action in
15 District Court without having an administrative proceeding before the Commission. The
16 Campbells instead chose not to pay the tax, and requested a redetermination of the deficiency
17 finding. This led to an evidentiary proceeding before the Commission. *Campbell v. Dep't of*
18 *Taxation*, 108 Nev. 215, 217, 827 P.2d 833, 834-835 (1992). The initial letter from the
19 Department did not inform the Campbells of the two options. After the conclusion of the
20 administrative proceeding, another letter from the Department advised the Campbells to pay
21 the tax. In 1992, once paid, the only statutory means provided for demanding and obtaining a
22 refund of any excess taxes paid was set forth in NRS 372.630-720. Therefore, the Campbells
23 were left without means, under the APA, to reclaim the taxes they believed to be improperly
24 collected. *Id.* at 219, 836.

25 Today, after the legislative change in 1999, whether for an action in refund or for
26 redetermination, the Campbells would have been subject to the Administrative Procedures
27 Act. The Court then concluded, "We agree that, pursuant to *Britton*, the Campbells do not
28 have a right to a second evidentiary hearing." *Id.* In 1993, when the case came back before

1 the Court, the Court stated, "We determined that, although the Campbells had no right to a
2 second evidentiary hearing, the Campbells' case merited judicial review." *Campbell v. Tax*
3 *Commission*, 109 Nev. 512, 515, 853 P.2d. 717, 719 (1993).

4 There is no suggestion by the Court that the NRS 372.680 action the Campbell's filed
5 was an action in equity, separate from and in addition to the administrative procedures in NRS
6 233B. Instead the Court affirmed the doctrine of administrative res judicata and due to the
7 unique circumstances, allowed the NRS 372.680 action to go forward based on a judicial
8 review standard. The Court did not permit the Campbells to proceed with a trial de novo
9 based on their request for refund.

10 In the *Campbell* cases, the administrative and evidentiary proceeding was based
11 on a request for redetermination of a deficiency and not for an action for refund. Even though
12 the administrative hearing was not based on a request for refund the Court still found that the
13 Campbells were not entitled to a trial de novo on the claim for refund and that in an ordinary
14 case a civil action would have been barred by administrative res judicata.

15 Although the Edison matter is different from the Campbell case in that the taxes were
16 paid prior to the administrative proceeding, it is a difference without a distinction. Edison, like
17 the Campbells, had a full administrative and evidentiary proceeding prior to filing a suit
18 pursuant to NRS 372.680. Like the Campbells, Edison is not entitled to a second evidentiary
19 proceeding or to a trial de novo.

20 C. IF THIS MATTER IS TREATED AS A TRIAL DE NOVO AND NOT AN
21 APPELLATE REVIEW PROCEDURE, THE ADMINSTRATIVE DECISION IS
22 FINAL AND PRECLUSIVE.

23 Nevada has adopted a general rule of administrative res judicata. *Britton v. City of*
24 *North. Las Vegas*, 106 Nev. 690, 799 P.2d 568 (1990). The Nevada Supreme Court in *Britton*
25 identifies three inquiries that are pertinent to the application of administrative res judicata. *Id.*
26 at 692-693 and 569-570. The inquiries are "(1) whether the issue decided in the prior
27 adjudication was identical to the issue presented in the action in question; (2) whether there
28 was a final judgment on the merits; and (3) whether the party against whom the judgment is
asserted was a party, or in privity with a party, to the prior adjudication." *Id.*

1 If the factors from *Britton* are applied to the facts alleged in the action filed by Edison, it
2 is clear that administrative res judicata applies. The first factor is whether the issue decided in
3 the prior adjudication was identical to the issue presented in the action in question. The issue
4 in both the administrative proceeding and the NRS 372.680 action is the request for refund of
5 use tax paid on out-of-state coal. A district court reviewing the action of the Commission is
6 limited to the record that was before the Commission. NRS 233B.135(1)(b). A district court is
7 similarly limited by NRS 372.680. Since a district court is so limited, the issues decided by the
8 Commission are identical to the issues that were brought by Edison in its NRS 372.680 action.

9 The second factor is whether there was a final decision on the merits. If this matter
10 proceeds as a trial de novo and is not subject to judicial review the decision by the
11 Commission is final. The Commission's decision was a decision on the merits of Edison's
12 claims for refund.

13 The final factor is whether the party against whom the judgment is asserted was a
14 party, or in privity with a party, to the prior adjudication. The Commission's judgment in the
15 administrative proceeding below was against Edison. The judgment is being asserted against
16 Edison in the current case.

17 This Court further addressed the doctrine of administrative res judicata in the *Campbell*
18 cases discussed above. *Campbell v. Dep't of Taxation*, 108 Nev. 215, 827 P.2d 833 (1992).
19 In *Campbell* the district court judge granted summary judgment in favor of the Department on
20 the grounds that "all of the elements necessary to apply the doctrine of res judicata to the
21 decision of the administrative tribunal...exist in this case." *Campbell* at 218, 835 (quoting the
22 district court decision). The Nevada Supreme Court, while reaffirming the doctrine of
23 administrative res judicata, concluded that there were unique circumstances involved in
24 *Campbell* that justified a different result than granting summary judgment. Absent the unique
25 circumstances, this Court affirmed that administrative res judicata should apply.

26 None of the unique circumstances in *Campbell* are present in the current case. As in
27 *Campbell*, Edison failed to file a petition for judicial review. If this matter is not going forward
28 as judicial review, then the decision by the Commission is final and preclusive.

1 The Supreme Court of Mississippi in *Davis v. Attorney General*, 935 So.2d 856 (Miss.
2 2006) applied administrative res judicata in a tax case that, while obviously involving different
3 state statutes, bears a remarkable similarity to the current case. In *Davis* a taxpayer
4 contested the income taxes assessed by the State. After losing before the Mississippi State
5 Tax Commission, the taxpayer paid the taxes and did not appeal the final order of the Tax
6 Commission. *Id.* at 857. Two years later, the taxpayer sought a refund of the taxes from the
7 Department of Finance and Administration under a separate statutory process for refund.
8 When his claim was denied, taxpayer filed a Complaint with the Chancery Court. *Id.* The
9 Chancery Court found that "because the taxes were affirmed by the final Order of the Tax
10 Commission . . . he was 'without authority to review the findings of [the Tax Commission] or to
11 find the assessment to be erroneous.'" *Id.* at 860. In considering the operation of the two
12 statutes, the Mississippi Supreme Court concludes that:

13 The Tax Commission fully considered the issue and entered a
14 determination against Appellants under Section 27-7-73. When
15 Appellants chose not to appeal the Tax Commission's
16 determination and paid the tax, finality attached under Section 27-
17 7-73. As the doctrines of res judicata and collateral estoppel apply
18 to administrative decisions, the finality of Section 27-7-73 judicially
19 forecloses the Appellants from now utilizing Section 27-73-1. . . To
hold otherwise would effectively strip Sections 27-7-71, and-73 of
the force they were legislatively created to possess and make a
mockery of the time-honored principles of res judicata and collateral
estoppel.

20 *Id.* at 864 (citations omitted).

21 While the *Davis* case may differ in some respects from the current case, the underlying
22 principle applies. That principle is that once a litigant has received the benefit of a full and fair
23 hearing on the merits in an administrative proceeding that has become final, the litigant must
24 be barred from pursuing a refund under some other statutory scheme.

25 The United States Supreme Court in *Astoria Federal. Sav. and Loan Ass'n v. Solimino*,
26 501 U.S. 104 (1991), analyzes the doctrine of administrative res judicata. The Court declines
27 to give final decisions by state administrative agencies preclusive effect in age discrimination
28 claims in federal court. While limiting its application in certain federal actions, the Court

describes the importance of the finality of decisions and resolution of actions without re-litigating matters that have already been decided. The Court wrote:

We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. 'When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.' . . . Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. . . . The principle holds true when a court has resolved an issue and should do so equally when the issue has been decided by an administrative agency, be it state or federal . . . which acts in a judicial capacity.

Id. at 107-108 (citations omitted).

If Edison is allowed to go forward with a trial de novo, the Department is faced with the daunting task of starting over after engaging in adversarial administrative proceedings with Edison over the course of the last nine years. Edison's request for a trial de novo, as a losing litigant seeking a rematch after defeat, raises the exact issues that led the United States Supreme Court to discuss the doctrine of administrative res judicata with approval.

D. EDISON HAS A PLAIN, SPEEDY AND ADEQUATE REMEDY AT LAW.

An extraordinary writ should not issue if there is a plain, speedy and adequate remedy at law. *Sonia F. v. Eighth Judicial District Court*, 125 Nev. 38, ___, 215 P.3d 705, 707 (2009). The procedures in NRS Chapter 233B establish procedural requirements for the adjudication of matters before all agencies state, including the Commission. NRS 233B.020.

NRS Chapter 233B has governed this matter since its inception with Edison's first request for refund filed in April 2001. Respondent's Appendix, BS pp.1-25. NRS Chapter 233B provides a means for a plain, speedy and adequate resolution of this matter in district court and for further review by this Court if necessary. NRS 233B.130-150.

1 **IV. CONCLUSION**

2 The proper nature of the proceeding in this case is an action for judicial review subject to
3 NRS Chapter 233B. The Commission is not exempt from NRS Chapter 233B and pursuant to
4 NRS 360.245(5) final decisions by the Commission are subject to judicial review. NRS
5 233B.130(6) provides that the procedures in NRS Chapter 233B are the exclusive means of
6 judicial action in relation to a final decision of an administrative agency such as the
7 Commission.

8 NRS 372.680 does not include any language authorizing a trial de novo. If this action
9 is not an appeal of the final decision by the Commission then this action should be barred by
10 administrative res judicata. In order to harmonize the statutory provisions and comply with
11 this Court's decisions in *Campbell*, this matter must go forward as a petition for judicial review.

12 The Department respectfully requests that this Court deny the Petition for Writ.

13 Dated this 22nd day of February, 2010.

14 CATHERINE CORTEZ MASTO
15 Attorney General

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General,
and that on this 22 day of February, 2010, I served a copy of the foregoing by mailing a
true copy of the foregoing to the following:

Norman J. Azevedo, Esq.
405 N. Nevada St.
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Employee of the Office of the Attorney General