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Electronically Filed  
Mar 05 2010 11:21 a.m.  
Tracie K. Lindeman

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

SOUTHERN CALIFORNIA EDISON,

Petitioner,

v.

THE FIRST JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA in  
and for the City of Carson, and THE  
HONORABLE JAMES T. RUSSELL,  
Judge thereof,

Respondents.

Case No. 09-0C-00016-1B

Docket No. 55228

**BRIEF OF AMICI CURIAE IN SUPPORT OF  
SOUTHERN CALIFORNIA EDISON'S PETITION FOR WRIT OF MANDAMUS**

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## INTRODUCTION

The Nevada Taxpayers Association (“NTA”), the Nevada Manufacturers Association (“NMA”), and the Council On State Taxation (“COST”), collectively the “Amici”, submit this *amici curiae* brief in support of Southern California Edison’s Petition for Writ of Mandamus in favor of vacating the District Court’s order that the underlying action proceed as a Petition for Judicial Review pursuant to NRS Chapter 233B rather than a de novo civil action as authorized under NRS 372.680.

The NTA is a nonprofit Nevada organization whose membership is comprised of large and small businesses, individuals, other associations and governmental entities located in Nevada. The NTA’s purpose is to promote the cause of the taxpayer for responsible government through research and dissemination of information and data to policy makers, taxpayers and others. NMA is an association of manufacturers in Nevada joined together to pursue common goals. COST is a nonprofit trade association consisting of approximately 600 multistate corporations, most doing business within Nevada. COST’s objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

Southern California Edison (“Edison”) has ably articulated its concern that the District Court incorrectly interpreted the judicial remedies available to Nevada taxpayers, and Amici will not restate those concerns here. Rather, Amici submit this *amici curiae* brief to highlight its concerns that the proper remedy be utilized consistently for all taxpayers who file suits for refunds of sales and use taxes in Nevada. The judicial remedy provided to a taxpayer seeking a refund of sales and use taxes is provided in NRS 372.680 and has been relied on by Edison and other Nevada taxpayers for a de novo review of their claims. The Nevada Department of Taxation (“Department”) has advised other taxpayers and advised Edison in this same proceeding that the appropriate remedy was a de novo review of their claims. Moreover, the Department has participated in other reported cases in which it acknowledged that the proper remedy was a de novo review of the claims. The Department now seeks to

1 restrict the judicial remedies available to Edison in a way that is not warranted by the  
2 statute and that is inconsistent with the Department's position in other cases—both  
3 current and prior. The Department's position regarding the need to seek a Petition for  
4 Judicial Review cannot be reconciled with the applicable statutory language or the  
5 Department's position with respect to other taxpayers. Neither can the position be  
6 reconciled with the standard practice for appeals in other states that are tempered by due  
7 process requirements.

8 This Court should therefore grant the relief requested in Edison's Petition for  
9 Writ of Mandamus

### 10 ARGUMENT

#### 11 **I. THIS COURT SHOULD GRANT SOUTHERN CALIFORNIA EDISON'S** 12 **PETITION FOR WRIT OF MANDAMUS TO CLARIFY THE** 13 **INCONSISTENT AND CONFLICTING POSITIONS TAKEN BY THE** 14 **DEPARTMENT OF TAXATION WITH RESPECT TO THE AVAILABLE** 15 **JUDICIAL REMEDIES FOR TAXPAYERS PURSUING REFUND** 16 **CLAIMS OF SALES AND USE TAXES.**

17 The judicial remedy granted to taxpayers is at the heart of their ability to contest  
18 their tax liability. It is a basic principle that there is no right without a remedy, and here  
19 the Department has deprived Edison of its statutorily granted judicial remedy by  
20 asserting a legal position different from what it has asserted in the past and different  
21 from its prior position with Edison. The remedy provided under NRS 372.680 must be  
22 consistently applied to all taxpayers, and the Department should not be allowed to limit  
23 one taxpayer's claim to judicial review when other taxpayers have been permitted the de  
24 novo trial that is clearly warranted by the plain statutory language.

25 The Department has previously advised Edison in this case that its remedy would  
26 be a de novo review of claim. The Department informed petitioner and the Commission  
27 that "Edison would have an opportunity before the district court to more fully develop  
28 the facts..." (Department's Brief dated November 21, 2003, BN 125-126). Moreover,  
the Department has similarly advised other taxpayers that the remedy granted to them  
under NRS 372.680 is a new civil action, contrary to its assertion in this case that the

1 remedy is mere judicial review. (Original Petition for Writ of Mandamus 3-4). The  
2 Department's inconsistency regarding the correct judicial remedy granted under NRS  
3 372.680 undermines the Department's duty to treat all taxpayers uniformly and  
4 consistently, and it is not permitted under the law.

5 In *Campbell v. State of Nevada*, this Court held administrative res judicata did  
6 not apply to that taxpayer's scenario because the Department, in two separate letters,  
7 misled the taxpayer as to their possible judicial remedies. 827 P.2d 833, 108 Nev. 215  
8 (Nev. 1992). The Department notified the taxpayer in a letter of their right to an  
9 administrative appeal, and in reliance on that letter, the taxpayer paid the taxes and  
10 sought the administrative review, foreclosing their other possible remedies. Although  
11 the Department asserts that "there does not exist any of the circumstances that were  
12 unique to the *Campbell* case..." here, the Department has taken disparate positions with  
13 Edison by first acknowledging that the remedy would be de novo review, but then  
14 changing its position and asserting that Judicial Review was the appropriate remedy.  
15 Edison should be permitted to rely on the Department's initial assertion.

16 Moreover, the Department has acknowledged in other reported cases that de  
17 novo review is the proper remedy. In *Sparks Nugget, Inc. v. State, Dept. of Taxation*,  
18 the Supreme Court of Nevada states the procedural posture of that case: "Following the  
19 denial of its claim, the Nugget administratively appealed the [Tax] Department's  
20 decision to the tax commission. That appeal proved unsuccessful, however, and having  
21 exhausted its administrative remedies, the Nugget then sued the [Tax] Department in  
22 district court, again seeking a refund of the use taxes that it had paid with respect to  
23 complimentary patron and employee meals." 179 P.3d 570, 573 (Nev. 2008).

24 Thus, the Department in *Sparks Nugget* did not impose any requirement that the  
25 taxpayer file a Petition for Judicial Review before pursuing a civil action in District  
26 Court. In addition to not imposing that requirement on *Sparks Nugget*, the Department  
27 has informed other taxpayers that the judicial remedy is a de novo trial (as set forth more  
28 fully in Edison's Petition for Writ of Mandamus); thus Edison is receiving treatment

1 different from other taxpayers, and is receiving treatment that is even inconsistent with  
2 the Department's *own prior acknowledgements in this same case*. The Department's  
3 effort to now attempt to require Edison to seek Judicial Review – despite Edison's  
4 reliance on the plain statutory language, the Department's prior interpretations of NRS  
5 372.680, and the Department's own promises of de novo review in this very case –  
6 should not be permitted. Taxpayers rely on positions taken by the Department and  
7 should not be deprived of a judicial remedy statutorily granted to them because of that  
8 reliance.

9 The Supreme Court of Oklahoma in *Strelecki v. Oklahoma Tax Commission*,  
10 held that it would not deny a taxpayer a refund suit where the taxpayer had previously  
11 relied on the Tax Commission's advice in pursuing remedies for its disputed tax  
12 liability: "It has lulled these taxpayers into a false sense of security by inducing their  
13 belief that the voluntary overpayments claimed to be due would be refunded if *Harper*  
14 gave retroactive effect to *Davis*. The Commission will not be heard-at this late hour- to  
15 deny liability upon a changed interpretation of the state's remedial regime for refunds."  
16 *Strelecki v. Oklahoma Tax Commission*, 872 P.2d 910, 919 (Ok. 1994). Similarly, here  
17 Edison should not be deprived of a remedy granted to other taxpayers because it relied  
18 on the Department's position in this and other cases.

19 Allowing inconsistent applications of statutes providing vital judicial remedies to  
20 taxpayers seeking refunds of taxes undermines not only the Department's duty to treat  
21 taxpayers uniformly and consistently, but it also discourages compliance by Nevada  
22 taxpayers. The Department cannot change this statutorily granted judicial remedy  
23 without forewarning to the taxpayers and moreover, should not be able to take  
24 inconsistent positions on the judicial remedy available and notify some taxpayers that  
25 the remedy is a de novo civil action and for others allow only a judicial review.

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1 **II. THIS COURT SHOULD GRANT SOUTHERN CALIFORNIA EDISON'S**  
2 **PETITION FOR WRIT OF MANDAMUS TO ENSURE THAT**  
3 **TAXPAYERS ARE ENTITLED TO THE TYPE OF REVIEW THE**  
4 **LEGISLATURE INTENDED WITH REFERENCE TO DUE PROCESS**  
5 **REQUIREMENTS AND PROCEDURES IN OTHER STATES.**

6 The Fifth and Fourteenth Amendments to the United States Constitution assure  
7 that no person shall be deprived of life, liberty, or property without due process of law.  
8 U.S. Const. amend. V, XIV. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the United States  
9 Supreme Court stated:

10 The constitutional right to be heard is a basic aspect of the  
11 duty of government to follow a fair process of decision  
12 making when it acts to deprive a person of his possessions.  
13 The purpose of this requirement is not only to ensure abstract  
14 fair play to the individual. Its purpose, more particularly, is  
15 to protect his use and possession of property from arbitrary  
16 encroachment to minimize substantively unfair or mistaken  
17 deprivations of property . . . So viewed, the prohibition  
18 against the deprivation of property without due process of law  
19 reflects the high value embedded in our constitutional and  
20 political history that we place on a person's right to enjoy  
21 what is his, free of governmental interference.

22 *Id.*, at 80-81. (Citations omitted.)

23 The concept of due process is flexible and the nature and scope of the appropriate  
24 process depends upon the particular situation and the weighing of the following factors.

25 First, the private interest that will be affected by the official  
26 action; second, the risk of an erroneous deprivation of such  
27 interest through the procedures used, and the probable value,  
28 if any, of additional or substitute procedural safeguards; and  
finally, the Government's interest, including the function  
involved and the fiscal and administrative burdens that the  
additional or substitute procedural requirements would entail.

*Zinerman v. Burch*, 494 U.S. 113, 127 (1990). (Citations omitted.)

These Constitutional guarantees have traditionally been reflected in prior  
positions by the Department and in the procedural structures of federal income tax  
appeals and the appeals processes in other states. The procedures comport with  
traditional notions of due process by providing meaningful notice and by providing a



1 hearing before a neutral tribunal where one may present his side. *Matthews v. Eldridge*,  
2 424 U.S. 319, 333 (1976).

3 For federal income tax purposes, following an examination of a taxpayer's return  
4 and upon the receipt of a notice of assessment, commonly referred to as a 30-day letter,  
5 a taxpayer has thirty days in which to either pay the tax or file a formal protest outlining  
6 the taxpayer's objections and request an administrative appeal. The appeal is "heard"  
7 before an appeals conferee, who is an employee of the Internal Revenue Service;  
8 although the appeals division is functionally separate from administration and  
9 examination. The appeal is based upon the information provided in the taxpayer's  
10 protest and a response from the examining agent. The appeal is conducted in a meeting  
11 with the appeals officer at which no formal record is made. If the taxpayer is  
12 unsuccessful in this appeal, he will then receive a deficiency notice from the Internal  
13 Revenue Service, commonly referred to as a statutory or 90-day notice. The taxpayer  
14 then has ninety days in which to pay the tax or appeal to the United States Tax Court for  
15 a full de novo trial. If the taxpayer chooses to pay the tax, he may then seek a refund in  
16 the United States Court of Claims or Federal District Court. The trial is conducted de  
17 novo in each forum and the taxpayer is entitled to a full jury trial in the latter.

18 A taxpayer in Alabama who receives a preliminary assessment may request an  
19 informal conference within the revenue department. If the taxpayer is unsuccessful and  
20 the department issues a notice of final assessment, the taxpayer may appeal the  
21 assessment to an administrative law division or file a lawsuit in an Alabama circuit  
22 court. In each case, the administrative law judge or the circuit court conducts a formal  
23 de novo hearing. Ala. Code § 40-2A-7.

24 An Arkansas taxpayer who receives a "Notice of Proposed Assessment" may file  
25 a written protest requesting an informal hearing within the department before a hearing  
26 officer appointed by the commissioner. If the taxpayer is unsuccessful in this appeal, he  
27 has the further opportunity to appeal the assessment internally to the commissioner. If  
28 the taxpayer is unsuccessful in this appeal, the department will issue a notice of final

1 assessment that may be appealed to the circuit court after payment of the tax under  
2 protest or the posting of a bond. The circuit court then conducts a de novo review and  
3 issues a final decision that may be appealed to the Arkansas Supreme Court. Ark Code  
4 Ann. § 26-18-405.

5 If a taxpayer receives a notice of proposed assessment in Louisiana, they may  
6 either file a written protest with the director of revenue for an informal review or pay the  
7 tax under protest and appeal to the district court. An informal agency review is  
8 discretionary, but if granted and the taxpayer is unsuccessful, the department may either  
9 issue a formal assessment or file suit in district court. If a suit is filed in district court,  
10 the court conducts a de novo review and makes a final determination. If the department  
11 issues a formal assessment, the taxpayer may file a petition with the Louisiana Board of  
12 Tax Appeals, an independent agency in the executive branch, or pay the tax under  
13 protest and appeal to district court. In either case, the taxpayer's appeal is heard de  
14 novo. La. Rev. Stat. Ann. §§ 47:1401 – 1486.

15 If a taxpayer receives a notice of assessment from the Tennessee Department of  
16 Revenue, the taxpayer may request a conference with the commissioner, pay the tax and  
17 sue for a refund or file suit in Tennessee Chancery Court. If the taxpayer requests a  
18 conference, an informal conference is conducted by the commissioner's legal office or  
19 the assistant commissioner's staff. If the taxpayer receives an adverse determination  
20 from the commissioner, he may appeal this decision to the Tennessee Chancery Court.  
21 In such case and in the case of any direct entry into the Tennessee Chancery Court by  
22 the commissioner, the chancellor will conduct a de novo review and issue its  
23 determination. Tenn. Code Ann. §§ 67-1-1801 – 1807.

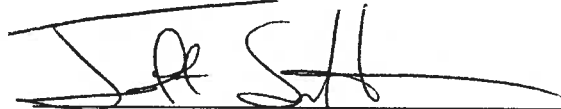
24 Amici respectfully submits that the District Court erred in its sweeping  
25 conclusion that a de novo review of the Commission's actions are not required by  
26 Nevada statute. COST further respectfully submits that such a review is not only  
27 required by Nevada statute, but also represents the norm in federal and many state tax  
28 appeals. Such review is in fact required to provide procedural due process.

**CONCLUSION**

For all of the foregoing reasons, Amici respectfully requests that the Court accept review of this case, vacate the District Court's order, and hold that petitioner is entitled to a civil action as authorized by NRS 372.680.

RESPECTFULLY SUBMITTED this 29th day of January, 2010.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP and that on the 29th day of January, 2010, a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE IN SUPPORT OF SOUTHERN CALIFORNIA EDISON'S PETITION FOR WRIT OF MANDAMUS** was served by depositing a copy of the same in the U.S. Mail, postage prepaid, upon the parties and at the addresses listed below:

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