Attachment 4

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

SOUTHERN CALIFORNIA EDISON, Plaintiff, vs. STATE OF NEVADA ex rel. DEPARTMENT OF TAXATION, Defendant.	Case No. 09 OC 00016 1B Department No. 1

NOTICE OF ENTRY OF AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW and DECISION

PLEASE TAKE NOTICE that the **AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, and DECISION**, was signed by Judge Russell on December 17, 2014, and was filed with this Court on December 17, 2014. A true and correct copy of the **AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, and DECISION**, is attached hereto as Exhibit 1.

Dated: December 17, 2014.

CATHERINE CORTEZ MASTO
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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on December 17, 2014, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW and DECISION** by mailing a copy thereof in the United States Mail, postage paid, fully addressed as follows:

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Dated: December 17, 2014.

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Nevada Office of the Attorney General
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EXHIBIT 1

EXHIBIT 1

Case No.: 09 OC 00016 1B

Dept. No.: I

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

SOUTHERN CALIFORNIA EDISON,

Plaintiff,

vs.

THE STATE OF NEVADA, EX REL. DEPARTMENT OF TAXATION,

Defendant.

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

This matter is before this Court based on a Second Amended Complaint filed by Plaintiff, Southern California Edison, as to a decision rendered by Defendant, The State of Nevada, ex rel, Department of Taxation. An eight day bench trial was held January 21-29, 2014. An Order Staying Determination Pending Decision by Nevada Supreme Court was entered on April 30, 2014, pending a decision in *Sierra Pacific Power Company, et al. v. The State of Nevada, Department of Taxation*, 130 Nev. Adv. Op. 93, which was rendered on December 4, 2014. Based on this decision, the following Findings of Fact and Conclusions of Law are entered in this case. An Amended Findings of Fact, Conclusions of Law, and Decision is issued by this Court pursuant to NRCP Rule 60(a), to clarify that this Court heard this matter on the Second Amended Complaint filed as an independent action, and on a Trial De Novo standard, not as a Petition for Judicial Review, based on the decision by the Nevada Supreme Court in *Southern California Edison v. First Judicial District Court*, 127 Nev. Adv. Op. 22 (2011).

FINDINGS OF FACT

1. Defendant State of Nevada *ex rel.* Department of Taxation (the "Department") is an agency of the executive branch of the State of Nevada that is charged with the administration and enforcement of the tax laws set forth in Title 32 of the Nevada Revised Statutes, including chapters 372 and 374 of the Nevada Revised Statutes governing sales and use taxes and local school support taxes, respectively.

2. The Plaintiff, Southern California Edison ("SCE") is a regulated public utility that operated the Mohave Generating Station ("Mohave"), a coal fired power plant in Clark County, Nevada, from 1970 to 2005. SCE owned a majority interest in Mohave.

3. As a result of an agreement with the Department of the Interior, SCE purchased coal in Arizona exclusively from Peabody Western Coal Company ("Peabody") pursuant to Mohave Coal Supply Agreement, dated January 6, 1967, and the Amended Mohave Project Supply Agreement, dated May 26, 1976, wherein Peabody is the seller and Mohave co-owners are the buyers. In exchange for the agreement to purchase coal mined on Indian Reservations in Arizona, SCE was able to purchase the water necessary to operate Mohave from the Colorado River Commission.

4. Peabody obtained the coal from the Black Mesa Mine located on Navajo and Hopi Indian reservations in Arizona. Peabody operated the Black Mesa Mine through lease agreements with the Navajo and Hopi Tribes.

5. SCE determined that the most inexpensive means to transport the coal from Arizona to Nevada was by means of a pipeline.

6. As part of the Coal Supply Agreement, Peabody entered into a Coal Slurry Pipeline Agreement with Black Mesa Pipeline ("BMP") to process the coal into a coal slurry that met SCE's specifications and could be transported to Mohave through the pipeline.

7. The tangible personal property purchased by SCE was the coal slurry product.

8. BMP operated the Coal Slurry Preparation Plant and the pipeline that transported the coal slurry to Mohave. Before delivery of the coal to BMP, Peabody processed the run-of-mine coal by separating rock in a rotary breaker lowering the ash content and reducing the coal to a 2" x 0" size. At the Coal Slurry Preparation Plant, the coal was further crushed by various means to a certain size and blended with water to create coal slurry that could then be transported through the pipeline.

9. The processing by Peabody and BMP created a coal slurry that met SCE's transportation requirements.

10. The price SCE paid Peabody for the coal slurry is set forth in the Amended Mohave Project Coal Supply Agreement, Sec. 6. The price for the coal slurry is paid for the coal delivered to the Mohave Project and is based on the mine price, the price for transportation, and all sale, use, production and severance taxes paid by the seller, mainly Peabody. Thus, Peabody is the entity that paid all taxes, not SCE.

11. The coal slurry was transported more than 270 miles through a pipeline to the Mohave Generating Station.

12. Peabody retained title to the coal when it was transferred to BMP for processing and transportation. After processing and transportation by BMP, the sales transaction between Peabody and SCE took place in Nevada when title to the coal slurry passed to SCE upon delivery at Mohave.

13. Risk of loss for the coal slurry and water passed from Peabody to SCE at the same time title was passed at the receiving facilities of the Mohave Generating Station in Nevada.

14. Because Peabody did not have any physical presence in Nevada, SCE paid Use Tax to Nevada for the coal slurry beginning in 1970.

15. SCE de-watered the coal and burned it to generate electricity. SCE further pulverized the coal into a powder that could be blown into the burners, it did not have the means at Mohave to take run-of-mine coal and process it for burning as fuel. SCE also used the water from the coal slurry for cooling at the plant.

16. SCE could not purchase coal in Nevada because there are no commercially viable deposits of coal in Nevada and there were no coal mines operating in Nevada during the 1998 to 2000 period of time at issue in this case. There is no record that any coal mine in Nevada has been subject to the Net Proceeds of Minerals tax or that any coal miner or supplier has ever made a sale of coal in Nevada that was not subject to either sales or use tax.

17. Peabody did not compete with any Nevada companies that mined coal in Nevada.

18. Peabody did not compete with any oil, natural gas, or geothermal producers in Nevada.

19. There is no evidence that any coal transaction in Nevada was exempt from sales or use tax pursuant to NRS 372.270.

20. Beginning in April 2001, SCE filed claims for a partial refund filed with the Department of Taxation for the period between March 1998 and December 2000. This claim was limited to a request for credit toward Arizona sales tax paid by SCE to Peabody.

21. On January 31, 2003, after the Department denied SCE's claims for refund for the time period between March 1998 and December 1999, SCE submitted a Petition for Redetermination limited to those periods arguing for the first time that its consumption of coal at the Mohave Plant was exempt based on the dormant Commerce Clause and that the taxable measure should not have included SMCRA and Black Lung payments, but SCE did not provide amended returns.

22. Thereafter, on October 27, 2003, SCE submitted a letter with revised returns referring to new claims but failed to articulate the grounds for its revised claims.

23. In November of 2003, SCE submitted a brief to the Nevada Tax Commission alleging, in the alternative, that either: (1) SCE's consumption of coal at the Mohave Plant was entirely exempt from Nevada's use tax; or (2) SCE is entitled to a refund based on its inadvertent inclusion of royalties and transportation charges in the measure of its use tax obligation. The brief also alleged that SCE is entitled to a refund based upon taxes and fees remitted to Arizona, the United States, and the Navajo Nation.

24. After a previous decision on SCE's refund request was voided by the Nevada Supreme Court, the Nevada Tax Commission held open hearings on the claims for refund on September 9, 2008, and December 1, 2008.

25. At the December 1, 2008, hearing the Commission voted to deny SCE's refund claims.

26. On March 2, 2009, the Commission served its final written decision, dated February 27, 2009, denying SCE's claims for refund (Ex. E to Plaintiff's Second Amended Complaint).

27. SCE did not pay any sales tax to the State of Arizona on its purchase of the coal slurry. Any tax was paid by Peabody to the state of Arizona.

28. SCE did not pay any taxes to the United States or the Navajo Nation or Hopi Tribe on its purchase of coal slurry. Any tax was paid by Peabody to the state of Arizona.

29. SCE did not pay taxes to the State of Nevada imposed pursuant to Chapter 362 of the Nevada Revised Statutes ("NRS").

30. SCE has not been taxed differently than any other similarly situated taxpayer on the use of coal in the state of Nevada nor any other tax payer who has had a product delivered to Nevada for use in this State.

31. SCE did not suffer any discrimination in fact in comparison to any other purchaser of coal in Nevada.

32. SCE has not suffered any injury as a result of the exemption in NRS 372.270 that would entitle it to retroactive relief.

CONCLUSIONS OF LAW

1. Nevada imposes a sales tax upon retailers for the privilege of selling tangible personal property at retail in Nevada. NRS 372.105. In addition to the sales tax, Nevada imposes a use tax upon consumers for the storage, use or other consumption of tangible personal property in Nevada. NRS 372.185 and NRS 374.190.

2. The use tax is imposed with respect to tangible personal property ". . . purchased from any [out-of-state] retailer on or after July 1, 1955, for storage, use or other consumption in [Nevada]." NRS 372.185(1).

3. The tax applies to tangible personal property which was acquired out-of-state but which would have been subject to sales tax if the sale had occurred in Nevada. NRS 372.185(2).

4. The use tax is complementary to the sales tax and generally applies when tangible personal property avoids the imposition of sales tax at a point of purchase outside of Nevada. *Nevada Tax Comm'n v. Nevada Cement Co.*, 116 Nev. 877, 8 P.3d 147 (2000). *See also Sparks Nugget, Inc. v. State of Nevada ex rel. Dep't of Taxation*, 124 Adv. Op. No. 15 (March 27, 2008) ("any non-exempt retail sales of personal property that have escaped sales tax are nonetheless taxed when the property is utilized in the state").

5. SCE paid use tax pursuant to NRS 372.185 beginning in 1970 on the coal slurry.

6. NRS 372.185 provides:

> 1. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1955, for storage, use or other consumption in this State at the rate of 2 percent of the sales price of the property.
> 2. The tax is imposed with respect to all property which was acquired out of state in a transaction that would have been a taxable sale if it had occurred within this State.

7. Because there is no coal mined in Nevada, any sale of coal in Nevada would necessarily be subject to either sales or use tax. The transfer of title to the coal slurry took place in Nevada and pursuant to the Mohave Project Coal Supply Agreements, Nevada law governs.

8. The fundamental objective of the dormant Commerce Clause is "preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Gen. Motors Corp. v. Tracy*, 519 U.S. 279, 299 (1997).

9. When challenging a state tax based on the dormant Commerce Clause, the taxpayer has the burden to demonstrate that the state tax in question does, in fact, violate the Commerce Clause of the United States Constitution. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983).

10. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court set out a test to determine whether a state tax provision violates the Commerce Clause. A state tax provision will survive a Commerce Clause challenge so long as the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services

provided by the state. *See Quill v. N. Dakota*, 504 U.S. 298 (1992) (quoting *Complete Auto Transit v. Brady*).

11. The use tax paid by Taxpayers pursuant to NRS 372.185(1) does not violate the dormant Commerce Clause under the Constitution of the United States. *Great Am. Airways v. Nevada State Tax Comm'n*, 101 Nev. 422, 425 (1985).

12. The United States Supreme Court has identified the fundamental objective of the dormant Commerce Clause as "preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Gen. Motors Corp. v. Tracy*, 519 U.S. 279, 299 (1997). In this case, SCE has not been treated any differently than any of its market competitors. Since there is no unequal treatment and consequently no impediment to free trade, SCE's claim is not within the zone of interests to be protected by the Commerce Clause.

13. There are no facts in the record to support a finding that SCE, by paying use tax on its purchase of the coal slurry, is being discriminated against in comparison to a similarly situated taxpayer. To hold otherwise would be to give an unpalatable windfall to SCE.

14. SCE has not been subject to an illegal or improper tax that would entitle them to a refund of use tax.

15. There is no evidence in the record that SCE's market competitors have claimed an exemption from the payment of Sales and Use tax pursuant to NRS 372.270 on the purchase of coal.

16. Further, the Nevada Supreme Court in the *Sierra Pacific Power Company, et al* case held that NRS 372.270 was not severable and that it was to be stricken down in its entirely. *Sierra Pacific Power Company, et al. v. The State of Nevada, Department of Taxation*, 130 Nev. Adv. Op. 93 (Dec. 04, 2014). Therefore, it cannot be used to create an agreement that there was a

benefit to any Nevada mining operation that would reflect a different treatment to an in state operation.

17. Dormant Commerce Clause case law makes clear that violations must be based on actual injury and it is the burden of the taxpayer to prove the injury. In *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481 (1932), the United States Supreme Court wrote: "Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries." The practical effect here is that there was no discrimination.

18. Further, the United States Supreme Court in *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dep't of Bus. Regulation of Florida*, 496 U.S. 18 (1990) analyzed the available remedies when a tax scheme is found to violate the dormant Commerce Clause. *McKesson* dealt with a Florida liquor tax that was found to discriminate against interstate commerce. The case addresses the means to address the injury suffered by a taxpayer in competition with a taxpayer that received beneficial treatment.

The Court concluded that the State had options available for addressing the injury. The State could refund the "difference between the tax [petitioner] paid and the tax [petitioner] would have been assessed were it extended the same rate reductions that **its competitors actually received.**" *Id.* at 40 (emphasis added).

Given the fact that SCE has not provided any facts to suggest that an actual competitor with SCE received tax rate reductions or exemptions that caused injury to SCE, there should be no applicable remedy.

19. The United States Supreme Court wrote:

Thus, in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express

discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply. The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.

Gen. Motors Corp. v. Tracy, 519 U.S. 279, 300 (1997).

20. The Legislature enacted NRS 372.270 which provides "the gross receipts from the sale of and the storage, use or other consumption in this State of, the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS" are exempt from sales and use tax. NRS Chapter 362 levies a tax on the net proceeds of minerals extracted in Nevada. *See* NRS 362.120 *et seq*. In other words, minerals which are subject to the net proceeds of minerals of tax under NRS Chapter 362 are exempted from the sales and use tax assessed in NRS Chapter 372.

21. The exemption in NRS 372.270 is only a partial exemption that applies only to the extent of actual payment of the Nevada net proceeds tax. A.G.O. 76 (June 27, 1955). The Attorney General concluded "that the sales tax is placed upon that portion of the gross receipts constituting the value of the product which is not taxed under the Net Proceeds of Mines Tax." *Id.*

22. The Nevada Supreme Court has ruled that sales and use tax exemptions are to be narrowly construed in favor of taxability. *Shetakis Distributing Co. v. Dep't of Taxation,* 108 Nev. 901, 907, 839 P.2d 1315, 1319 (1992). The language of the Nevada Constitution Article X Section 5(1) and NRS 362.110[1] clearly limits the net proceeds tax, and the corresponding exemption from sales and use taxes, to minerals extracted in Nevada.

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[1] NRS 362.110 requires that the net proceeds form be filed by "every person extracting minerals in this State . . ."

23. The coal in question was mined or extracted outside of Nevada and is, therefore, not subject to the net proceeds of minerals tax in Nevada and is not exempted from Nevada sales and use tax by NRS 372.270, which statute has been stricken by the Nevada Supreme Court.

24. Because of the requirement to narrowly construe tax exemptions, SCE is required to clearly show that the sales and use tax exemption of NRS 372.270 was intended to apply to coal mined outside Nevada. This is not the case.

25. The Constitutional provision is not ambiguous to a reasonably informed person but clearly applies only to minerals extracted in Nevada.

26. The Nevada Supreme Court in the *Sierra Pacific Power Company et al* case held that there was no refund available to the utility company in that case because there had been no actual injury. *Sierra Pacific Power Company, et al. v. The State of Nevada, Department of Taxation*, 130 Nev. Adv. Op. 93 (Dec. 04, 2014). Here, as in that case, SCE did not pay any higher tax than did its competitors. No competitor gained a competitive advantage under the tax scheme.

Although the exemption to the use tax set forth in NRS 372.270 is unconstitutional and in violation of the Dormant Commerce Clause, the use tax itself is not unconstitutional. Thus, the tax itself complained of was lawfully assessed. NRS 372.270 has no applicability because there was no competitor that obtained an advantage thereunder; and, as such, there was no actual discrimination against interstate commerce. *See Sierra Pacific Power Company, et al. v. The State of Nevada, Department of Taxation*, 130 Nev. Adv. Op. 93 (Dec. 04, 2014). In fact, to not charge a use tax would have given a benefit to SCE which other taxpayers did not enjoy. SCE is on an even playing field with all such companies in the state of Nevada in regard to this issue.

27. SCE is not entitled to a credit for the Arizona Transaction Privilege Tax that Peabody paid to the State of Arizona.

NAC 372.055 provides,

In determining the amount of use tax that is due from a taxpayer, the Department will allow a credit toward the amount due to this State in an amount equal to sales tax legitimately paid for the same purchase of tangible personal property to a state or local government outside of Nevada, upon proof of payment deemed satisfactory to the Department. Here there was no "same purchase." SCE paid no direct tax to the state of Arizona.

In the contract between the parties SCE agreed to reimburse Peabody as part of the sale price the taxes that Peabody paid to Arizona. This reimbursement was a part of the purchase price SCE paid to Peabody for the coal slurry. The State of Nevada was entitled to collect use tax measured by the entire price of the coal slurry. HELLERSTEIN, STATE TAXATION, ¶ 17.08 (3d ed. 2013).

Even assuming that SCE was entitled to a credit for sales tax Peabody paid, this credit does not apply to the Arizona Transaction Privilege Tax because in this context it is not a sales tax, it is levied on a seller's, Peabody's, gross receipts rather than each individual sale and is for the privilege of doing business in the State of Arizona. *Arizona Dep't. of Revenue v. Robinson's Hardware*, 721 P.2d 137, 141 (Ariz. Ct. App. 1986).

28. SCE may not exclude taxes Peabody paid to the federal government from the measure of use tax. In the contract between the parties SCE agreed to reimburse Peabody for taxes and fees that Peabody paid to the federal government. This reimbursement was a part of the purchase price SCE paid to Peabody for the coal slurry. Peabody was the actual taxpayer, not SCE. SCE paid no direct tax to the federal government. The State of Nevada was entitled to collect use tax measured by the entire price of the coal slurry. HELLERSTEIN, STATE TAXATION, ¶ 17.08 (3d ed. 2013).

29. SCE claims that the federal taxes should not have been included in the sales price subject to Nevada use tax under NRS 372.025. Prior to its amendment NRS 372.025 provided,

1. "Gross receipts" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold. However, in accordance with such rules and regulations as the Tax Commission may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor is required to pay to the State or has paid the use tax with respect to the property, and has resold the property before making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

(b) The cost of the materials used, labor or service cost, interest paid, losses or any other expense.

(c) The cost of transportation of the property before its sale to the purchaser.

2. The total amount of the sale or lease or rental price includes all of the following:

(a) Any services that are a part of the sale.

(b) All receipts, cash, credits and property of any kind.

(c) Any amount for which credit is allowed by the seller to the purchaser.

3. "Gross receipts" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) The sale price of property returned by customers when the full sale price is refunded either in cash or credit, but this exclusion does not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The price received for labor or services used in installing or applying the property sold.

(d) The amount of any tax, not including any manufacturers' or importers' excise tax, imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

4. For purposes of the sales tax, if the retailers establish to the satisfaction of the Tax Commission that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed.

In the contract between the parties, SCE agreed to reimburse Peabody for taxes that Peabody paid to the federal government. This reimbursement was a part of the price SCE paid to Peabody for the coal slurry. Again, Peabody was the actual taxpayer, not SCE. The State of Nevada was entitled to collect sue tax measured by the entire price of the coal slurry. HELLERSTEIN, STATE TAXATION, ¶ 17.08 (3d ed. 2013).

Further, the federal taxes paid by Peabody do not fall within the exclusion in NRS 372.025(3)(d) because the taxes did not concern retail sales. The fee imposed by the Surface Mining Control & Reclamation Act of 1977 is an assessment or excise tax on all coal produced for sale by surface or underground mining. *United States v. Tri-No Enterprises, Inc.*, 819 F.2d 154, 158 (7th Cir. 1987). The tax imposed by the Black Lung Benefits Revenue Act of 1977 is also an excise tax. *See e.g. Warrior Coal Mining Co. v. U.S.*, 72 F.Supp. 2d 747 (W.D. Ky. 1999)

and *Costain Coal Inc. v. U.S.*, 126 F.3d 1437 (C.A. Fed. 1997). Since the federal taxes Peabody paid pursuant to the Surface Mining Control & Reclamation Act of 1977 and the Black Lung Benefits Revenue Act of 1977 are excise taxes and not retail sales taxes, the exclusion does not apply.

30. SCE is not entitled to exclude from the measure of use tax taxes Peabody and/or Black Mesa paid to the Navajo Nation and Hopi tribe. In the contract between the parties SCE agreed to reimburse Peabody for taxes that Peabody and/or Black Mesa paid to the Navajo nation and/or the Hopi Tribe. This reimbursement was a part of the price SCE paid to Peabody for the coal slurry. Again, Peabody was the actual taxpayer, not SCE. The State of Nevada was entitled to collect use tax measured by the entire price of the coal slurry. HELLERSTEIN, STATE TAXATION, ¶ 17.08 (3d ed. 2013)

As set forth above, NRS 372.065(3)(d) excludes, "the amount of any tax, not including any manufacturers' or importers' excise tax, imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer" from the definition of sales price. The Navajo Nation Business Activity Tax and Possessor Interest Tax do not fall within this exclusion because these are not taxes imposed with respect to retail sales. The Business Activity Tax imposed by the Navajo Nation is a tax on the privilege of doing business on the Navajo Nation lands. *Pittsburg & Midway Coal Mining Co., v. Watchman,* 52 F.3d 1531, 1535 (10th Cir. 1995). The Possessory Interest Tax levied by the Navajo Nation is based on the value of property leased on tribal lands. *Peabody Coal Co. v. Navajo Nation,* 75 F.3d 457, 468 (9th Cir. 1996). These are not retail sales taxes and there is no basis for not including them in the sales price of the property used to compute the measure of the use tax.

31. SCE is not entitled to exclude from the measure of use tax taxes paid to the state of Arizona. SCE argues that it should not have paid use tax on amounts paid to Peabody for the

Arizona Ad Valorem Tax and the Arizona Transaction Privilege Tax, "because such amounts are not includable in the sales price subject to Nevada use tax under NRS 372.065." This argument fails because these taxes are not taxes on retail sales.

In other words, sales price does not include a tax imposed on a retail sale. The exclusion does not apply to Peabody's sales of coal to SCE because the taxes Peabody paid were not taxes on retail sales. The Arizona Transaction Privilege is not a tax on a retail sale. *See Arizona Dept. of Revenue v. Robinson's Hardware*, 721 P.2d 137 (Ariz. App. 1986); *In re Inselman,* 334 B.R. 267 (D.Ariz., 2005); and, *City of Phoenix v. West Publishing Co.,* 712 P.2d 944, 946-47 (Ariz. Ct. App. 1986). The Arizona Ad Valorem Tax is also not a sales tax; rather, it is a property tax paid to the State of Arizona based upon the assessed valuation of the property. *Bahr v. State of Arizona,* 985 P.2d 564, 565 (Ariz. Ct. App. 1999).

As such SCE may not exclude from the measure of use tax, taxes that Peabody paid to the state of Arizona.

32. SCE is not entitled to exclude transportation costs from the measure of use tax. Prior to its amendment in 2002 NAC 372.101 provided,

1. Except as otherwise provided in subsection 3, any charge for freight, transportation or delivery included in the sale of tangible personal property is subject to sales and use taxes.
2. Any charge for freight, transportation or delivery that appears on the invoice of the seller is part of the selling price even if stated separately and is not deductible from the price of the property as shown on the invoice.
3. A charge for freight, transportation or delivery is not taxable if:
   a. It is invoiced to the purchaser by the freight carrier; and
   b. Title to the property passes before shipment.

A charge for freight, transportation or delivery that is not connected with the sale of tangible personal property is a charge for a service and is not subject to sales and use taxes.

Transportation costs were included in the calculation of use tax at the time SCE incurred the tax liability. Therefore, SCE is not entitled to exclude from the sales price the amounts it paid for transportation costs.

33. Based on the evidence before the court, SCE is not entitled to any refund on its payment use tax on its consumption of a coal slurry product at the Mohave Generating Station in Nevada.

34. Based on this decision, this Court does not have to reach a decision on whether the coal lost its identity when it became coal slurry with the application of the transformation process.

DECISION

Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that the relief prayed for by the Plaintiff in its Second Amended Complaint is DENIED and judgment is awarded to the Defendant.

IT IS SO ORDERED.

Dated this 17th day of December, 2014.

JAMES T. RUSSELL
DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned, an employee of the First Judicial District Court, hereby certifies that on the 17th day of December, 2014, I served the foregoing to counsel of record, as follows:

☒ By depositing a copy thereof in the United States Mail at Carson City, Nevada, postage paid, addressed as follows:

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Attachment 5

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IN THE FIRST JUDICIAL DISTRICT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

SOUTHERN CALIFORNIA EDISON,

Plaintiff,

v.

THE STATE OF NEVADA, *ex rel.* DEPARTMENT OF TAXATION

Defendant.

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

Dept. No.: 1

SOUTHERN CALIFORNIA EDISON COMPANY'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TO AMEND JUDGMENT OR DIRECT ENTRY OF A NEW JUDGMENT

SOUTHERN CALIFORNIA EDISON COMPANY'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TO AMEND JUDGMENT OR DIRECT ENTRY OF A NEW JUDGMENT

Southern California Edison Company ("SCE") respectfully requests that the Court amend its Amended Findings of Fact, Conclusions of Law, and Decision ("Decision") and amend or replace its judgment pursuant to Rules 52(b) and 59(e) of the Nevada Rules of Civil Procedure. SCE presented to the Court arguments and evidence in eight days of trial showing that SCE is entitled to a full refund of the use tax it paid between 1998 and 2000 on the coal used to generate electricity at the Mohave Generating Station.[1] The Court's Decision fails to address many of the legal issues and much of the evidence SCE presented, in contravention of Rule 52(a) ("the court shall find the facts specially and state separately its conclusions of law thereon"); *see Bing Constr. Co. v. Vasey-Scott Eng'g Co.*, 674 P.2d 1107, 1107 (Nev. 1984) (remanding case for failure to set forth basis for award: "The findings must be sufficient to indicate the factual bases for the court's ultimate conclusions."). Other findings and conclusions in the Decision are in error. *See* Nev. Civ. Proc. Rule 59(e); *AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1193 (Nev. 2010) ("Among the basic grounds for a Rule 59(e) motion are correct[ing] manifest errors of law or fact...[and] the need to prevent manifest injustice") (internal citations omitted). As set forth below, the Court should amend its Decision and enter judgment awarding a refund of use taxes to SCE.

A. The Decision Incorrectly Assumes the Nevada Supreme Court found NRS 372.270 Unconstitutional And Does Not Address SCE's Statutory Construction Argument

First, this Court incorrectly determined that the Nevada Supreme Court in *Sierra Pacific* found unconstitutional NRS 372.270 – the sales and use tax exemption for the proceeds of mines.[2] *See* Decision at 11, ¶¶ 23, 26. Because the parties in *Sierra Pacific* did not dispute the

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[1] Such a refund is not inconsistent with the Nevada Supreme Court's decision in *Sierra Pacific Power Co. v. Dep't of Tax'n*, 130 Nev. Adv. Op. 93 (Dec. 4, 2014). Although the Nevada Supreme Court denied a refund of use tax to NV Energy in *Sierra Pacific*, SCE's case differs significantly.

[2] NRS 372.270 expressly exempts from sales and use tax "the gross receipts from the sale of, and the storage, use or other consumption in this State of, the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS." Coal is one of the specifically enumerated minerals subject to the net proceeds of minerals tax contained in that chapter. *See* NRS 362.010.

lower court's finding that NRS 372.270 violates the Commerce Clause, the Nevada Supreme Court in its own words acknowledged that it did "not consider the lawfulness of the statute as a whole." *Sierra Pac. Power Co.*, 130 Nev. Adv. Op. 93 at 2. Instead, the Nevada Supreme Court *assumed* that the statute was unconstitutional and decided only the severability and remedy issues raised by the parties. It specifically noted, "*for purposes of resolving this case,* the district court did not err in striking NRS 372.270 in its entirety." *Id.* at 8 (emphasis added). Because there was no determination that NRS 372.270 is unconstitutional, this Court cannot simply assume that it is.

NRS 372.185(2) imposes use tax on "property which was acquired out of state in a transaction that would have been a taxable sale if it had occurred within this State." The Court can and should avoid any finding of unconstitutionality by applying the plain words of NRS 372.185(2) to permit imposition of use tax only in those circumstances where there would have been a taxable sale if the transaction had occurred in Nevada.[3] *See* SCE's Post-Trial Opening Brief at 4-5 (Feb. 28, 2014) ("2/28/14 Brief") & SCE's Post-Trial Response Brief at 2-3 (March 21, 2014) ("3/21/14 Brief"). Statutes should be construed to avoid unconstitutionality: "If [a] law is reasonably open to two constructions, one that renders it unconstitutional and one that does not, the court must adopt the interpretation that upholds [its] constitutionality." *Berkson v. Lepome*, 245 P.3d 560, 571 (Nev. 2010) (Pickering, J., concurring in part and dissenting in part) (quoting J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction, § 45:11, at 81-83 (7th ed. 2007)). *See also Waite v. Burgess*, 245 P. 2d 994, 996 (Nev. 1952) (declining to read statute literally in violation of Nevada's constitutional division of powers of government).

Reading NRS 372.270 and NRS 372.185(2) together, SCE's purchases *would not have been* taxable sales if the Black Mesa mine were located in Nevada, so they *should not have been* subject to use tax just because the mine was located outside the state.[4] This is the only

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[3] No party in *Sierra Pacific* raised this issue, and the Nevada Supreme Court did not discuss, much less decide, it.

[4] This Court's statement that "[b]ecause there is no coal mined in Nevada, any sale of coal in Nevada would necessarily be subject to either sales or use tax" does not resolve the issue. *See* Decision at 7, ¶ 7. Neither the statute nor any evidence presented at trial requires actual sales. NRS 372.185(2) imposes use tax on "property which was acquired out of state in a transaction that *would have been a taxable sale* if it had occurred within this State." Even assuming all other transactions involving imported coal were taxed (illegally), it is undisputed that if coal were mined in Nevada, its sale *would not have been a taxable sale*.

interpretation of the statutes that does not run afoul of Nevada Constitutional provision which prohibits the imposition of tax, other than a net proceeds tax, on minerals. Specifically, Article 10, Section 5 of Nevada's Constitution says:

> 1. The legislature shall provide by law for a tax upon the net proceeds of all minerals, including oil, gas and other hydrocarbons, extracted in this state, at a rate not to exceed 5 percent of the net proceeds. *No other tax may be imposed upon a mineral or its proceeds until the identity of the proceeds as such is lost.*

Nev. Const. art. 10, § 5 (emphasis added).[5]

It its Decision, the Court concluded that Article 10, section 5 "clearly limits the net proceeds tax, and the corresponding exemption from sales and use taxes, to minerals extracted in Nevada." Decision at 10, ¶ 22; *see also id.* at 11, ¶ 25 ("The Constitutional provision is not ambiguous to a reasonably informed person but clearly applies only to minerals extracted in Nevada."). While the first sentence of this constitutional provision provides for a net proceeds tax on minerals "extracted in this state," there is no similar language in the second sentence. The Court's legal conclusion is without support and should be amended.

The Decision also incorrectly states that the "exemption in NRS 372.270 is only a partial exemption that applies only to the extent of actual payment of the Nevada net proceeds tax." Decision at 10, ¶ 21 (citing A.G.O. 76 (June 27, 1955)). Opinions of the Attorney General are not binding legal authority. *Blackjack Bonding v. City of Las Vegas Mun. Court*, 14 P.3d 1275, 1279 (Nev. 2000). And the Decision fails to acknowledge the contrary evidence presented by SCE regarding the tax practice in Nevada. *See* Trial Tr. Day 2, 400:1-401:3.

If the Court were to amend its Decision to find NRS 372.270 and 372.185(2) can be reconciled with each other to avoid any issue of unconstitutionality, none of the remaining arguments need be addressed in the Decision. No changes to current statutory language would be required, the taxation of present in-state mining operations would not be affected, and there

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[5] Neither the Commerce Clause of the U.S. Constitution nor Article 10, Section 5 of Nevada's Constitution prohibits the imposition of a net proceeds of minerals tax on imported coal, which would avoid any "windfall" for SCE. SCE has presented the Court with the approximate net proceeds of minerals tax that it would have paid had the Black Mesa mine been operated in Nevada. *See* 2/28/14 Brief at 24-26. The Decision does not discuss this evidence.

would be no conflict with *Sierra Pacific,* which merely *assumed* the unconstitutionality of NRS 372.270.

B. The Decision Does Not Address SCE's Internal Consistency And Unconstitutional Tariff Challenges

If the Court does not amend its Decision to adopt this plain-language reading of NRS 372.270 and 372.185(2), then it must address SCE's arguments that the tax scheme violates internal consistency and imposes an illegal tariff solely on interstate commerce in minerals.

Internal consistency is a test deriving from the apportionment prong of the U.S. Supreme Court's *Complete Auto* test.[6] The Court's Decision sets forth the four prongs of the U.S. Supreme Court's *Complete Auto test* (Decision at 7-8, ¶ 11) but fails to address the arguments presented by SCE with respect to internal consistency.[7] As applied by the Department, Nevada's mineral taxation scheme flunks the internal consistency test. *See* 2/28/14 Brief at 7-8. The Department's expert Professor John Swain agreed with this assessment. *Id.*; Trial Tr. Day 7, 1378:6-10 ("And so we see a discrimination. The out-of-state person is paying two taxes and the local person is paying one tax. And that's -- using this case an illustration of how the internal consistency test works."). Professor Richard Pomp's testimony makes clear that a taxpayer is not required to make a showing of advantaged competitors where its injury results from a violation of internal consistency. *See* 2/28/14 Brief at 12-15. The injury is not actual discrimination but the payment of an unconstitutional tax. *Id.* Accordingly, SCE is entitled to full a refund for this violation. SCE respectfully requests that this Court amend its Decision to address internal consistency arguments.

Nor does the Court's Decision address the tariff arguments presented by SCE. *See* 2/28/14 Brief at 6-7. Import tariffs are so patently unconstitutional that states are prohibited from imposing them on goods from other states even where no similar goods are produced locally. As

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[6] *See Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992) (*quoting Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)) (the U.S. Supreme Court "will sustain a tax against a Commerce Clause challenge so long as the 'tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'").

[7] The internal consistency doctrine was neither raised by the parties in *Sierra Pacific* nor addressed by the Nevada Supreme Court.

the Department interprets Nevada's mineral taxation scheme, a purchase of minerals extracted outside of Nevada for use or consumption in the state will always be taxed more heavily than a purchase of minerals extracted from a Nevada mine for use or consumption in Nevada. This makes Nevada's tax an illegal tariff on imported minerals. Again, SCE is entitled to a full refund for this violation. SCE respectfully requests that this Court amend its Decision to address SCE's tariff arguments.

C. The Decision Does Not Address The Competition Evidence Presented By SCE

The Decision also should be amended to find that SCE is entitled to a refund based on evidence that Nevada's mineral taxation scheme discriminates against interstate commerce. In *Sierra Pacific,* the Nevada Supreme Court concluded that NV Energy was not entitled to a refund "because no interstate discrimination actually occurred here and NV Energy demonstrated no deprivation as a result of the statute's enforcement." *Sierra Pac. Power Co.,* 130 Nev. Adv. Op. 93 at 3.[8] The evidence in SCE's case differs significantly from that presented in *Sierra Pacific,* and even if a showing of competition is required, the record in this case meets the standard as articulated by the Nevada Supreme Court. *Id.* at 11 n.7. This Court's Decision should be amended accordingly.

In this case, SCE presented evidence at trial regarding the existence of competitors advantaged by the use tax they did not have to pay. *See* 2/28/14 Brief at 3, 15-18; 3/21/14 Brief at 13-14. In general, Dr. John Jurewitz pointed out that an illegal tax disadvantages any power producer on which it is imposed and advantages all those who do not pay such a tax. *Id.* Specifically, Dr. Jurewitz singled out geothermal producers who are based in Nevada, use a fuel source to generate electricity, and that fuel source is eligible for the sales tax exemption that SCE's out-of-state coal is not. *Id.* Yet the Court's Decision does not address or even

[8] SCE believes that the Nevada Supreme Court in *Sierra Pacific* erred in its interpretation of *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990), and by ignoring Nevada's tax statutes and its constitution, which set forth a clear preference for taxpayer refunds as the remedy in situations where a tax has been collected based upon an illegal statute. See 2/28/14 Brief at 9-15; *Worldcorp v. Dep't of Tax'n,* 944 P.2d 824, 826 (1997) (remedy for paying an unconstitutional tax is a refund); NRS 372.265 (prohibiting unconstitutional use taxes); NRS 372.630 (amended 2009) (compelling Department to refund taxes that were "erroneously or illegally" collected). In deciding this case, however, because of the extensive trial record regarding competitive markets, the Court may follow *Sierra Pacific* and still award a refund to SCE.

acknowledge the evidence presented by SCE, and thereby reaches factual findings and conclusions of law that are irreconcilable with the evidence:

- "In this case, SCE has not been treated any differently than any of its market competitors." Decision at 8, ¶ 12.
- "There are no facts in the record to support a finding that SCE, by paying use tax on its purchase of the coal slurry, is being discriminated against in comparison to a similarly situated taxpayer." Decision at 8, ¶ 13.
- "Given the fact that SCE has not provided any facts to suggest that an actual competitor with SCE received tax rate reductions or exemptions that caused injury to SCE, there should be no applicable remedy." Decision at 9, ¶ 18.
- "SCE did not pay any higher tax than did its competitors. No competitor gained a competitive advantage under the tax scheme." Decision at 11, ¶ 26.
- "NRS 372.270 has no applicability because there was no competitor that obtained an advantage thereunder; and, as such, there was no actual discrimination against interstate commerce." Decision at 11, ¶ 26.[9]

The Decision also states that "Peabody did not compete with any oil, natural gas, or geothermal producers in Nevada" (Decision at 4, ¶ 18), but the Court made no such finding with respect to SCE. Nor would the evidence support such a finding. The Decision fails to address critical issues presented by the evidence, such as who are SCE's market competitors, who are "similarly situated taxpayers," and what is the significance of the market evidence presented by SCE. The findings of fact and conclusions of law in the Decision are insufficient and in error. Nev. Civ. Proc Rules 52(a), 59(e).

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[9] The Court also makes several statements about taxes paid by other taxpayers on imported minerals, but the fact that others also paid an unconstitutional tax does not resolve the question of whether SCE is entitled to a remedy. *See, e.g.,* Decision at 6, ¶ 31 ("SCE did not suffer any discrimination in fact in comparison to any other purchaser of coal in Nevada."); Decision at 6, ¶ 30 ("SCE has not been taxed differently than any other similarly situated taxpayer on the use of coal in the state of Nevada nor any other tax payer who has had a product delivered to Nevada for use in the State."); Decision at 4, ¶ 16 ("There is no record that ...any coal miner or supplier has ever made a sale of coal in Nevada that was not subject to either sales or use tax."); Decision at 4, ¶ 19 ("There is no evidence that any coal transaction in Nevada was exempt from sales or use tax pursuant to NRS 372.270."). Furthermore, given the confidentiality of individual taxpayer information, it would be impossible to know what sales or use tax exemptions have been taken by other taxpayers in Nevada.

The Decision also fails to acknowledge the rules governing the confidentiality of tax returns and other taxpayer records and information. Such rules make obtaining information about individual taxpayers who benefit from the exemption in NRS 372.270 impossible. *See* 2/28/14 Brief at 18-20. Yet without access to this information, no basis exists for the Court's conclusion that, "to charge a use tax would have given a benefit to SCE which other taxpayers did not enjoy. SCE is on an even playing field with all such companies in the state of Nevada in regard to this issue." Decision at 11, ¶ 26. In fact, SCE's evidence showed that the Department itself estimated that $217.7 million in NRS 372.270 exemptions were taken by Nevada taxpayers in just one year. (Trial Ex. 54, Department Executive Director's February 1999 Exemption Report;[10] *see also* Trial Ex. 67, Report of Sharon R. Byram at 4 (April 5, 2013)). And in any case, SCE's right to "meaningful backward-looking relief" as guaranteed in *McKesson* cannot require a taxpayer to gain access to the tax returns of other taxpayers.

D. The Decision Does Not Address Evidence Presented by SCE Related To Its Claims For Partial Refund

The Decision's factual findings and legal conclusions regarding SCE's partial refund claims also are insufficient and should be amended accordingly. *See* 1/16/14 Trial Statement at 23-30; 2/28/14 Brief at 26; 3/21/14 Brief at 19-21.

***Arizona Transaction Privilege Tax*:** The Decision does not address SCE's argument that this tax is the "functional equivalent" of a sales tax because it – like Nevada's sales and use tax – is imposed on the seller, not the buyer, and that it – again like Nevada's sales and use tax – is imposed on the seller's "gross receipts."

***Federal Surface Mining Control & Reclamation Act tax*:** The Decision does not address SCE's argument that this cannot be considered a "manufacturers' excise tax" because mining operations are not listed in the manufacturers' excise taxes codified in 26 U.S.C. §§ 4064 *et seq.* The Decision fails to note that SCE dropped its claim for a partial refund for taxes paid pursuant

[10] The Department acknowledges that the Exemption Report covers *all* mining operations eligible for the NRS 372.270 exemption, which includes geothermal producers. See 2/28/14 Brief at 16-17; 3/21/14 Brief at 13-14.

to the Black Lung Benefits Revenue Act precisely because those taxes *are* listed in the Internal Revenue Code as a "manufacturers' excise tax."

Transportation Cost: The Decision does not discuss the uncontroverted fact that SCE paid the coal slurry transport costs directly to Black Mesa Pipeline which separately provided the transport services. Thus, the transportation costs are not taxable under NAC 372.101(4), because they are "charge[s] for a service" and "not connected with the sale of tangible personal property."

E. There Is No Support For The Decision's Findings And Conclusions Regarding A "Coal Slurry Product"

Finally, the Decision incorrectly characterizes the property on which SCE paid use tax as a "coal slurry product." Decision at 3, ¶ 7; *id.* at 17, ¶ 33. The term is not an accepted one in the coal industry, nor can it be found in the materials on which the Department's expert based his opinions. Trial Tr. Day 5, 916:3-918:6. The Department's legal counsel actually suggested that the expert use the term in his report. *Id.* at 920:19-926:15 (discussing Trial Ex. 132). There is no dispute, however, that the coal's chemical composition and total BTU content remained constant from the time it was extracted until it arrived at Mohave. Indeed, the raw Black Mesa coal was merely crushed and suspended in water to facilitate its transport by pipeline. The process neither changed the mineral, nor improved its value as fuel for Mohave. *See* 2/28/14 Brief at 20-21; 3/21/14 Brief at 16-19. Given the lack of support for the term, the references to it in the Decision should be amended.

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For these reasons, SCE respectfully requests that the Court grant this motion and amend its findings of fact and conclusions of law accordingly. SCE further requests that the Court amend or alter its judgment. Based on the evidence and arguments presented, and consistent with *Sierra Pacific* and other applicable law, SCE requests that the Court enter judgment ordering a full refund of the use taxes SCE paid in the period 1998-2000.

Dated: December 24, 2014

Respectfully submitted,

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LAI-383229446v5

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of December, 2014, I mailed a copy of the following document via U.S. Mail addressed as follows:

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Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701

Rhonda Azevedo

Rhonda Azevedo

Attachment 6

Case No: 09 OC 00016 1B

Dept. No: I

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE CARSON CITY

SOUTHERN CALIFORNIA EDISON,

Plaintiff,

vs.

STATE OF NEVADA, EX REL. DEPARTMENT OF TAXATION,

Defendant.

ORDER DENYING SOUTHERN CALIFORNIA EDISON'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TO AMEND JUDGMENT OR DIRECT ENTRY OF A NEW JUDGMENT

This matter is before this Court on Southern California Edison's Motion to Amend Findings of Fact and Conclusions of Law and to Amend Judgment or Direct Entry of a New Judgment, filed herein on December 24, 2014, and Defendant's Opposition thereto filed January 9, 2015. Southern California Edison did not file a Reply but did file a Request to Submit on January 15, 2015.

In its Motion, Southern California Edison argues that this Court incorrectly applied the Nevada Supreme Court's decision in *Sierra Pac. Power v. State Dep't of Tax*, 130 Nev. Adv. Op. 93, 338 P.3d 1244 (2014) to the facts of this case. The Motion further requests that this Court amend its Decision to include certain evidence and argument introduced by Plaintiff, Southern California Edison, at trial. Lastly, Southern California Edison asks that the Decision be amended so that it does not refer to "coal slurry" as a "coal slurry product." Southern California Edison does not indicate what term should be utilized instead.

This Court has reviewed the Amended Findings of Fact, Conclusions of Law and Decision entered December 17, 2014, and finds that it correctly applied the Nevada Supreme

Court's decision in *Sierra Pac. Power* and further that the findings are sufficient to indicate the factual basis for the Court's ultimate decision to deny Southern California Edison the relief prayed for in its Second Amended Complaint and to award judgment in favor of Defendant, Nevada Department of Taxation.

Therefore, good cause appearing, IT IS HEREBY ORDERED that Southern California Edison's Motion to Amend Findings of Fact and Conclusions of Law and to Amend Judgment or Direct Entry of a new Judgment is DENIED.

IT IS SO ORDERED this 30th day of January, 2015.

JAMES T. RUSSELL
DISTRICT COURT JUDGE

Submitted by:
ADAM PAUL LAXALT
Attorney General
GINA C. SESSION
Chief Deputy Attorney General
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Attorneys for Defendant
Nevada Department of Taxation

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of January, 2015, I served a copy of the foregoing by placing the foregoing in the United States Mail, postage prepaid, addressed as follows:

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Samantha Peiffer
Law Clerk, Dept. 1

Attachment 7

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

SOUTHERN CALIFORNIA EDISON, Plaintiff, vs. STATE OF NEVADA ex rel. DEPARTMENT OF TAXATION, Defendant.	Case No. 09 OC 00016 1B Department No. 1

NOTICE OF ENTRY OF ORDER DENYING SOUTHERN CALIFORNIA EDISON'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TO AMEND JUDGMENT OR DIRECT ENTRY OF NEW JUDGMENT

PLEASE TAKE NOTICE that the **ORDER DENYING SOUTHERN CALIFORNIA EDISON'S MOTION TO AMENDED FINDINGS OF FACT and CONCLUSIONS OF LAW and TO AMEND JUDGMENT or DIRECT ENTRY OF A NEW JUDGMENT,** was signed by Judge Russell on January 30, 2015, and was filed with this Court on January 30, 2015. A true and correct copy of the **ORDER DENYING SOUTHERN CALIFORNIA EDISON'S MOTION TO AMENDED FINDINGS OF FACT and CONCLUSIONS OF LAW and TO AMEND**

///

///

JUDGMENT or DIRECT ENTRY OF A NEW JUDGMENT, is attached hereto as Exhibit 1.

Dated: February 3, 2015.

ADAM PAUL LAXALT
Attorney General

By: _____

GINA C. SESSION
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Attorneys for Defendants

Nevada Office of the Attorney General
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Carson City, NV 89701-4717

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on February 3, 2015, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER OF ORDER DENYING SOUTHERN CALIFORNIA EDISON'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSION OF LAW AND TO AMEND JUDGMENT OR DIRECT ENTRY OF A NEW JUDGMENT** by mailing a copy thereof in the United States Mail, postage paid, fully addressed as follows:

Norman J. Azevedo, Esq.
405 North Nevada Street
Carson City, NV 89703

Charles C. Reed, Esq.
Joe Ward, Esq.
Jones Day
555 S. Flower Street, 50th Floor
Los Angeles, CA 90071

Dated: February 3, 2015.

An Employee of the State of Nevada
Office of the Attorney General

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

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Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

EXHIBIT 1

EXHIBIT 1

Case No: 09 OC 00016 1B

Dept. No: I

REC'D & FILED

2015 JAN 30 AM 10:00

SUSAN MERRIWETHER
CLERK

BY _____ DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE CARSON CITY

SOUTHERN CALIFORNIA EDISON,

Plaintiff,

vs.

STATE OF NEVADA, EX REL. DEPARTMENT OF TAXATION,

Defendant.

ORDER DENYING SOUTHERN CALIFORNIA EDISON'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TO AMEND JUDGMENT OR DIRECT ENTRY OF A NEW JUDGMENT

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This Court has reviewed the Amended Findings of Fact, Conclusions of Law and Decision entered December 17, 2014, and finds that it correctly applied the Nevada Supreme

Court's decision in *Sierra Pac. Power* and further that the findings are sufficient to indicate the factual basis for the Court's ultimate decision to deny Southern California Edison the relief prayed for in its Second Amended Complaint and to award judgment in favor of Defendant, Nevada Department of Taxation.

Therefore, good cause appearing, IT IS HEREBY ORDERED that Southern California Edison's Motion to Amend Findings of Fact and Conclusions of Law and to Amend Judgment or Direct Entry of a new Judgment is DENIED.

IT IS SO ORDERED this 30th day of January, 2015.

JAMES T. RUSSELL
DISTRICT COURT JUDGE

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Nevada Department of Taxation

CERTIFICATE OF MAILING

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Samantha Peiffer
Law Clerk, Dept. 1

Southern California Edison
v. Nevada Department of Taxation
Case No. 67497

Attachments to Docketing Statement Civil Appeal

1. Answers to Questions 8, 9 & 22
2. Second Amended Complaint
3. Amended Findings of Fact, Conclusions of Law, and Decision
4. Notice of Entry of Order of Amended Findings of Fact, Conclusions of Law, and Decision
5. Edison's Motion to Amend Findings of Fact and Conclusions of Law and to Amend Judgment or Direct Entry as a New Judgment
6. Order Denying Edison's Motion to Amend Findings of Fact and Conclusions of Law and to Amend Judgment or Direct Entry of a New Judgment
7. Notice of Entry of Order Denying Edison's Motion to Amend Findings of Fact and Conclusions of Law and to Amend Judgment or Direct Entry of a New Judgment

Attachment 1

Southern California Edison Company's Attachment to Docketing Statement
In the Supreme Court of the State of Nevada No. 67497

8. Nature of the action. Briefly describe the nature of the action and the result below:

Through its de novo trial before the District Court, Southern California Edison Company ("SCE") sought a full refund of tax paid to the Nevada Department of Taxation from March 1998 through December 2000 on its use of coal at the Mohave Generating Station near Laughlin, Nevada. SCE claimed that it was statutorily exempt from use tax and that the Department's imposition of use tax violated the Commerce Clause of the United States Constitution. Alternatively, SCE claimed that it was entitled to partial refunds of use tax based on several Nevada tax statutes. In its Findings of Fact, Conclusions of Law, and Decision, dated December 15, 2014, and Amended Findings of Fact, Conclusions of Law, and Decision, dated December 17, 2014,[1] the District Court denied SCE's claims and found that it was entitled to no refund. SCE then filed a Motion To Amend Findings of Fact and Conclusions of Law and to Amend Judgment or Direct Entry of a New Judgment pursuant to Rules 52(b) and 59(e) of the Nevada Rules of Civil Procedure. On January 30, 2015, the District Court issued an order denying that motion.

9. Issues on appeal. State specifically all issues in this appeal:

- Did the District Court err in failing to consider whether NRS 372.270 may be interpreted constitutionally to exempt from use tax SCE's use of coal at the Mohave Generating Station?[2]
- Does the Department of Taxation's interpretation of NRS 372.270 and NRS 372.185(2) violate the U.S. Commerce Clause?
- If NRS 372.270 is unconstitutional, did the District Court err in failing to consider, *inter alia*, SCE's internal consistency and tariff challenges and its evidence of competition, all of which show that SCE is entitled to a full refund of the use taxes it paid under the illegal scheme?
- Did the District Court err in denying SCE's claim for a credit against the use tax paid on the Arizona Transaction Privilege Tax?
- Did the District Court err in denying SCE's claim to exclude from the measure of use tax taxes paid to the federal government pursuant to the Surface Mining Control & Reclamation Act of 1977?

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[1] The Amended Findings of Fact and Conclusions of Law were issued by the Court pursuant to NRCP Rule 60(a), to clarify that the Court heard the matter on a trial de novo standard, not as a petition for judicial review.

[2] SCE is aware of this Court's recent decision in *Sierra Pacific Power Co. v. State Department of Taxation*, 338 P.3d 1244, 1245 (Nev. 2014). Because the parties in that case did not dispute the lower court's finding that NRS 372.270 violates the Commerce Clause, this Court acknowledged that it did "not consider the lawfulness of the statute as a whole." *Id.* at 1245. Instead, the Court decided noted, "*for purposes of resolving this case,* the district court did not err in striking NRS 372.270 in its entirety" and decided only the severability and remedy issues raised by the parties. *Id.* at 1248 (emphasis added).

- Did the District Court err in denying SCE's claim to exclude from the measure of use tax taxes paid to the Navajo Nation?
- Did the District Court err in denying SCE's claim to exclude from the measure of use tax taxes paid to the State of Arizona for the ad valorem tax and the Transaction Privilege Tax?
- Did the District Court err in denying SCE's claim to exclude from the measure of use tax the transportation costs it incurred in transporting the coal to the Mohave Generating Station?

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third party claims and the date of formal disposition of each claim.

SCE claims it is entitled to a full refund of use tax paid on coal used at the Mohave Generating Station based on:

- NRS 372.270 and NRS 372.185(2); or, alternatively,
- because the Department of Taxation's interpretation of these statutes violates the U.S. Commerce Clause.

SCE claims it is entitled to partial refunds of use tax paid on coal used at the Mohave Generating Station based on its payment of:

- Arizona Transaction Privilege Tax;
- Surface Mining Control & Reclamation Act of 1977 taxes;
- Navajo Nation taxes;
- Arizona ad valorem tax; and,
- Transportation costs.

The formal disposition of all claims is in the District Court's orders dated December 17, 2014, and January 30, 2015.

Attachment 2

Norman J. Azevedo, Esq.
State Bar No. 3204
405 North Nevada Street
Carson City, Nevada 89703
(775) 883.7000

Charles C. Read (admitted pro hac vice)
JONES DAY
555 S. Flower Street
Los Angeles, California 90071
(213) 243-2818

Attorneys for Plaintiff, Southern California Edison

IN THE FIRST JUDICIAL DISTRICT OF THE STATE OF NEVADA IN AND FOR CARSON CITY

SOUTHERN CALIFORNIA EDISON,

Plaintiff,

v.

THE STATE OF NEVADA, *ex rel.* DEPARTMENT OF TAXATION

Defendant.

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

Dept. No.: 1

SECOND AMENDED COMPLAINT
(NRS 372.680; NRS 374.685; NRS 30.030)

Comes now Plaintiff Southern California Edison, by and through its counsel Norman J. Azevedo, Esq., and hereby complains against Defendant, State of Nevada, *ex rel.* Department of Taxation, and alleges as follows:

NATURE OF THE ACTION

1. This is an action to recover use taxes pursuant to Sections 372.680(1) and 374.685(1) of the Nevada Revised Statutes ("NRS") following a final decision by the Nevada Tax Commission ("Commission") disallowing Plaintiff's claims for refund of use tax Plaintiff paid to the Defendant for tax periods March 1998 through and including December 2000.

2. NRS 372.680(1) and 374.685(1) each provide: "Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set

forth in the claim in a court of competent jurisdiction in Carson City . . . for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed."

3. Defendant illegally imposed use tax on the use and consumption of out-of-state coal at a coal-fired power plant in Nevada. All of the coal used and consumed at the power plant was purchased, extracted and shipped from a coal mine located entirely within the State of Arizona. Under NRS 372.185(2) and 374.190(2), Nevada's use tax does not apply to the use or consumption of property acquired outside of Nevada in a transaction that would not have been a taxable sale if it had occurred within Nevada. Sales by mines located within Nevada of the minerals they extract, including coal, are expressly exempt from sales tax and therefore not taxable sales. Since the equivalent in-state transaction would not have been a taxable sale, Defendant's imposition of tax on the use and consumption in Nevada of coal that was purchased, extracted and shipped from a mine located in Arizona is illegal.

4. Defendant's imposition of use tax on Plaintiff's use and consumption of coal in Nevada discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution (U.S. Const. Art. I. §8, cl. 3) by taxing minerals acquired from in-state mines more favorably than minerals acquired from out-of-state mines for use in Nevada. Indeed, Defendant's application of the sales and use tax statutes is facially unconstitutional because, as explained above, minerals acquired from in-state mines enjoy a complete exemption from Nevada's sales tax while minerals acquired from out-of-state mines for use or consumption in Nevada are subject to Nevada's use tax.

5. If the Court were to determine that Defendant's imposition of use tax in this case is neither illegal nor unconstitutional, Plaintiff alternatively claims that it is entitled to a refund of use tax in respect of each of the following reasons:

a. Plaintiff is entitled to a credit against the use tax for sales tax paid to Arizona;

b. The taxable sales price should exclude taxes imposed by various taxing jurisdictions; and

c. The taxable sales price should exclude the amounts paid for transportation of the coal pursuant to NRS 372.065 and Nevada Administrative Code ("NAC") 372.101.

PARTIES

6. Plaintiff Southern California Edison Company ("Edison") is a California corporation having its principal place of business in Los Angeles County, California. Edison is not a Debtor in bankruptcy.

7. Defendant State of Nevada *ex rel.* Department of Taxation (the "Department") is an agency of the executive branch of the State of Nevada that is charged with the administration and enforcement of the tax laws set forth in Title 32 of the Nevada Revised Statutes, including chapters 372 and 374 of the Nevada Revised Statutes governing sales and use taxes and local school support taxes, respectively.

FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

I. The Mohave Generating Station

8. At all times relevant to this Complaint, Edison owned a majority interest in the Mohave Generating Station ("Mohave Project"), a coal-fired power plant located in Clark County, Nevada. The Mohave Project generated electricity by burning coal. It had two generating units and supplied enough electricity to power approximately 1.5 million homes. The Mohave Project provided energy to customers in Nevada, Arizona and Southern California.

9. The Mohave Project began operations in 1970. Edison co-owned the Mohave Project with three other parties (collectively, the "Mohave Co-owners"): Nevada Power Company, the Department of Water and Power of the City of Los Angeles and Salt River Project Agricultural Improvement and Power District. Edison owned the majority interest (a 56% undivided interest) in the Mohave Project.

10. Edison operated the Mohave Project pursuant to the Mohave Project Operating Agreement effective May 1, 1969 and dated July 6, 1970 (the "Operating Agreement"). The Mohave Project ceased operations on December 31, 2005.

II. Out-of-State Purchase and Delivery of Coal

11. At all times relevant to this Complaint, all of the coal used and consumed at the Mohave Project was supplied by Peabody Western Coal Company ("Peabody") pursuant to the Amended Mohave Project Coal Supply Agreement dated May 26, 1976 between Peabody (as seller) and the Mohave Co-owners (as buyers) (the "Amended Coal Supply Agreement").

12. All of the coal sold by Peabody for use at the Mohave Project was extracted from the Black Mesa Mine in northeastern Arizona.

13. The Black Mesa Mine is located on land owned by the Navajo Nation and Hopi Tribe. At all times relevant to this Complaint, Peabody operated the Black Mesa Mine through lease agreements with the Navajo Nation and the Hopi Tribe.

14. Pursuant to agreements between Peabody and Black Mesa Pipeline, Inc. ("BMP"), BMP constructed and operated a 273-mile pipeline to transport and deliver the coal from the Black Mesa Mine to the Mohave Project (the "Pipeline"). The coal was crushed and suspended in water for transportation through the Pipeline, and was separated from the water upon delivery to the Mohave Project.

15. The Amended Coal Supply Agreement required Edison to pay Peabody, on a monthly basis, for the price of the coal it purchased. Peabody invoiced Edison for this charge and Edison sent payment for the coal to Peabody. BMP invoiced Edison directly for the charges for transporting and delivering the coal to the Mohave Project and Edison sent payment for such transportation charges directly to BMP.

16. Since 1970, Edison paid Nevada use tax to the Department in respect of the coal used and consumed at the Mohave Project.

III. Exhaustion of Administrative Remedies

A. The Department Denies Edison's Claims for Refund for the Periods March 1998 Through and Including December 2000

17. Edison determined that several grounds existed for challenging Nevada's imposition of use tax in respect of the out-of-state coal used and consumed at the Mohave Project.

18. Between April 26, 2001 and February 25, 2003, Edison timely filed claims for refund of the use tax it paid to the Department for the periods March 1998 through and including December 2000 ("Claims Set 1"). For these periods, Edison paid $23,896,668.08 in use tax to the Department in respect of the coal used and consumed at the Mohave Project.

19. By letter dated December 17, 2002 (Ex. A hereto), the Department denied the claims for refund filed for the periods March 1998 through and including September 1999. By letter dated December 30, 2002 (Ex. B hereto), the Department denied the claims for refund filed for the periods October 1999 through and including December 1999.

20. In the December 17 and December 30, 2002 denial letters, the Department advised Edison that, if Edison desired to appeal the Department's decision, it had to file a petition for redetermination within 45 days pursuant to NRS 360.360. On January 31, 2003, Edison filed a timely petition for redetermination for the periods covered by these denial letters—March 1998 through December 1999.

21. By letter dated May 16, 2003 (Ex. C hereto), the Department denied the claims for refund for the periods January 2000 through and including December 2000. The Department's letter states that it will "consider this denial in the same status as your previous requests and these periods will be added to the issue(s) under petition." Accordingly, the Department deemed Edison to have appealed its denial of the periods from January 2000 through and including December 2000 by considering them as part of the petition for redetermination previously filed by Edison.

22. In a letter dated July 2, 2003, the Department acknowledged that it should have instructed Edison to appeal the denial of its claims for refund to the Commission pursuant to NRS 360.245(1) rather than filing a petition for redetermination with the Department. The Department stated that it had rectified its mistake by redirecting Edison's claims for refund to the Commission for a hearing.

B. In 2005 The Commission Grants Edison's Claims For Refund

23. The Commission held a series of hearings beginning on November 1, 2004 and continuing on February 7, 2005, April 5, 2005 and May 9, 2005.[1]

24. At the May 9, 2005 hearing, the Commission voted to grant Edison's claims for refund. The Commission's written decision dated November 29, 2006 (Ex. D hereto) granted Edison's claims for refund.

C. The Open Meeting Law Case

25. At Edison's request, the Commission closed each of the aforementioned hearings. Edison made the request because the Commission's determination of the refund claims required consideration of Edison's and the other Mohave Co-owners' proprietary and confidential information. The Commission closed the hearings at the request of the taxpayer in accordance with former NRS 360.247 and with the advice and consent of its counsel, the Attorney General's Office of the State of Nevada ("Attorney General").[2] The Commission had a thirty-year practice of closing hearings at the request of taxpayers.

26. Notwithstanding the fact that it served as legal counsel to the Commission (the decision-maker in respect of Edison's claims) and approved the closure of the hearings, the Attorney General filed a complaint on July 7, 2005 against the Commission

---

[1] On December 8, 2003, the Commission held an initial hearing on Edison's claims for refund and referred the claims to a hearing officer. The hearing officer issued a written decision on July 14, 2004. Significantly, while the hearing officer found that the Department's imposition of the use tax on Edison's use and consumption of coal at the Mohave Plant discriminated against interstate commerce in violation of the Commerce Clause, he refused to grant a refund of the unconstitutional tax to Edison.

[2] Former NRS 360.247 provided, in pertinent part: "Except as otherwise provided in this section, any appeal to the Nevada tax commission which is taken by a taxpayer concerning his liability for tax must be heard during a session of the commission which is open to the public. A hearing on such an appeal may be closed to the public if the taxpayer requests that it be closed."

in the First Judicial Court, Carson City, seeking to void the Commission's grant of Edison's claims for refund on the ground that the Commission had violated Nevada's Open Meeting Law (NRS 241.010 et seq.) when it granted Edison's claims for refund in closed session at the May 9, 2005 hearing ("Open Meeting Law Case").

27. The Commission hired independent counsel to represent it in the Open Meeting Law Case. Edison was the real party in interest in the case.

28. Following a bench trial on August 26, 2006, the district court dismissed the Attorney General's complaint and entered judgment for the Commission and Edison.

29. The Attorney General appealed to the Supreme Court of Nevada. In an opinion filed on April 24, 2008, the Supreme Court reversed the district court and found that the Commission had violated the Open Meeting Law when it granted Edison's claims for refund in a closed hearing.

30. Edison is thus the only taxpayer whose grant of a claim for refund by the Commission has ever been voided pursuant to the Open Meeting Law, notwithstanding that the Commission had been closing hearings at taxpayers' requests as provided by statute and with the consent of its counsel for the past thirty years (during which time the Attorney General acted as counsel to both the Commission and the Department at those hearings).

D. On Remand, the Commission Denies Edison's Claims for Refund

31. Since the Commission's prior decision in favor of Edison was voided by the Supreme Court's decision, Edison's claims for refund were returned to the Commission for redetermination in open session.

32. The Commission held open hearings on the claims for refund on September 9, 2008 and December 1, 2008.

33. There were no changes in the facts or the law between the hearings held before the Commission in 2004 and 2005 and those that were held in 2008.

34. At the December 1, 2008 hearing, and notwithstanding the absence of any change in the applicable facts and law, the Commission voted to deny Edison's refund claims.

35. On March 2, 2009, the Commission served its final written decision, dated February 27, 2009, denying Edison's claims for refund (Ex. E hereto).

36. The Commission's written decision fails to set forth any analysis of facts or law in support of its conclusions. The decision reaches the *ipse dixit* conclusion that what Edison purchased from Peabody "was a processed and/or manufactured product," and not simply coal, in complete disregard of the uncontroverted evidence that Edison purchased coal from a coal mine, that Edison separately purchased water in order to transport the coal through the Pipeline, and that at the Mohave Project the coal was burned as fuel and the water was used for cooling purposes. In other words, Edison purchased and used two separate and distinct products. Significantly, the Commission's written decision following the December 1, 2008 vote, by concluding that Edison purchased a combined coal/water product, completely and inexplicably contradicted a finding in the Commission's November 29, 2006 written decision that expressly reached the opposite conclusion, namely that "we find that Edison is purchasing a raw mineral—in this case coal. . . ."

37. Having exhausted its administrative remedies with regard to Claims Set 1, Edison now brings this suit against the Department in district court pursuant to NRS 372.680(1) and NRS 374.685(1), almost eight years after filing its initial claim for refund.

38. Edison also has timely filed claims for refund of use tax with the Department for the use tax it paid in respect of the coal used and consumed at the Mohave Project for the periods January 2001 through and including September 2003 ("Claims Set 2")[3] and claims for the refund of the use tax it paid to the Department for the periods

[3] The Commission hearings on November 1, 2004, February 7, 2005, April 5, 2005 and May 9, 2005, included both Claims Set 1 and Claims Set 2. The Commission's written decision dated November 29, 2006 (Ex. D hereto) granting Edison's claims for refund expressly stated that the Commission's decision included Claims Set 1 and Claims Set 2.

October 2003 through and including December 2005 ("Claims Set 3"). The parties have reached an agreement (attached as Ex. F) that to the extent a final judgment in this proceeding (including appellate review) is based upon conclusions of law and findings of fact applicable to Claims Set 2 and Claims Set 3, the parties agree that the final judgment should be dispositive of Claims Set 2 and Claims Set 3.[4]

FIRST CLAIM FOR RELIEF

(Statutory Exemption from Use Tax)

39. Plaintiff re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 38, inclusive.

40. Edison's use and consumption of coal purchased from Peabody is exempt from use tax under NRS 372.185(2) and 374.190(2). Under those statutes, use tax does not apply to property acquired outside of Nevada in a transaction that would not have been a taxable sale if it had occurred within this state. Under NRS 372.270 and 374.275 a purchase of coal or any other mineral from a mine located in Nevada is not a taxable sale. Since an acquisition of coal from an in-state mine would not be a taxable sale under Nevada law, Edison's use and consumption of coal purchased from Peabody's mine in Arizona is not subject to use tax.

41. Edison is entitled to recover a refund of $23,896,668.08 in use taxes it paid to the Department for the periods March 1998 through and including December 2000, together with interest at the appropriate statutory rate.

[4] In other words, if a final judgment requires the Department to refund the use tax SCE paid to the Department for the periods March 1998 through and including December 2000, or any portion thereof, and is based upon conclusions of law and findings of fact applicable to Claims Set 2 and Claims Set 3, then the Department shall at that same time provide applicable refunds to SCE for the period of January 2001 through and including December 2005 without additional administrative or legal action. If a final judgment finds that the Department is not required to refund the use tax SCE paid to the Department for the periods of March 1998 through and including December 2000, and is based upon conclusions of law and findings of fact applicable to Claims Set 2 and Claims Set 3, then SCE will not pursue refunds for the period of January 2001 through and including December 2005 and will not bring any further administrative or legal action on those claims.

SECOND CLAIM FOR RELIEF

(The Department's Imposition of Use Tax is in Violation of the Commerce Clause of the United States Constitution)

42. Edison re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 38, inclusive.

43. The application of Nevada's use tax to Edison's use and consumption of the coal acquired from Peabody discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution (U.S. Const. Art. I. §8, cl. 3) because, as explained in paragraph 40 above, Nevada taxes the sales of minerals, including coal, extracted from mines in Nevada more favorably than it does the use or consumption of minerals, including coal, extracted and purchased from out-of-state mines for use in Nevada.

44. Edison is entitled to recover a refund of $23,896,668.08 in use taxes it paid to the Department for the periods March 1998 through and including December 2000, together with interest at the appropriate statutory rate.

THIRD CLAIM FOR RELIEF

(Edison is Entitled to a Credit Against the Use Tax for Sales Tax Paid to Arizona)

45. Edison re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 38, inclusive.

46. Edison reimbursed Peabody for the Arizona Transaction Privilege Tax imposed on Edison's purchase of coal from Peabody and that Peabody paid to the State of Arizona. The Arizona Transaction Privilege Tax is Arizona's sales tax. In self-assessing Nevada use tax, Edison included the amount reimbursed to Peabody for the Arizona Transaction Privilege Tax in the sales price subject to use tax.

47. Edison is entitled to a credit against the Nevada use tax for the Arizona Transaction Privilege Tax it reimbursed to Peabody because NAC 372.055 provides such a credit for "sales tax legitimately paid for the same purchase . . . to a state or local government outside of Nevada."

48. Edison will establish at trial the amounts it reimbursed to Peabody for Arizona's Transactions Privilege Tax and will thereby establish the amount of the refund to which it is entitled for use taxes it paid to the Department for the periods March 1998 through and including December 2000, together with interest at the appropriate statutory rate.

FOURTH CLAIM FOR RELIEF

(Edison is Entitled to Exclude From the Measure of Use Tax Taxes Paid to the Federal Government)

49. Edison re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 38, inclusive.

50. Edison reimbursed Peabody for taxes imposed by the United States under the Surface Mining Control & Reclamation Act of 1977 and the Black Lung Benefits Revenue Act of 1977 (collectively, the "Federal Taxes") on the purchase of coal from Peabody and that Peabody paid to the United States. In paying the Nevada use tax, Edison included the Federal Taxes in the sales price subject to use tax.

51. Edison is entitled to exclude from the sales price the Federal Taxes that Edison reimbursed to Peabody because the Federal Taxes are not includable in the sales price subject to Nevada use tax under NRS 372.065.

52. Edison will establish at trial the amount of Federal Taxes it reimbursed to Peabody and will thereby establish the amount of the refund to which it is entitled for use taxes it paid to the Department for the periods March 1998 through and including December 2000, together with interest at the appropriate statutory rate.

FIFTH CLAIM FOR RELIEF

(Edison is Entitled to Exclude From the Measure of Use Tax Taxes Paid to the Navajo Nation and Hopi Tribe)

53. Edison re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 38, inclusive.

54. Edison reimbursed Peabody for the Navajo Nation Business Activity Tax and Possessory Interest Tax imposed on the coal purchased from Peabody for use at the Mohave Project and that Peabody paid to the Navajo Nation. In paying the Nevada use tax, Edison included the amount reimbursed to Peabody for the Navajo Nation's Business Activity Tax and Possessory Interest Tax in the sales price subject to use tax.

55. Edison is entitled to exclude from the sales price the amounts paid to Peabody for the Navajo Nation's Business Activity Tax and Possessory Interest Tax because such taxes are not includable in the sales price subject to Nevada use tax under NRS 372.065.

56. Edison will establish at trial the amount of the Navajo Nation's Business Activity Tax and Possessory Interest Tax it reimbursed to Peabody and will thereby establish the amount of the refund to which it is entitled for use taxes it paid to the Department for the periods March 1998 through and including December 2000, together with interest at the appropriate statutory rate.

SIXTH CLAIM FOR RELIEF

(Edison is Entitled to Exclude From the Measure of Use Tax Taxes Paid to the State of Arizona)

57. Edison re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 38, inclusive.

58. Edison reimbursed Peabody for Arizona's Ad Valorem Tax imposed on the coal purchased from Peabody for use at the Mohave Project and that Peabody paid to the State of Arizona. In paying the Nevada use tax, Edison included the amount reimbursed to Peabody for the Arizona Ad Valorem Tax in the sales price subject to use tax.

59. Edison reimbursed Peabody for the Arizona Transaction Privilege Tax imposed on the coal purchased from Peabody for use at the Mohave Project and that Peabody paid to the State of Arizona. In paying the Nevada use tax, Edison included the amount reimbursed to Peabody for the Arizona Transaction Privilege Tax in the sales price subject to use tax.

60. Edison is entitled to exclude from the sales price the amounts paid to Peabody for Arizona's Ad Valorem Tax because such amounts are not includable in the sales price subject to Nevada use tax under NRS 372.065.

61. Edison is entitled to exclude from the sales price the amounts paid to Peabody for the Arizona Transaction Privilege Tax because such amounts are not includable in the sales price subject to Nevada use tax under NRS 372.065.

62. Edison will establish at trial the amount of Arizona's Ad Valorem Tax and Arizona Transaction Privilege Tax it reimbursed to Peabody and will thereby establish the amount of the refund to which it is entitled for use taxes it paid to the Department for the periods March 1998 through and including December 2000, together with interest at the appropriate statutory rate.

SEVENTH CLAIM FOR RELIEF

(Edison is Entitled to Exclude From the Measure of Use Tax the Transportation Costs it Incurred in Transporting the Coal to the Mohave Project)

63. Edison re-alleges and incorporates by reference herein the allegations set forth in paragraphs 1 through 38, inclusive.

64. Edison paid use tax on amounts it paid for transportation costs to BMP.

65. Edison is entitled to exclude from the sales price the amounts it paid for the transportation costs pursuant to NRS 372.065 and NAC 372.101.

66. Edison will establish at trial the amount of the transportation costs it paid to BMP and will thereby establish the amount of the refund to which it is entitled for use taxes it paid to the Department for the periods March 1998 through and including December 2000, together with interest at the appropriate statutory rate.

WHEREFORE, Edison requests that judgment be entered in its favor as follows:

1. That the Court order Defendant State of Nevada to issue Edison a refund of use tax previously paid in the total amount of $23,896,668.08 together with interest at the appropriate statutory rate;

2. For costs of suit; and

3. For such additional relief as the Court deems appropriate under the circumstances.

Dated: April 9, 2012

Charles C. Read (admitted pro hac vice)
JONES DAY
555 S. Flower Street
Los Angeles, California 90071
(213) 243-2818
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of April, 2012, I hand-delivered a copy of the foregoing addressed as follows:

Gina Session, Esq.
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701

Johanna Maher

Johanna Maher

EXHIBIT A

KENNY C GUINN
Governor

CHARLES E. CHINNOCK
Executive Director

DEPARTMENT OF TAXATION
[illegible] Way
Suite 115
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Phone: (775) 687-4820 · Fax: (775) 687-5981
In-State Toll Free: 800-992-0900
Web Site: http://tax.state.nv.us

[illegible]
Reno, Nevada [illegible]
Phone: [illegible]
Fax: [illegible]

December 17, 2002

Dolores Sandler
Edison International – Tax Dept
P O Box 800
Rosemead, CA 91770

Re: Southern California Edison Refund Requests
Account 465-197-254

Dear Ms. Sandler:

This letter is in response to your eight refund requests covering the periods March 1, 1998 through September 30, 1999 for a total of $4,904,490.59. You request a refund of "use taxes" paid to the State of Arizona on your purchases of coal. You purchase the coal from Peabody Western Coal Company in Arizona. The coal is shipped to your location via pipeline, F.O.B. Destination. Peabody charges you Arizona tax of 3.437%. The coal is consumed in your Mojave Generating Station, located in Clark County, Nevada.

Your refund requests are denied for the following reasons:

1) Nevada only allows credit for sales taxes legitimately paid to a state or local government outside of Nevada, Nevada Administrative Code (NAC) 372.055. Research shows that the taxes charged by Peabody are actually "severance" taxes for the removal of minerals and metals from Arizona not sales taxes. This tax is an excise tax, not a sales or use tax.

2) Nevada Revised Statute (NRS) 372.025 (3)(d), under the definition of gross receipts for Nevada sales tax purposes, excludes any tax imposed by the United States. However, this exclusion does not include any manufacturers' or importers' excise tax. The excise taxes paid to Peabody are properly included in your calculation for use taxes due Nevada.

I am enclosing a petition form and related statutes if you wish to appeal this decision. Any appeal needs to be in writing and post marked within 45 days of the date of this letter.

If you have any questions, please call me at (775) 687-6539 or e-mail me at kphillip@tax.state.nv.us .

Sincerely,

Katy Phillips
Supervising Auditor II

enclosures

EXHIBIT B

STATE OF NEVADA
DEPARTMENT OF TAXATION
1550 E. College Parkway,
Suite 115
Carson City, Nevada 89706-7937
Phone: (775) 687-4820 • Fax: (775) 687-5981
In-State Toll Free: 800-992-0900
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Governor

CHARLES E. CHINNOCK
Executive Director

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RENO OFFICE
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Building O, Suite 262
Reno, Nevada 89502
Phone: (775) 688-1295
Fax: (775) 688-1303

December 30, 2002

Dolores Sandler
Edison International – Tax Dept
P O Box 800
Rosemead, CA 91770

Re: Southern California Edison Refund Requests
Account 463-197-254

Dear Ms. Sandler:

This letter is in response to your refund request covering the periods October 1, 1999 through December 31, 1999 for a total of $945,837.36. You request a refund of "use taxes" paid to the State of Arizona on your purchases of coal. You purchase the coal from Peabody Western Coal Company in Arizona. The coal is shipped to your location via pipeline, F.O.B. Destination. Peabody charges you Arizona tax of 3.437%. The coal is consumed in your Mojave Generating Station located in Clark County, Nevada.

Your refund requests are denied for the following reasons:

1) Nevada only allows credit for sales taxes legitimately paid to a state or local government outside of Nevada, Nevada Administrative Code (NAC) 372.055. Research shows that the taxes charged by Peabody are actually "severance" taxes for the removal of minerals and metals from Arizona not sales taxes. This tax is an excise tax, not a sales or use tax.

2) Nevada Revised Statute (NRS) 372.025 (3)(d), under the definition of gross receipts for Nevada sales tax purposes, excludes any tax imposed by the United States. However, this exclusion does not include any manufacturers' or importers' excise tax. The excise taxes paid to Peabody are properly included in your calculation for use taxes due Nevada.

I am enclosing a petition form and related statutes if you wish to appeal this decision. Any appeal needs to be in writing and post marked within 45 days of the date of this letter.

If you have any questions, please call me at (775) 687-6539 or e-mail me at kphillip@tax.state.nv.us.

Sincerely,

Katy Phillips
Supervising Auditor II

enclosures

EXHIBIT C

KENNY C GUINN
Governor
BARBARA SMITH CAMPBELL
Chair, Nevada Tax Commission
CHARLES E CHINNOCK
Executive Director

DEPARTMENT OF TAXATION
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Fax (775) 688-1303

May 16, 2003

Dolores Sandler
Edison International – Tax Dept
P O Box 800
Rosemead, CA 91770

Re: Southern California Edison Refund Requests
Account 465-197-254

Dear Ms. Sandler:

This letter is in response to your refund request covering the periods January 1, 2000 through December 31, 2000 for a total of $3,526,625.70. You request a refund of "use taxes" paid to the State of Arizona on your purchases of coal. You purchase the coal from Peabody Western Coal Company in Arizona. The coal is shipped to your location via pipeline, F.O.B. Destination. Peabody charges you Arizona tax of 3.437%. The coal is consumed in your Mojave Generating Station located in Clark County, Nevada.

Your refund requests are denied for the following reasons:

1) Nevada only allows credit for sales taxes legitimately paid to a state or local government outside of Nevada, Nevada Administrative Code (NAC) 372.055. Research shows that the taxes charged by Peabody are actually "severance" taxes for the removal of minerals and metals from Arizona not sales taxes. This tax is an excise tax, not a sales or use tax.

2) Nevada Revised Statute (NRS) 372.025 (3)(d), under the definition of gross receipts for Nevada sales tax purposes, excludes any tax imposed by the United States. However, this exclusion does not include any manufacturers' or importers' excise tax. The excise taxes paid to Peabody are properly included in your calculation for use taxes due Nevada.

You have petitioned the Department's denial(s) for refund for prior periods on this same issue. We are in the process of scheduling an oral hearing on the matter. We will consider this denial in the same status as your previous requests and these periods will be added to the issue(s) under petition.

If you have any questions, please call me at (775) 687-6539 or e-mail me at kphillip@tax.state.nv.us .

Sincerely,

Katy Phillips
Supervising Auditor II

EXHIBIT D

KENNY C. GUINN
Governor
THOMAS R. SHEETS
Chair, Nevada Tax Commission
DINO DICIANNO
Executive Director

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CERTIFIED MAIL 7003 1680 0001 3689 4453

November 29, 2006

Norman J. Azevedo
Attorney at Law
712 E. Musser Street
Carson City NV 89701

IN THE MATTER OF: ***Southern California Edison***

At a closed hearing on April 5, 2005 that was continued to May 9, 2005, the Nevada Tax Commission ("Commission") heard and decided the appeal of Southern California Edison ("Edison") from the denial by a Hearing Officer of the Department of Taxation ("Department") of Edison's claims for refund of Nevada use tax. Gregory L. Zunino, Senior Deputy Attorney General, appeared on behalf of the Department and Norman J. Azevedo, Esq., appeared on behalf of Edison. Also present, as intervenors supporting the denial of Edison's claims, were Paul Johnson, Deputy District Attorney for Clark County, and Terri Williams, Assistant City Attorney for the City of Henderson.

Edison has been paying Nevada use tax on the purchase of coal imported from Arizona since 1970. Edison timely filed administrative claims for refund of this tax for the periods of March, 1998 through September, 2003 on the grounds that section 372.270 of the Nevada Revised Statutes ("NRS"), a sales and use tax exemption, is applicable to Edison's purchase of coal as more fully described below.[1] The Department denied these claims for refund on December 17, 2002, December 30, 2002 and May 16, 2003. Edison appealed the denials, and a Hearing Officer heard the case on December 22, 2003 and January 28, 2004. In a decision issued on July 14, 2004, the Hearing Officer concluded that, as applied by the Department in this case, NRS 372.270 violated the Commerce Clause of the U.S. Constitution. Nonetheless, the Hearing Officer denied the claims for refund because he reasoned that the appropriate remedy would be to prohibit all taxpayers from using the exemption. We find that there are appropriate statutory and Nevada constitutional grounds to grant Edison's claims for refund.

[1] Reference in this Decision to the sales and use tax statutes contained in NRS chapter 372 shall be deemed to include reference to the identical provisions in chapter 374 (the local school support tax portion of the Nevada sales and use tax). There are no differences between such statutes for purposes of this Decision.

FINDINGS OF FACT

Edison operates the Mohave Generating Station (the "Mohave Plant") in Laughlin, Nevada, which is located within Clark County. Edison is also the majority owner of the Mohave Plant.[2] The Mohave Plant generates electricity by burning coal. All of the coal burned at the Mohave Plant is purchased from Peabody Western Coal Company ("Peabody"), which operates the Black Mesa coal mine located in the State of Arizona on lands belonging to the Navajo Nation and Hopi Tribe. The coal is transported from the Black Mesa mine to the Mohave Plant in a coal slurry (ground coal suspended in water) through a 273-mile long pipeline owned by Black Mesa Pipeline, Inc. The slurry travels through the pipeline at a rate of 580 to 650 tons of coal per hour, requiring one billion gallons of water annually.

After extraction, but prior to transport, the raw coal is broken into small pieces by Peabody and sent by conveyor to a coal weighing and sampling tower operated by Commercial Testing & Engineering, a third party. There the coal is tested to see whether it meets the standards pertaining to, for example, BTUs and sulfur content as specified in the agreement between Peabody and Edison. After testing, Peabody further grinds the coal to a sand-like consistency and delivers it to the pipeline. Black Mesa Pipeline mixes the coal with ground water pumped out of local wells – the mix is approximately 50/50. The water used to transport the coal is purchased by Peabody.

The coal purchased by Edison never becomes something other than coal between the time it is mined and the time it is delivered to Edison. The parties submitted expert testimony and written evidence on this issue and presented argument at the hearing. The mined coal is physically ground and suspended in water for transport. This "coal slurry" is not, as the Department argues, a manufactured mineral by-product. Rather, we find that Edison is purchasing a raw mineral – in this case coal – and the processes relating to the creation of the slurry do not convert the coal to something other than a raw mineral.

When the slurry arrives at the Mohave Plant, a centrifuge removes approximately 94% of the coal from the water. The remaining 6% of the coal is pumped into a settling tank where it settles to the bottom and is removed. Once dry, the coal is pulverized and blown into the burners for the boilers that make steam for the generating units. All of the water that comes through the pipeline is either used in the circulatory cooling system at the Mohave Plant or evaporated in the boilers when the coal is burned. Thus, the Mohave Plant uses 100% of the materials that are delivered to it through the pipeline.

CONCLUSIONS OF LAW

Edison claims that Nevada use tax does not apply to its purchase of coal for use at the Mohave Plant pursuant to NRS 372.185(2), 372.270, NRS 372.265, the federal Commerce Clause and Article 10, section 5(1) of the Nevada Constitution. NRS 372.185 imposes the use tax:

> 1. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 2955, for storage, use or other consumption in this State at the rate of 2 percent of the sales price of the property.
>
> 2. The tax is imposed with respect to all property which was acquired out of state in a transaction that would have been a taxable sale if it had occurred within this State.

---

[2] Edison owns a 56% undivided interest in the Mohave Plant. Edison jointly owns the plant with Nevada Power Company, Salt River Project Agriculture Improvement and the Department of Water and Power of the City of Los Angeles.

NRS 372.270 is an exemption that applies to both the sales and use taxes:

> **Proceeds of mines.** There are exempted from the taxes imposed by this chapter the gross receipts from the sale of, and the storage, use or other consumption in this State of, the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS.

NRS 372.265 provides:

> **Constitutional and statutory exemptions.** There are exempted from the taxes imposed by this chapter the gross receipts from the sale of, and the storage, use or other consumption in this State of, tangible personal property the gross receipts from the sale of which, or the storage, use or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.

Article 10, § 5(1) of the Nevada Constitution provides:

> The legislature shall provide by law for a tax upon the net proceeds of all minerals, including oil, gas and other hydrocarbons, extracted in this state, at a rate not to exceed 5 percent of the net proceeds. No other tax may be imposed upon a mineral or its proceeds until the identity of the proceeds as such is lost.

The Commission was thoroughly briefed on the facts of this case and the interaction of the net proceeds of minerals tax and the sales and use tax by all parties. In addition, the Commission heard argument from, and asked questions of, all parties regarding the same. Edison argues that under NRS 372.185(2), use tax does not apply to its purchase of Arizona coal for the Mohave Plant because, had it purchased the coal in Nevada, that transaction would not have been taxable. A purchase of Nevada coal would not have been taxable because NRS 372.270 exempts from the sales and use tax "the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS," and had Edison purchased its coal from a Nevada mine, this exemption would have applied. Furthermore, Edison argues that due to restrictions imposed by the dormant Commerce Clause, which is taken into account under NRS 372.265, Nevada cannot impose its use tax on the purchase of imported coal when a sale or purchase of Nevada coal is exempt from such tax.

On the other hand, the Department argues that Edison's purchase of Arizona coal is taxable because NRS 372.270 exempts proceeds of mines that are "subject to taxes levied pursuant to chapter 362 of NRS," and coal imported from Arizona is *not subject* to the net proceeds of minerals tax imposed by chapter 362. We agree with Edison because the applicability of the use tax in this case is not dependent on whether the Arizona coal is subject to the net proceeds of minerals tax, but rather whether an equivalent in-state transaction would be subject to sales or use tax. *See* NRS 372.185(2).

The exemption in NRS 372.270 applies to minerals subject to taxes levied by NRS chapter 362 (the Net Proceeds of Minerals Tax).[3] The 5% net proceeds of minerals tax applies to the net proceeds of

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[3] Although NRS 372.270 uses the term "proceeds of mines," in 1989, pursuant to an amendment to Article 10, § 5 of the Nevada Constitution, and related amendments to NRS chapter 362, NRS chapter 362 was amended to tax the "proceeds of minerals." The failure to change the reference from "mines" to "minerals" in NRS 372.270 appears to be an oversight. If the term "proceeds of mines" were given a substantive meaning in NRS 372.270, the remaining portion of that section would be rendered meaningless – NRS 372.270 still refers to NRS chapter 362, and that chapter now taxes net proceeds of "minerals" not "mines." There is no indication that the legislature intended to nullify NRS 372.270 when the Nevada Constitution was amended and NRS chapter 362 was

minerals extracted in N ada. *See* NRS 362.110(1). *See also* N . Const., Art. 10, § 5(1) (directing the legislature to "provide by law for a tax upon the net proceeds of all minerals, including oil, gas and other hydrocarbons, extracted in this state..."). Coal is a mineral. *See* NRS 362.010(1) & (2) (referring to coal and hydrocarbons, respectively); Nev. Const., Art. 10, § 5(1) (referring to hydrocarbons). If a Nevada mine sells its coal to Edison for use at the Mohave Plant, no sales or use tax applies. NRS 372.270. Accordingly, by operation of NRS 372.185(2), Edison's purchase of coal from an out-of-state mine for use at the Mohave Plant is not a taxable transaction.[4]

Both sides looked to Article 10, Section 5(1) of the Nevada Constitution to support their arguments. That section provides:

> The legislature shall provide by law for a tax upon the net proceeds of all minerals, including oil, gas and other hydrocarbons, extracted in this state, at a rate not to exceed 5 percent of the net proceeds. ***No other tax may be imposed upon a mineral or its proceeds*** until the identity of the proceeds as such is lost. (Emphasis added.)

Under this constitutional provision, the only tax that may be imposed upon minerals or their proceeds is the 5% tax that the first sentence directs the legislature to impose. Both parties and the Commission agree that the net proceeds of minerals tax does not apply to minerals extracted outside of Nevada.

The parties disagreed regarding the application of the second sentence. Edison argued that the second sentence does not limit the prohibition against "other" taxes to minerals extracted in Nevada. Therefore, Edison concluded, since Edison was purchasing coal that had not lost its identity as coal, "[n]o other tax," namely the use tax, could be imposed upon the use of its imported coal. The Department, on the other hand, argued that the coal being delivered to Edison at the Mohave Plant was a by-product that had "lost its identity" as the mineral or its proceeds such that the second sentence of Article 10, § 5(1) did not apply.

We found, above, that the coal purchased by Edison and delivered to the Mohave Plant through the pipeline is a mineral. We also found, necessarily, that the coal slurry is not, as the Department argued, a manufactured mineral by-product. (We do not find the Department's citation to AGO No. 72, dated June 22, 1955, involving a mineral by-product to be authoritative here.) Because Edison purchased and received raw coal, we agree with Edison that Article 10, § 5(1) of the Nevada Constitution precludes imposition of the use tax on the purchase and use of that coal.

Further support for this conclusion can be found in the legislative history to the 1989 amendments to NRS chapter 362 (SB 61), and the history to the amendments to Article 10 of the Nevada Constitution (SJR 22). Section 1 of SB 61 of the 1989 Session of the Nevada Legislature provides:

> The legislature hereby declares that:
>
> 1. The legislature's intent in proposing and approving Senate Joint Resolution No. 22 of the 64th session is to provide a separate method of

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substantially revised. Thus, NRS 372.270 is still applicable and it exempts proceeds of minerals subject to the taxes imposed by NRS chapter 362. *Accord. Bartlett v. Brodigan*, 37 Nev. 245, 249 (1914).

[4] Because of our construction of the Nevada statutes and Constitution, we do not need to reach the Commerce Clause violation raised by Edison and found by the Hearing Officer. *See, e.g., Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984) ("a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State."); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963) ("The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state.").

taxation it is intended to be the only manner of ation of mines, other than patented mines and mining claims upon which less than $100 worth of labor has been actually performed in the preceding year, and minerals, including oil, gas and other hydrocarbons until the mineral has been extracted and subjected to the ordinary mining processes involved in the extraction.

2. The legislature intends that the tax imposed by this act and the proposed constitutional limitations upon the taxation of the minerals and their proceeds ***preclude a tax upon***:

(a) The extraction and ordinary mining processes involved in the extraction of minerals, including oil, gas and other hydrocarbons;

(b) ***Minerals, including oil, gas and other hydrocarbons, until after the completion of the ordinary mining processes involved in the extraction of the mineral, and if exchanged at that time, until after the completion of the exchange***; and

(c) The proceeds received in exchange for minerals, including oil, gas and other hydrocarbons, if the minerals are exchanged upon the completion of the ordinary mining processes, until after the completion of the exchange.

3. The legislature's intent in proposing and approving Senate Joint Resolution No. 22 of the 64th session is to provide the opportunity for this and other legislatures to assess a tax on the net proceeds of minerals.

4. The legislature intends that the tax imposed by this act and the proposed constitutional imitations upon the taxation of minerals and their proceeds to not preclude or in any way affect the taxation of motor vehicle or diesel fuel, jewelry, profits or revenues of business, or any other tax upon property, sales or businesses, ***except as provided in subsection 2.*** (Emphasis added.)

This passage makes clear that minerals extracted in Nevada that have not been subject to more than "the ordinary mining processes involved in the extraction of the mineral" are not subject to tax until after completion of the first exchange.

The ordinary mining processes described in Section 1 of SB 61 are the processes set forth in NRS chapter 362 for which expense deductions are allowed in calculating the net proceeds of minerals tax (as may be amended by the Legislature and interpreted by the Commission from time to time). *See* NRS 362.120 and the applicable NACs. Specifically, on this topic, Legislative Counsel Malkiewich stated as follows:

> While the end of 'ordinary mining processes' may change, that is where the exemption ends -- once those processes are done, that is the part of the process that SJR-22 is intended to exempt. Yes, this is going to be effected by cases, **but I think more important to remember is that Nevada law does not track federal law exactly on when the end of ordinary mining processes are**. We define very clearly in our statutes what is allowable for

determi g gross yield, and it includes the value ceived in exchange of the final sale. **Well, the sale of the mineral may well be past the end of ordinary mining processes under federal law, but for the purposes of determining gross yield, we include those processes. We also include a number of those processes in the allowable deductions to get to net proceeds. So, this is not necessarily tying our hands or saying that federal law is going to shift our tax, this is just saying that is the point that we feel before that we can't touch.** Wherever this cut-off is, wherever this end of ordinary mining processes is, before that point we cannot tax, that that is what SJR-22 is intended to do.

Senate and Assem. Comm. on Tax'n Minutes dated February 2, 1989 @ pp. 10.

Accordingly, the ordinary mining processes are determined by legislative determination which is intended to be consistent with current mining practices. Ordinary mining processes are not to be determined by relying upon the Federal Income Tax Laws addressing federal depletion. *See* IRC §613.

DECISION

In conclusion, based upon the plain language of NRS 372.185(2), the coal that Edison imports from Arizona for use at the Mohave Plant is exempt from use tax because the equivalent in-state transaction is exempt pursuant to NRS 372.270, Article 10, § 5(1) of the Nevada Constitution and NRS 372.265. Interest will accrue on the amount to be refunded pursuant to NRS 372.660 and NRS 374.665.

FOR THE COMMISSION:

DINO DICIANNO
Executive Director
Nevada Department of Taxation

cc: Dennis Belcourt, Deputy Attorney General
Paul Johnson, Esq., Clark County District Attorney's Office
Certified Mail 7003 1680 0001 3689 4446
Terri A. Williams, Esq., City of Henderson
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EXHIBIT E

JIM GIBBONS
Governor
THOMAS R. SHEETS
Chair, Nevada Tax Commission
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February 27, 2009

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IN THE MATTER OF: ***Southern California Edison***

The Nevada Supreme Court on April 24, 2008 issued a decision in *Chanos v. Nevada Tax Commission, et.al,* 181 P.3d 675, Nev., April 24, 2008 (no. 48292), voiding a decision by the Nevada Tax Commission ("Commission") approving a refund of Nevada use tax. The refund at issue was for use tax paid by Southern California Edison ("Edison") for coal slurry product purchased in Arizona and used at Edison's power plant in southern Nevada. Because its previous decision was void, the Commission scheduled this matter for a new hearing. The parties, which included Edison, the Department of Taxation ("Department"), Clark County and the city of Henderson, stipulated to a briefing and hearing schedule.

A hearing was held before the Commission on September 9, 2008. The Department was represented by counsel, Gina C. Session, Chief Deputy Attorney General. Clark County was represented by Deputy District Attorney Paul Johnson. The City of Henderson was represented by Assistant City Attorney Terri A. Williams. Edison was represented by Norman Azevedo, Esq. and Christopher Campbell, Esq. Post-hearing briefs were filed, and on December 1, 2008, closing arguments were presented to the Commission. The matter having been submitted to the Commission, the Commission by a vote of 6-2 now enters the following findings of fact, conclusions of law and decision.

FINDINGS OF FACT

1. The coal slurry product purchased by Edison in this case was a processed and/or manufactured product consisting of approximately fifty percent water and fifty percent finely pulverized coal.

2. The coal slurry product was prepared in Arizona, from coal and water derived in Arizona, and delivered to Edison via a coal slurry pipeline more than two hundred and fifty miles long.

3. All of the coal slurry product was used by Edison at its power plant in Nevada.

4. Edison filed claims for refund on use taxes paid between March 1, 1998 and December 31, 2000.

5. The only stated basis for Edison's claims in its original requests for refund was for credit against taxes paid to other jurisdictions.

6. After Edison's initial refund requests were denied, Edison untimely sought to amend its claims to assert new grounds for refund not previously asserted.

7. There is not now, nor was there during the time period covered by Edison's refund requests, any source of commercial coal production in Nevada.

8. There is not now, nor was there during the time period covered by Edison's refund requests, any vendor of coal or coal products produced from Nevada sources, nor did the State of Nevada collect any net proceeds tax from any producer of coal or coal products during the relevant time period.

9. None of the taxes or fees for which Edison sought a credit for were sales taxes or net proceeds taxes for which a credit could be given.

10. Neither Edison, nor its coal slurry provider, were subject to any discriminatory tax in Nevada; inasmuch as, there were neither providers nor potential providers of coal or coal slurry originating from Nevada sources.

CONCLUSIONS OF LAW

1. The coal slurry product at issue in this case is not a raw mineral that would be subject to the exemption in NRS 372.270[1] and/or Article 10, Section 5 of the Nevada Constitution.

2. The payment of use tax by Edison does not violate the Commerce Clause of the United States Constitution, nor any Nevada statutory or constitutional provision.

3. Edison's claims related to the Commerce Clause of the United States Constitution, NRS 372.265, NRS 372.270 and Article 10, Section 5 of the Nevada Constitution or any other basis not raised in Edison's original claims for refund were waived and are barred by NRS 372.635, NRS 372.645 and NRS 372.650.

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[1] The sales and use tax statutes relevant to this case found in chapters 372 and 374 of the NRS are identical; hence, only the statutes in Chapter 372 are cited herein.

4. None of the taxes and/or fees paid by Edison or Peabody Coal Company in Arizona were entitled to a credit against Nevada's use tax. Use tax was properly collected in Nevada on the coal slurry product purchased by Edison in Arizona and used in Nevada.

DECISION

Based on the above Findings of Fact and Conclusions of Law, Edison's request for refund of use tax on coal slurry product purchased in Arizona and used in Nevada is DENIED.

FOR THE COMMISSION:

DINO DICIANNO
Executive Director
Nevada Department of Taxation

cc: Jennifer Crandell, Senior Deputy Attorney General
Gina Session, Chief Deputy Attorney General
Tax Managers
Anthony Smith, Southern California Edison
Dolores Sandler, Southern California Edison
Christopher Campbell, O'Melveny & Myers LLP

EXHIBIT F

AGREEMENT REGARDING CLAIMS SET 2 AND CLAIMS SET 3

This agreement ("Agreement") is entered into between the Nevada Department of Taxation (the "Department") and Southern California Edison Company ("SCE") (the Department and SCE each referred to as a "Party," and collectively the "Parties").

WHEREAS, SCE commenced an action in the First Judicial District Court of the State of Nevada ("Court"), captioned *Southern California Edison v. The State of Nevada, ex rel. Department of Taxation,* Case No. 09-0C-00016-1B (the "Action") and filed its Amended Complaint (Corrected Version) on May 22, 2009 ("Complaint");

WHEREAS, SCE seeks in its Action to recover use taxes pursuant to Sections 372.680(1) and 374.685(1) of the Nevada Revised Statutes ("NRS"), including claims for the refund of the use taxes it paid to the Department for the periods March 1998 through and including December 2000 ("Claims Set 1"), claims for the refund of the use taxes it paid to the Department for the periods January 2001 through and including September 2003 ("Claims Set 2"), and claims for the refund of the use taxes it paid to the Department for the periods October 2003 through and including December 2005 ("Claims Set 3");

WHEREAS, pursuant to NRS 30.030, SCE seeks in the Action a declaration from the Court that, notwithstanding the Department's assertions to the contrary, SCE has exhausted its administrative remedies with respect to Claims Set 2 and that such claims are properly before the Court;

WHEREAS, pursuant to NRS 30.030, SCE seeks in the Action a declaration that the decision of the Court in the Action with respect to any factual or legal disputes shall apply, subject to any appellate review thereof, to Claims Set 2 (if the Court finds such claims are not properly before the Court) and to Claims Set 3;

WHEREAS, the Department intends to move to strike references to Claims Set 2 and Claims Set 3 from SCE's Complaint on the grounds that the Court lacks jurisdiction over these claims, *i.e.,* paragraphs 6, 7, 25, 26, 42, 43, 44, 45, 47 (partial), 48, 49, 50, 51, 54 (partial), 57 (partial), 61 (partial), 65 (partial), 69 (partial), 75 (partial), 79 (partial), 81, 82, 83, 84, 85, 87, 88, 89, and Exhibits G and H of SCE's Complaint;

WHEREAS, SCE included Claims Set 2 and Claims Set 3 in its Complaint so that a final decision regarding Claims Set 1 would apply to Claims Set 2 and Claims Set 3 without having to re-litigate identical issues for Claims Set 2 and Claims Set 3 before the Department, the Nevada Tax Commission, the district court, and appellate court(s); and

WHEREAS, the Parties believe if the final judgment on Claim Set 1 in the Action (including appellate review) is based upon conclusions of law and findings of fact applicable to Claims Set 2 and Claims Set 3, then the final judgment should be dispositive of Claims Set 2 and Claims Set 3.

NOW THEREFORE, in consideration of the mutual promises and other good and valuable consideration in this Agreement, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. The Parties agree that SCE may amend its Complaint. SCE shall file within 10 days of execution of this Agreement the Second Amended Complaint attached hereto as Exhibit 1.

2. To the extent a final judgment in the Action (including appellate review) is based upon conclusions of law and findings of fact applicable to Claims Set 2 and Claims Set 3, the Parties agree that the final judgment should be dispositive of Claims Set 2 and Claims Set 3. In other words:

a. If a final judgment requires the Department to refund the use taxes SCE paid to the Department for the periods March 1998 through and including December 2000, or any portion thereof, and is based upon conclusions of law and findings of fact applicable to Claims Set 2 and Claims Set 3, then the Department shall at that same time provide applicable refunds to SCE for the period of January 2001 through and including December 2005 without additional administrative or legal action.

b. If a final judgment finds that the Department is not required to refund the use taxes SCE paid to the Department for the periods of March 1998 through and including December 2000, and is based upon conclusions of law and findings of fact applicable to Claims Set 2 and Claims Set 3, then SCE will not pursue refunds for the period of January 2001 through and including December 2005 and will not bring any further administrative or legal action on those claims.

3. This Agreement does not alter the terms of the stipulation entered into by the Parties dated September 30, 2008 regarding the Amnesty Payment for use taxes made to the Department for the periods March 2005 through and including December 2005, or to SCE's claims for refund thereon.

4. Miscellaneous Provisions.

4.1 Counterparts. This Agreement may be executed by the Parties in counterparts, each of which shall be deemed an original regardless of the date of its execution and delivery, and said counterparts together shall constitute one and the same agreement. Copies of such counterparts, even if delivered by facsimile or by email as .pdf or .tif documents, or in any equivalent format, shall be deemed originals and fully binding.

4.2 Headings. The headings in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of this Agreement or any provision hereof.

4.3 Construction and Interpretation. This Agreement is a product of negotiation between the Parties and is not to be interpreted more strongly in favor of one or the other in any later interpretation or enforcement. The making, execution and delivery of this Agreement have been induced by no representations, statements, warranties, or agreements other than those set forth in this Agreement.

4.4 Applicable Law. This Agreement shall be governed by, interpreted and construed in accordance with the laws of the State of Nevada. The Parties agree that the state and/or federal courts of Nevada shall be the sole and exclusive forums for the resolution of any action to

construe or enforce the terms or provisions of this Agreement, or arising out of the alleged breach of this Agreement.

4.5 Costs and Expenses. Each Party shall bear its own costs and expenses arising out of the negotiation, execution, delivery, and performance of this Agreement and the consummation of all transactions contemplated hereby.

4.6 Integration Clause: No Oral Modifications. This Agreement constitutes the entire agreement and understanding between the Parties concerning the subject matter hereof and supersedes any and all prior or contemporaneous agreements, understandings or negotiations, whether written or oral, between the Parties or their counsel. This Agreement may only be modified, amended, or otherwise changed by a signed writing, executed by all of the Parties hereto. No provision hereof may be waived unless in writing and signed by the Party whose rights are thereby waived. Waiver of one provision hereof shall not be deemed to be a waiver of any other provision.

4.7 Implementation. The Parties agree to sign such further documents, and to otherwise reasonably cooperate, as necessary to carry out the purpose and intent of this Agreement.

4.8 Disclosure. The Parties agree that either or both of them may submit an informational copy of this Agreement to Judge Russell after it has been executed by both Parties.

IN WITNESS WHEREOF, the Parties have executed this Agreement by their duly authorized representatives.

DATED: April 6th, 2012

Nevada Department of Taxation

By: _____

DATED: April 6, 2012

Southern California Edison Company

By: _____

Attachment 3

Rec'd 12/19

REC'D & FILED

2014 DEC 17 AM 9:48

ALAN GLOVER

BY _____ CLERK

DEPUTY

Case No.: 09 OC 00016 1B

Dept. No.: 1

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

SOUTHERN CALIFORNIA EDISON,

Plaintiff,

vs.

THE STATE OF NEVADA, EX REL. DEPARTMENT OF TAXATION,

Defendant.

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

This matter is before this Court based on a Second Amended Complaint filed by Plaintiff, Southern California Edison, as to a decision rendered by Defendant, The State of Nevada, ex rel, Department of Taxation. An eight day bench trial was held January 21-29, 2014. An Order Staying Determination Pending Decision by Nevada Supreme Court was entered on April 30, 2014, pending a decision in *Sierra Pacific Power Company, et al. v. The State of Nevada, Department of Taxation*, 130 Nev. Adv. Op. 93, which was rendered on December 4, 2014. Based on this decision, the following Findings of Fact and Conclusions of Law are entered in this case. An Amended Findings of Fact, Conclusions of Law, and Decision is issued by this Court pursuant to NRCP Rule 60(a), to clarify that this Court heard this matter on the Second Amended Complaint filed as an independent action, and on a Trial De Novo standard, not as a Petition for Judicial Review, based on the decision by the Nevada Supreme Court in *Southern California Edison v. First Judicial District Court*, 127 Nev. Adv. Op. 22 (2011).

FINDINGS OF FACT

1. Defendant State of Nevada *ex rel.* Department of Taxation (the "Department") is an agency of the executive branch of the State of Nevada that is charged with the administration and enforcement of the tax laws set forth in Title 32 of the Nevada Revised Statutes, including chapters 372 and 374 of the Nevada Revised Statutes governing sales and use taxes and local school support taxes, respectively.

2. The Plaintiff, Southern California Edison ("SCE") is a regulated public utility that operated the Mohave Generating Station ("Mohave"), a coal fired power plant in Clark County, Nevada, from 1970 to 2005. SCE owned a majority interest in Mohave.

3. As a result of an agreement with the Department of the Interior, SCE purchased coal in Arizona exclusively from Peabody Western Coal Company ("Peabody") pursuant to Mohave Coal Supply Agreement, dated January 6, 1967, and the Amended Mohave Project Supply Agreement, dated May 26, 1976, wherein Peabody is the seller and Mohave co-owners are the buyers. In exchange for the agreement to purchase coal mined on Indian Reservations in Arizona, SCE was able to purchase the water necessary to operate Mohave from the Colorado River Commission.

4. Peabody obtained the coal from the Black Mesa Mine located on Navajo and Hopi Indian reservations in Arizona. Peabody operated the Black Mesa Mine through lease agreements with the Navajo and Hopi Tribes.

5. SCE determined that the most inexpensive means to transport the coal from Arizona to Nevada was by means of a pipeline.

6. As part of the Coal Supply Agreement, Peabody entered into a Coal Slurry Pipeline Agreement with Black Mesa Pipeline ("BMP") to process the coal into a coal slurry that met SCE's specifications and could be transported to Mohave through the pipeline.

7. The tangible personal property purchased by SCE was the coal slurry product.

8. BMP operated the Coal Slurry Preparation Plant and the pipeline that transported the coal slurry to Mohave. Before delivery of the coal to BMP, Peabody processed the run-of-mine coal by separating rock in a rotary breaker lowering the ash content and reducing the coal to a 2" x 0" size. At the Coal Slurry Preparation Plant, the coal was further crushed by various means to a certain size and blended with water to create coal slurry that could then be transported through the pipeline.

9. The processing by Peabody and BMP created a coal slurry that met SCE's transportation requirements.

10. The price SCE paid Peabody for the coal slurry is set forth in the Amended Mohave Project Coal Supply Agreement, Sec. 6. The price for the coal slurry is paid for the coal delivered to the Mohave Project and is based on the mine price, the price for transportation, and all sale, use, production and severance taxes paid by the seller, mainly Peabody. Thus, Peabody is the entity that paid all taxes, not SCE.

11. The coal slurry was transported more than 270 miles through a pipeline to the Mohave Generating Station.

12. Peabody retained title to the coal when it was transferred to BMP for processing and transportation. After processing and transportation by BMP, the sales transaction between Peabody and SCE took place in Nevada when title to the coal slurry passed to SCE upon delivery at Mohave.

13. Risk of loss for the coal slurry and water passed from Peabody to SCE at the same time title was passed at the receiving facilities of the Mohave Generating Station in Nevada.

14. Because Peabody did not have any physical presence in Nevada, SCE paid Use Tax to Nevada for the coal slurry beginning in 1970.

15. SCE de-watered the coal and burned it to generate electricity. SCE further pulverized the coal into a powder that could be blown into the burners, it did not have the means at Mohave to take run-of-mine coal and process it for burning as fuel. SCE also used the water from the coal slurry for cooling at the plant.

16. SCE could not purchase coal in Nevada because there are no commercially viable deposits of coal in Nevada and there were no coal mines operating in Nevada during the 1998 to 2000 period of time at issue in this case. There is no record that any coal mine in Nevada has been subject to the Net Proceeds of Minerals tax or that any coal miner or supplier has ever made a sale of coal in Nevada that was not subject to either sales or use tax.

17. Peabody did not compete with any Nevada companies that mined coal in Nevada.

18. Peabody did not compete with any oil, natural gas, or geothermal producers in Nevada.

19. There is no evidence that any coal transaction in Nevada was exempt from sales or use tax pursuant to NRS 372.270.

20. Beginning in April 2001, SCE filed claims for a partial refund filed with the Department of Taxation for the period between March 1998 and December 2000. This claim was limited to a request for credit toward Arizona sales tax paid by SCE to Peabody.

21. On January 31, 2003, after the Department denied SCE's claims for refund for the time period between March 1998 and December 1999, SCE submitted a Petition for Redetermination limited to those periods arguing for the first time that its consumption of coal at the Mohave Plant was exempt based on the dormant Commerce Clause and that the taxable measure should not have included SMCRA and Black Lung payments, but SCE did not provide amended returns.

22. Thereafter, on October 27, 2003, SCE submitted a letter with revised returns referring to new claims but failed to articulate the grounds for its revised claims.

23. In November of 2003, SCE submitted a brief to the Nevada Tax Commission alleging, in the alternative, that either: (1) SCE's consumption of coal at the Mohave Plant was entirely exempt from Nevada's use tax; or (2) SCE is entitled to a refund based on its inadvertent inclusion of royalties and transportation charges in the measure of its use tax obligation. The brief also alleged that SCE is entitled to a refund based upon taxes and fees remitted to Arizona, the United States, and the Navajo Nation.

24. After a previous decision on SCE's refund request was voided by the Nevada Supreme Court, the Nevada Tax Commission held open hearings on the claims for refund on September 9, 2008, and December 1, 2008.

25. At the December 1, 2008, hearing the Commission voted to deny SCE's refund claims.

26. On March 2, 2009, the Commission served its final written decision, dated February 27, 2009, denying SCE's claims for refund (Ex. E to Plaintiff's Second Amended Complaint).

27. SCE did not pay any sales tax to the State of Arizona on its purchase of the coal slurry. Any tax was paid by Peabody to the state of Arizona.

28. SCE did not pay any taxes to the United States or the Navajo Nation or Hopi Tribe on its purchase of coal slurry. Any tax was paid by Peabody to the state of Arizona.

29. SCE did not pay taxes to the State of Nevada imposed pursuant to Chapter 362 of the Nevada Revised Statutes ("NRS").

30. SCE has not been taxed differently than any other similarly situated taxpayer on the use of coal in the state of Nevada nor any other tax payer who has had a product delivered to Nevada for use in this State.

31. SCE did not suffer any discrimination in fact in comparison to any other purchaser of coal in Nevada.

32. SCE has not suffered any injury as a result of the exemption in NRS 372.270 that would entitle it to retroactive relief.

CONCLUSIONS OF LAW

1. Nevada imposes a sales tax upon retailers for the privilege of selling tangible personal property at retail in Nevada. NRS 372.105. In addition to the sales tax, Nevada imposes a use tax upon consumers for the storage, use or other consumption of tangible personal property in Nevada. NRS 372.185 and NRS 374.190.

2. The use tax is imposed with respect to tangible personal property ". . . purchased from any [out-of-state] retailer on or after July 1, 1955, for storage, use or other consumption in [Nevada]." NRS 372.185(1).

3. The tax applies to tangible personal property which was acquired out-of-state but which would have been subject to sales tax if the sale had occurred in Nevada. NRS 372.185(2).

4. The use tax is complementary to the sales tax and generally applies when tangible personal property avoids the imposition of sales tax at a point of purchase outside of Nevada. *Nevada Tax Comm'n v. Nevada Cement Co.*, 116 Nev. 877, 8 P.3d 147 (2000). *See also Sparks Nugget, Inc. v. State of Nevada ex rel. Dep't of Taxation*, 124 Adv. Op. No. 15 (March 27, 2008) ("any non-exempt retail sales of personal property that have escaped sales tax are nonetheless taxed when the property is utilized in the state").

5. SCE paid use tax pursuant to NRS 372.185 beginning in 1970 on the coal slurry.

6. NRS 372.185 provides:

> 1. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1955, for storage, use or other consumption in this State at the rate of 2 percent of the sales price of the property.
> 2. The tax is imposed with respect to all property which was acquired out of state in a transaction that would have been a taxable sale if it had occurred within this State.

7. Because there is no coal mined in Nevada, any sale of coal in Nevada would necessarily be subject to either sales or use tax. The transfer of title to the coal slurry took place in Nevada and pursuant to the Mohave Project Coal Supply Agreements, Nevada law governs.

8. The fundamental objective of the dormant Commerce Clause is "preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Gen. Motors Corp. v. Tracy*, 519 U.S. 279, 299 (1997).

9. When challenging a state tax based on the dormant Commerce Clause, the taxpayer has the burden to demonstrate that the state tax in question does, in fact, violate the Commerce Clause of the United States Constitution. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983).

10. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court set out a test to determine whether a state tax provision violates the Commerce Clause. A state tax provision will survive a Commerce Clause challenge so long as the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services

provided by the state. *See Quill v. N. Dakota*, 504 U.S. 298 (1992) (quoting *Complete Auto Transit v. Brady*).

11. The use tax paid by Taxpayers pursuant to NRS 372.185(1) does not violate the dormant Commerce Clause under the Constitution of the United States. *Great Am. Airways v. Nevada State Tax Comm'n*, 101 Nev. 422, 425 (1985).

12. The United States Supreme Court has identified the fundamental objective of the dormant Commerce Clause as "preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Gen. Motors Corp. v. Tracy*, 519 U.S. 279, 299 (1997). In this case, SCE has not been treated any differently than any of its market competitors. Since there is no unequal treatment and consequently no impediment to free trade, SCE's claim is not within the zone of interests to be protected by the Commerce Clause.

13. There are no facts in the record to support a finding that SCE, by paying use tax on its purchase of the coal slurry, is being discriminated against in comparison to a similarly situated taxpayer. To hold otherwise would be to give an unpalatable windfall to SCE.

14. SCE has not been subject to an illegal or improper tax that would entitle them to a refund of use tax.

15. There is no evidence in the record that SCE's market competitors have claimed an exemption from the payment of Sales and Use tax pursuant to NRS 372.270 on the purchase of coal.

16. Further, the Nevada Supreme Court in the *Sierra Pacific Power Company, et al* case held that NRS 372.270 was not severable and that it was to be stricken down in its entirely. *Sierra Pacific Power Company, et al. v. The State of Nevada, Department of Taxation*, 130 Nev. Adv. Op. 93 (Dec. 04, 2014). Therefore, it cannot be used to create an agreement that there was a

benefit to any Nevada mining operation that would reflect a different treatment to an in state operation.

17. Dormant Commerce Clause case law makes clear that violations must be based on actual injury and it is the burden of the taxpayer to prove the injury. In *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481 (1932), the United States Supreme Court wrote: "Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries." The practical effect here is that there was no discrimination.

18. Further, the United States Supreme Court in *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dep't of Bus. Regulation of Florida*, 496 U.S. 18 (1990) analyzed the available remedies when a tax scheme is found to violate the dormant Commerce Clause. *McKesson* dealt with a Florida liquor tax that was found to discriminate against interstate commerce. The case addresses the means to address the injury suffered by a taxpayer in competition with a taxpayer that received beneficial treatment.

The Court concluded that the State had options available for addressing the injury. The State could refund the "difference between the tax [petitioner] paid and the tax [petitioner] would have been assessed were it extended the same rate reductions that **its competitors actually received.**" *Id.* at 40 (emphasis added).

Given the fact that SCE has not provided any facts to suggest that an actual competitor with SCE received tax rate reductions or exemptions that caused injury to SCE, there should be no applicable remedy.

19. The United States Supreme Court wrote:

Thus, in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express

discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply. The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.

Gen. Motors Corp. v. Tracy, 519 U.S. 279, 300 (1997).

20. The Legislature enacted NRS 372.270 which provides "the gross receipts from the sale of and the storage, use or other consumption in this State of, the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS" are exempt from sales and use tax. NRS Chapter 362 levies a tax on the net proceeds of minerals extracted in Nevada. *See* NRS 362.120 *et seq*. In other words, minerals which are subject to the net proceeds of minerals of tax under NRS Chapter 362 are exempted from the sales and use tax assessed in NRS Chapter 372.

21. The exemption in NRS 372.270 is only a partial exemption that applies only to the extent of actual payment of the Nevada net proceeds tax. A.G.O. 76 (June 27, 1955). The Attorney General concluded "that the sales tax is placed upon that portion of the gross receipts constituting the value of the product which is not taxed under the Net Proceeds of Mines Tax." *Id.*

22. The Nevada Supreme Court has ruled that sales and use tax exemptions are to be narrowly construed in favor of taxability. *Shetakis Distributing Co. v. Dep't of Taxation,* 108 Nev. 901, 907, 839 P.2d 1315, 1319 (1992). The language of the Nevada Constitution Article X Section 5(1) and NRS 362.110[1] clearly limits the net proceeds tax, and the corresponding exemption from sales and use taxes, to minerals extracted in Nevada.

[1] NRS 362.110 requires that the net proceeds form be filed by "every person extracting minerals in this State . . ."

23. The coal in question was mined or extracted outside of Nevada and is, therefore, not subject to the net proceeds of minerals tax in Nevada and is not exempted from Nevada sales and use tax by NRS 372.270, which statute has been stricken by the Nevada Supreme Court.

24. Because of the requirement to narrowly construe tax exemptions, SCE is required to clearly show that the sales and use tax exemption of NRS 372.270 was intended to apply to coal mined outside Nevada. This is not the case.

25. The Constitutional provision is not ambiguous to a reasonably informed person but clearly applies only to minerals extracted in Nevada.

26. The Nevada Supreme Court in the *Sierra Pacific Power Company et al* case held that there was no refund available to the utility company in that case because there had been no actual injury. *Sierra Pacific Power Company, et al. v. The State of Nevada, Department of Taxation*, 130 Nev. Adv. Op. 93 (Dec. 04, 2014). Here, as in that case, SCE did not pay any higher tax than did its competitors. No competitor gained a competitive advantage under the tax scheme.

Although the exemption to the use tax set forth in NRS 372.270 is unconstitutional and in violation of the Dormant Commerce Clause, the use tax itself is not unconstitutional. Thus, the tax itself complained of was lawfully assessed. NRS 372.270 has no applicability because there was no competitor that obtained an advantage thereunder; and, as such, there was no actual discrimination against interstate commerce. *See Sierra Pacific Power Company, et al. v. The State of Nevada, Department of Taxation*, 130 Nev. Adv. Op. 93 (Dec. 04, 2014). In fact, to not charge a use tax would have given a benefit to SCE which other taxpayers did not enjoy. SCE is on an even playing field with all such companies in the state of Nevada in regard to this issue.

27. SCE is not entitled to a credit for the Arizona Transaction Privilege Tax that Peabody paid to the State of Arizona.

NAC 372.055 provides,

In determining the amount of use tax that is due from a taxpayer, the Department will allow a credit toward the amount due to this State in an amount equal to sales tax legitimately paid for the same purchase of tangible personal property to a state or local government outside of Nevada, upon proof of payment deemed satisfactory to the Department. Here there was no "same purchase." SCE paid no direct tax to the state of Arizona.

In the contract between the parties SCE agreed to reimburse Peabody as part of the sale price the taxes that Peabody paid to Arizona. This reimbursement was a part of the purchase price SCE paid to Peabody for the coal slurry. The State of Nevada was entitled to collect use tax measured by the entire price of the coal slurry. HELLERSTEIN, STATE TAXATION, ¶ 17.08 (3d ed. 2013).

Even assuming that SCE was entitled to a credit for sales tax Peabody paid, this credit does not apply to the Arizona Transaction Privilege Tax because in this context it is not a sales tax, it is levied on a seller's, Peabody's, gross receipts rather than each individual sale and is for the privilege of doing business in the State of Arizona. *Arizona Dep't. of Revenue v. Robinson's Hardware,* 721 P.2d 137, 141 (Ariz. Ct. App. 1986).

28. SCE may not exclude taxes Peabody paid to the federal government from the measure of use tax. In the contract between the parties SCE agreed to reimburse Peabody for taxes and fees that Peabody paid to the federal government. This reimbursement was a part of the purchase price SCE paid to Peabody for the coal slurry. Peabody was the actual taxpayer, not SCE. SCE paid no direct tax to the federal government. The State of Nevada was entitled to collect use tax measured by the entire price of the coal slurry. HELLERSTEIN, STATE TAXATION, ¶ 17.08 (3d ed. 2013).

29. SCE claims that the federal taxes should not have been included in the sales price subject to Nevada use tax under NRS 372.025. Prior to its amendment NRS 372.025 provided,

1. "Gross receipts" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold. However, in accordance with such rules and regulations as the Tax Commission may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor is required to pay to the State or has paid the use tax with respect to the property, and has resold the property before making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

(b) The cost of the materials used, labor or service cost, interest paid, losses or any other expense.

(c) The cost of transportation of the property before its sale to the purchaser.

2. The total amount of the sale or lease or rental price includes all of the following:

(a) Any services that are a part of the sale.

(b) All receipts, cash, credits and property of any kind.

(c) Any amount for which credit is allowed by the seller to the purchaser.

3. "Gross receipts" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) The sale price of property returned by customers when the full sale price is refunded either in cash or credit, but this exclusion does not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The price received for labor or services used in installing or applying the property sold.

(d) The amount of any tax, not including any manufacturers' or importers' excise tax, imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

4. For purposes of the sales tax, if the retailers establish to the satisfaction of the Tax Commission that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed.

In the contract between the parties, SCE agreed to reimburse Peabody for taxes that Peabody paid to the federal government. This reimbursement was a part of the price SCE paid to Peabody for the coal slurry. Again, Peabody was the actual taxpayer, not SCE. The State of Nevada was entitled to collect sue tax measured by the entire price of the coal slurry. HELLERSTEIN, STATE TAXATION, ¶ 17.08 (3d ed. 2013).

Further, the federal taxes paid by Peabody do not fall within the exclusion in NRS 372.025(3)(d) because the taxes did not concern retail sales. The fee imposed by the Surface Mining Control & Reclamation Act of 1977 is an assessment or excise tax on all coal produced for sale by surface or underground mining. *United States v. Tri-No Enterprises, Inc.*, 819 F.2d 154, 158 (7th Cir. 1987). The tax imposed by the Black Lung Benefits Revenue Act of 1977 is also an excise tax. *See e.g. Warrior Coal Mining Co. v. U.S.*, 72 F.Supp. 2d 747 (W.D. Ky. 1999)

and *Costain Coal Inc. v. U.S.*, 126 F.3d 1437 (C.A. Fed. 1997). Since the federal taxes Peabody paid pursuant to the Surface Mining Control & Reclamation Act of 1977 and the Black Lung Benefits Revenue Act of 1977 are excise taxes and not retail sales taxes, the exclusion does not apply.

30. SCE is not entitled to exclude from the measure of use tax taxes Peabody and/or Black Mesa paid to the Navajo Nation and Hopi tribe. In the contract between the parties SCE agreed to reimburse Peabody for taxes that Peabody and/or Black Mesa paid to the Navajo nation and/or the Hopi Tribe. This reimbursement was a part of the price SCE paid to Peabody for the coal slurry. Again, Peabody was the actual taxpayer, not SCE. The State of Nevada was entitled to collect use tax measured by the entire price of the coal slurry. HELLERSTEIN, STATE TAXATION, ¶ 17.08 (3d ed. 2013)

As set forth above, NRS 372.065(3)(d) excludes, "the amount of any tax, not including any manufacturers' or importers' excise tax, imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer" from the definition of sales price. The Navajo Nation Business Activity Tax and Possessor Interest Tax do not fall within this exclusion because these are not taxes imposed with respect to retail sales. The Business Activity Tax imposed by the Navajo Nation is a tax on the privilege of doing business on the Navajo Nation lands. *Pittsburg & Midway Coal Mining Co., v. Watchman,* 52 F.3d 1531, 1535 (10th Cir. 1995). The Possessory Interest Tax levied by the Navajo Nation is based on the value of property leased on tribal lands. *Peabody Coal Co. v. Navajo Nation,* 75 F.3d 457, 468 (9th Cir. 1996). These are not retail sales taxes and there is no basis for not including them in the sales price of the property used to compute the measure of the use tax.

31. SCE is not entitled to exclude from the measure of use tax taxes paid to the state of Arizona. SCE argues that it should not have paid use tax on amounts paid to Peabody for the

Arizona Ad Valorem Tax and the Arizona Transaction Privilege Tax, "because such amounts are not includable in the sales price subject to Nevada use tax under NRS 372.065." This argument fails because these taxes are not taxes on retail sales.

In other words, sales price does not include a tax imposed on a retail sale. The exclusion does not apply to Peabody's sales of coal to SCE because the taxes Peabody paid were not taxes on retail sales. The Arizona Transaction Privilege is not a tax on a retail sale. *See Arizona Dept. of Revenue v. Robinson's Hardware*, 721 P.2d 137 (Ariz. App. 1986); *In re Inselman,* 334 B.R. 267 (D.Ariz., 2005); and, *City of Phoenix v. West Publishing Co.,* 712 P.2d 944, 946-47 (Ariz. Ct. App. 1986). The Arizona Ad Valorem Tax is also not a sales tax; rather, it is a property tax paid to the State of Arizona based upon the assessed valuation of the property. *Bahr v. State of Arizona,* 985 P.2d 564, 565 (Ariz. Ct. App. 1999).

As such SCE may not exclude from the measure of use tax, taxes that Peabody paid to the state of Arizona.

32. SCE is not entitled to exclude transportation costs from the measure of use tax. Prior to its amendment in 2002 NAC 372.101 provided,

1. Except as otherwise provided in subsection 3, any charge for freight, transportation or delivery included in the sale of tangible personal property is subject to sales and use taxes.
2. Any charge for freight, transportation or delivery that appears on the invoice of the seller is part of the selling price even if stated separately and is not deductible from the price of the property as shown on the invoice.
3. A charge for freight, transportation or delivery is not taxable if:
   a. It is invoiced to the purchaser by the freight carrier; and
   b. Title to the property passes before shipment.

A charge for freight, transportation or delivery that is not connected with the sale of tangible personal property is a charge for a service and is not subject to sales and use taxes.

Transportation costs were included in the calculation of use tax at the time SCE incurred the tax liability. Therefore, SCE is not entitled to exclude from the sales price the amounts it paid for transportation costs.

33. Based on the evidence before the court, SCE is not entitled to any refund on its payment use tax on its consumption of a coal slurry product at the Mohave Generating Station in Nevada.

34. Based on this decision, this Court does not have to reach a decision on whether the coal lost its identity when it became coal slurry with the application of the transformation process.

DECISION

Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that the relief prayed for by the Plaintiff in its Second Amended Complaint is DENIED and judgment is awarded to the Defendant.

IT IS SO ORDERED.

Dated this 17th day of December, 2014.

JAMES T. RUSSELL
DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned, an employee of the First Judicial District Court, hereby certifies that on the 17th day of December, 2014, I served the foregoing to counsel of record, as follows:

☒ By depositing a copy thereof in the United States Mail at Carson City, Nevada, postage paid, addressed as follows:

Norman Azevedo, Esq.
405 North Nevada Street
Carson City, Nevada 89703

Charles C. Read, Esq.
Jones Day
555 S. Flower Street,
Fiftieth Floor
Los Angeles, CA 90071-2300

Gina C. Session, Esq.
Andrea Nichols, Esq.
Chief Deputy Attorney General
100 N. Carson Street
Carson City, Nevada 89701

☒ By emailing a copy thereof addressed as follows:

Gina Session: gsession@ag.nv.gov
Andrea Nichols: anichols@ag.nv.gov
Norman Azevedo: norm@nevadataxlawyers.com
Charles C. Read: ccread@jonesday.com

Samantha Peiffer, Esq.
Law Clerk, Dept. 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

SOUTHERN CALIFORNIA EDISON,
Appellant,
vs.
THE STATE OF NEVADA DEPARTMENT OF TAXATION,
Respondent.

No. 67497

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District First Department 1

County Carson City Judge Russell

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

2. Attorney filing this docketing statement:

Attorney Norman J. Azevedo Telephone 775-883-7000

Firm 405 North Nevada Street, Carson City, NV 89703

Address

Appellant is also represented by Charles Read (pro hac vice application to be filed) and Haley McIntosh, Jones Day, 555 S. Flower Street, Los Angeles, CA 90071

Client(s) Southern California Edison Co.

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Gina G. Session, Chief Deputy Telephone 775-684-1207

Attorney General

Firm 100 N. Carson Street, Carson City, NV 89701

Address

Client(s) The State of Nevada, ex rel. Department of Taxation

Attorney _____ Telephone _____

Firm _____

Address

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- ☒ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination
- ☐ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify): _____
- ☐ Divorce Decree:
  - ☐ Original ☐ Modification
- ☐ Other disposition (specify): _____

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody N/A
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Case No. 48292 - Chanos v. Nevada Tax Commission and Southern California Edison
Case No. 55228 - Southern California Edison v. The First Judicial District Court

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. Nature of the action. Briefly describe the nature of the action and the result below:

See attached.

9. Issues on appeal. State specifically all issues in this appeal (attach separate sheets as necessary):

See attached.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

N/A

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☒ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Trial. If this action proceeded to trial, how many days did the trial last? 8

Was it a bench or jury trial? bench

14. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice? No

TIMELINESS OF NOTICE OF APPEAL

15. Date of entry of written judgment or order appealed from 12/17/14

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

16. Date written notice of entry of judgment or order was served 12/17/14

Was service by:

☐ Delivery

☒ Mail/electronic/fax

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☒ NRCP 52(b) Date of filing 12/24/14; served on 12/24/14 by mail

☒ NRCP 59 Date of filing 12/24/14; served on 12/24/14 by mail

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See* AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion 1/30/15

(c) Date written notice of entry of order resolving tolling motion was served 2/3/15

Was service by:

☐ Delivery

☒ Mail

18. Date notice of appeal filed 2/26/15

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

N/A

19. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other

NRAP 4(a)(4)

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)	☐ NRS 38.205
☐ NRAP 3A(b)(2)	☐ NRS 233B.150
☐ NRAP 3A(b)(3)	☐ NRS 703.376
☐ Other (specify)	

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRAP 3A(b)(1) allows an appeal to be taken from a final judgment entered in an action commenced in the court in which the judgment is rendered. SCE appeals from the final judgment in Case No. 09-0C-00016-1B in the First Judicial District.

21. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Plaintiff - Southern California Edison Co.
Defendant - The State of Nevada, ex rel. Department of Taxation

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

N/A

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

See attached.

23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

24. If you answered "No" to question 23, complete the following:

(a) Specify the claims remaining pending below:

N/A

(b) Specify the parties remaining below:

N/A

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes
☐ No

N/A

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes
☐ No

N/A

25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

N/A

26. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Southern California Edison Company
Name of appellant

Norman J. Azevedo
Name of counsel of record

March 25, 2015
Date

Signature of counsel of record

Carson City, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 25th day of March, 2015, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Gina Sessions, Esq.
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701

Dated this 25th day of March, 2015

Signature