IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN CALIFORNIA EDISON, Appellant, v. THE STATE OF NEVADA, *ex rel.* DEPARTMENT OF TAXATION, Respondent.	Supreme Court No. 67497 **APPELLANT'S APPENDIX**

Appeal from the First Judicial District Court, Carson City

The Honorable James T. Russell

District Court Case No. 09-OC-00016-1B

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I. INTRODUCTION

Appellant Southern California Edison Company ("SCE") respectfully replies to the Answering Brief of Respondent Nevada Department of Taxation ("Department"). While the Department does not appeal the District Court's conclusion that NRS 372.270 violates the Commerce Clause, the Department argues that SCE is not entitled to a refund of the use taxes it paid on coal. Such a result is inconsistent with SCE's constitutional right to "meaningful backward-looking relief." *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990). Being forced to pay use tax on out-of-state coal during the same time that an unconstitutional exemption was available for in-state minerals caused economic injury to SCE, and Nevada law mandates a refund as the exclusive remedy available for a taxpayer in SCE's position.

SCE's alternative claim that it is at a minimum entitled to a credit for the Transaction Privilege Tax ("TPT") paid in Arizona merits this Court's special attention because the Department's position presents an entirely separate issue of unconstitutional burden on interstate commerce that has not been addressed by this Court. As the last section of this Reply demonstrates, the Department's position relies heavily on the name of the TPT, in direct contradiction of the U.S. Supreme Court's instruction to consider "not the formal language of the tax statute but rather its practical effect." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

Throughout its Answering Brief, the Department sets forth irrelevant issues and seemingly attributes to SCE arguments that it has never made. SCE begins by responding to four of the Department's most irrelevant and misleading arguments. First, the Department's repeated references to the size of the refund at issue make clear that it does not have the law on its side. *See* Answering Brief at 1, 19, 20, 21. The amount at issue has nothing to do with the merits of a claim for refund. The U.S. Supreme Court has expressly declared that the cost to the State of a potential

refund is no justification for keeping it. *McKesson*, 496 U.S. at 51 n.35. The size of SCE's refund claim is thus irrelevant in fashioning a proper remedy here. Likewise, the economic effect the refund may have on the State provides no basis to withhold it. *See id.* at 44-45 (a state's ability to enact procedural restrictions on refund claims protects its ability to engage in sound fiscal planning). This is a dispute involving a taxpayer who was subjected to an unconstitutional tax scheme. Requiring the Department to return money it never should have collected in the first place should not be a controversial decision.

Second, SCE has never argued that there are significant coal deposits or coal mining in Nevada. *See* Answering Brief at 12. Nor is it claiming that Nevada taxes the "sale of coal extracted from mines in Nevada more favorably than it does the use or consumption of coal extracted from out-of-state." Answering Brief at 20, 21. SCE is well-aware that at least one other taxpayer been taxed by the State on its use of out-of-state coal in Nevada; the *Sierra Pacific* case is discussed extensively in SCE's Opening Brief. *Sierra Pac. Power Co. v. State Dep't of Taxation*, 338 P.3d 1244 (Nev. 2014). The first argument in the Department's Answering Brief is that NV Energy paid use tax on coal and SCE is a similarly situated taxpayer, so that it would violate the Taxpayers Bill of Rights to refund use tax to SCE. Answering Brief at 17-19. But nothing in the Bill of Rights justifies the continued denial of a refund that is lawfully due. As set forth in its Opening Brief, SCE urges this Court to reconsider its interpretation of *McKesson* in *Sierra Pacific,* but even if it does not, SCE is entitled to a refund because the evidence from its de novo trial differs significantly from that in *Sierra Pacific's* petition for judicial review.

Third, throughout its Answering Brief, the Department argues about the nature of the coal purchased by SCE, including its "processing" and transportation, and suggests that the statutes under which SCE seeks relief simply do not apply. *See, e.g.,* Answering Brief at 7-12, 18-19, 23. But this issue is not on appeal and not before this Court. While it is true that the District Court referred to the property

on which SCE paid use tax as "coal slurry product," it did not "reach a decision on whether the coal lost its identity when it became coal slurry with the application of the transformation process." JA, vol. II, pp. 259 (Finding of Fact 7) & 274 (Conclusion of Law 34). Accordingly, the Department's arguments regarding the nature of the coal are simply distractions to the issues on appeal and will not be addressed in this Reply.

Finally, SCE does not argue that the imposition of Nevada's use tax is *per se* unconstitutional or beyond the taxing power of the State. *See* Answering Brief at 29, 33; *Great Am. Airways v. Nev. Tax Comm'n,* 705 P.2d 654 (Nev. 1985). It is the Department's failure to exempt out-of-state minerals that is unconstitutional.

For the reasons below and those set forth in SCE's Opening Brief, the Department's arguments should be rejected and the District Court's Decision should be reversed.[1]

II. ARGUMENT

A. SCE Is Entitled to a Full Refund Under A Plain-Language Reading of NRS 372.185(2) and NRS 372.270 and Interpreting These Statutes Together Avoids Constitutional Issues

As discussed in SCE's Opening Brief, this Court should interpret NRS 372.270 and NRS 372.185(2) to prohibit the Department from imposing use tax on the importation of any mineral – including coal – that would be exempt from the comparable sales tax if it were mined in Nevada. This approach would avoid the constitutional problems created by the Department's interpretation of NRS 372.270, which fails to exempt out-of-state coal because no coal is mined in Nevada. *See* Opening Brief at 9-11. In *Sierra Pacific,* this Court found that "the district court did not err in striking NRS 372.270 in its entirety." But striking the statue does not

[1] SCE refers to the District Court's Amended Findings of Fact, Conclusions of Law, and Decision, dated December 17, 2014 (Joint Appendix ("JA"), vol. II, pp. 276-293) as its "Decision."

remedy the unconstitutionality of Nevada's mineral taxation scheme.[2] Without NRS 372.270's exemption, taxpayers today *would pay* use tax on out-of-state minerals used in Nevada but *would not pay* sales tax on in-state minerals pursuant to Article 10, Section 5 of the Nevada Constitution which prohibits the imposition of sales or use tax "upon a mineral or its proceeds until the identity of the proceeds as such is lost." To avoid this constitutional violation, NRS 372.270 is necessary and should be interpreted with NRS 372.185 to exempt both in-state and out-of-state minerals from sales and use taxes. Accordingly, SCE is entitled to a full refund of use tax paid on out-of-state coal.

The Department claims that NRS 372.185(2) "does not apply" to SCE because the transfer of title to the coal and risk of loss occurred in Nevada and therefore the sale occurred in Nevada. Answering Brief at 19. As discussed in more detail below, contract formalities such as title and risk of loss are not the exclusive determinants of where and if a sale occurs for tax purposes. Transfer of possession of the coal occurred in Arizona, and both Arizona and Nevada define a sale for tax purposes as occurring where there is a transfer of possession.[3] The Department's argument of a Nevada sale is undermined by the fact that it assessed a *use tax* pursuant to NRS 372.185 rather than a *sales tax*. It is far too late for the Department now to argue it should have imposed a sales tax. *See* NRS 360.355. If a use tax was wrongly imposed on SCE, that is a separate reason for a refund and the Department neither refunded the use tax paid by SCE nor timely imposed a sales tax deficiency.

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[2] Nor does simply striking the statute provide a sufficient remedy to taxpayers injured by paying use tax on out-of-state minerals while an unconstitutional exemption was available for in-state minerals. *See supra* Section I(B)(4).

[3] *Compare* NRS 372.060(1) *with* Ariz. Rev. Stat. 42.5001(14).

Ironically, the Department relies entirely on the "plain language" of the statute for its position. *See* Answering Brief at 19. The statutory language in question, however, states that use 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." NRS 372.185(2) (emphasis added). The statute's application is not, as the Department suggests, limited only to sale transactions where title passed out-of-state. The legislature would have said so if that is what it intended. This Court should not infer such intent absent any supporting evidence. *See Worldcorp v. State, Dep't of Taxation*, 944 P.2d 824, 826 (Nev. 1997) ("It is well settled in Nevada that when statutory language is clear on its face, its intention must be deduced from such language."). There is no dispute that the coal in this case originated from the Black Mesa mine in Arizona; thus it must be considered property that SCE acquired out of state. NRS 372.185(2) requires nothing more.

The Department next argues that NRS 372.185(2) is not applicable because coal is not mined in Nevada, and all sales of coal brought into the state are subject to use tax. *See* Answering Brief at 19-20. But the existence of an actual in-state coal mine is irrelevant to the plain language analysis.[4] By conditioning the effect of NRS 372.185(2) on the existence of in-state mines, the Department effectively seeks an import tariff on out-of-state minerals and discriminates against interstate commerce. That is unconstitutional regardless of whether a particular mineral is produced in Nevada. *See* Opening Brief at 12-13, 17-19.

B. SCE Is Entitled to a Full Refund Because NRS 372.270 As Interpreted By the Department Violates The Commerce Clause

If the Court does not adopt the plain-language reading of NRS 372.270 and 372.185(2) discussed above, the Court should hold that NRS 372.270's mineral

[4] The Department's argument ignores the hypothetical situation that *if* the Black Mesa mine were located in Nevada and SCE were purchasing its coal for Mohave, the coal would be exempt from sales tax under NRS 372.270.

exemption to Nevada's use tax violates the Commerce Clause and order a refund of the use tax paid by SCE. The Department does not dispute the exemption's unconstitutionality. *See, e.g.,* JA, vol. V, p. 1020; Answering Brief at 28. Instead, its Answering Brief argues that SCE lacks standing and is entitled to no relief for its payment of use tax pursuant to an unconstitutional tax scheme. Each of its arguments must be rejected.

1. SCE has standing to pursue its Commerce Clause claim

The tax experts for both parties agreed that SCE has standing to pursue its claims. Professor Richard Pomp testified that he has "never understood a taxpayer not to have standing to challenge a tax that it's paid." Appellant's Supplemental Appendix ("SA"), p. 1548:23-24. It is "pretty black-letter law," he said, "[y]ou pay the tax, of course you have standing to challenge it." SA, p. 1549:14-15; *see also* 1 Laurence H. Tribe, *American Constitutional Law* § 3-17, at 421 (3d ed. 2000) ("A taxpayer of course has standing to challenge the validity or application of a taxing statute in determining his or her own tax obligation."). The Department's expert Professor John Swain agreed, noting that "we get to challenge our taxes." SA, p. 1550:9-11. Nonetheless, the Department challenges SCE's standing. Even if standing can be raised at any time, there are no new arguments or new facts to consider. The Tax Commission and the District Court proceeded to decide the merits of SCE's claims, as did this Court in *Sierra Pacific* with respect to NV Energy's similar claims. *Sierra Pac.,* 338 P.3d at 1245.

As a predicate to judicial relief, Nevada courts require "an actual justiciable controversy." *In re Amerco Derivative Litig.*, 252 P.3d 681, 694 (Nev. 2011) (*citing Doe v. Bryan*, 728 P.2d 443, 444 (Nev. 1986) ("The issue of standing is dispositive of this appeal…Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief. Moreover, litigated matters must present an existing controversy, not merely the prospect of a future problem.")). The Department cites a mandamus case to argue that a "zone of

interests" test applies in this case. Answering Brief at 22-23 (citing *Heller v. Legislature of the State of Nevada,* 120 Nev. 456, 461 n.3 (Nev. 2004)). In *Heller,* this Court explained that to establish standing in a mandamus proceeding, "petitioner must demonstrate a 'beneficial interest' in obtaining writ relief... . To demonstrate a beneficial interest sufficient to pursue a mandamus action, a party must show a direct and substantial interest that falls within the zone of interest to be protected by the legal duty asserted." *Id.* at 460-61 (internal citations omitted). Whether or not this standard for establishing standing applies in non-mandamus proceedings, SCE meets the test.

NRS 372.680 provides standing to file a refund action. There is no limitation set forth in NRS 372.680 limiting the taxpayer's standing to seek a refund other than to bring the action after receiving a final decision from the Commission on the taxpayer's refund claim. *See also* NRS 372.700. SCE has standing to assert a violation of the Commerce Clause which involves claims for refund of millions of dollars of use tax *already paid* by SCE. The case presents an actual controversy for resolution by this Court – not a speculative future problem. See *Worldcorp*, 944 P.2d at 828 (holding that taxpayers had standing to challenge a taxing scheme that burdened interstate commerce by providing a direct commercial advantage to local businesses over out-of-state businesses). Moreover, SCE seeks redress for a tax scheme that discriminates against interstate commerce – nothing could be more related to the purpose of the Commerce Clause. *See Camps Newfound/Owatonna Inc. v. Town of Harrison*, 520 U.S. 564, 574 (1997) (finding that the Commerce Clause applied to a claim that a statute discriminated against interstate commerce by denying a property tax exemption to charitable institutions principally operated for out-of-state residents). As such, the Court should reject the Department's "zone of interest" argument.

The Department also makes another attack on SCE's standing, which, if successful, would leave no one with the ability to challenge the constitutional

violation in this case. *See* Answering Brief at 24-25. It argues that SCE's standing must be analyzed from the perspective of Peabody Western Coal Company ("Peabody"), the Arizona seller of the coal purchased by SCE. *Id.* It claims Peabody lacks standing because it "had a requirements contract with SCE and had no competitors for providing the primary fuel to Mohave." *Id.* at 25. According to the Department, that fact distinguishes this case from the discussion of standing in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). But contrary to the Department's arguments, these cases support a finding of standing in this case. In *Bacchus*, the U.S. Supreme Court explained:

> The State presents a claim not made below that the wholesalers have no standing to challenge the tax because they have shown no economic injury from the claimed discriminatory tax. The wholesalers are, however, liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills. Furthermore, even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business. The wholesalers plainly have standing to challenge the tax in this Court.

468 U.S. at 267; *see also General Motors*, 519 U.S. at 286-87 (adopting its reasoning in *Bacchus* to find that the plaintiff had standing). No matter whether considered from the perspective of SCE or Peabody, the use tax imposed by the Department increased the cost of the coal. Thus, even standing in Peabody's shoes, SCE "plainly [has] standing to challenge the tax in this Court."

2. SCE's right to a refund is not contingent upon showing a specific "favored competitor" in this case

As set forth in its Opening Brief, SCE respectfully requests the Court reconsider its interpretation of *McKesson* and find that SCE is entitled to a refund of the use tax paid on its coal purchases without regard to the actual competitive effects of Nevada's unconstitutional mineral taxation scheme. *McKesson,* 496 U.S. at 48 ("The [unconstitutional] tax injured petitioner...because it left petitioner poorer in an absolute sense than before..."); *United States v. Windsor,* _ U.S. _, 133 S. Ct. 2675, 2684-85 (2013) ("'being forced to pay [an unconstitutional] tax causes a real and immediate economic injury to the individual taxpayer'" and petitioner "suffered a redressable injury when she was required to pay ... taxes from which...she was exempt...") (internal citation omitted); *see also* Opening Brief at 13-19.

The Department cites a handful of cases that purportedly support its position that a showing of actual discrimination is required under *McKesson*, but none require a taxpayer to prove the existence of an advantaged competitor to obtain a refund. Most of the Department's cited cases involve determinations regarding the *constitutionality* of taxes, not remedy issues. The District Court in this case concluded that NRS 372.270 "is unconstitutional and in violation of the Dormant Commerce Clause." JA, vol. II, pp. 286 (Conclusion of Law 26). The Department did not appeal. Accordingly, it is the *remedy* and not the Commerce Clause violation itself at issue.

The "*Vulcan Lands* cases" do involve remedies, and the Department attempts to distinguish them from SCE's case for good reason. *See* Answering Brief at 27-28. Indeed, that line of cases is highly instructive here. It begins with *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999), where the U.S. Supreme Court declared Alabama's franchise tax on foreign corporations facially discriminatory and thus unconstitutional. The Court reasoned that:

> Alabama law gives domestic corporations the ability to reduce their franchise tax liability simply by reducing the par value of their stock, while it denies foreign corporations that same ability. And no one claims that the different tax rates for foreign and domestic corporations offset the difference in the tax base. The tax therefore facially discriminates against interstate commerce and is unconstitutional unless the State can offer a sufficient justification for it.

Id. at 169 (internal citations omitted). The Court concluded that "this discrimination is borne out in practice, as the record, undisputed here, shows that the average domestic corporation pays only one-fifth the franchise tax it would pay if it were treated as a foreign corporation." *Id.* That is not unlike the competitive advantage in-state mineral producers – including geothermal electricity producers – received from NRS 372.270. JA, vol. VI, pp. 1295:10-1297:20 (effective rate of net proceeds tax was one percent for in-state producers while effective use tax rate for SCE was "in the neighborhood of 6, 7 percent in total"). Upon finding the statute unconstitutional, the Court remanded the case for further proceedings not inconsistent with its decision. *S. Cent. Bell*, 526 U.S. at 171. South Central Bell settled before the state court could fashion a remedy. *See Vulcan Lands, Inc. v. Surtees*, 6 So. 3d 1148, 1151 (Ala. Ct. App. 2007), *aff'd in part, rev'd in part sub nom. Ex parte Surtees*, 6 So. 3d 1157 (Ala. 2008).

In the meantime, Vulcan Lands, Inc., a New Jersey company paying Alabama's unconstitutional franchise tax sought a refund based on the *South Central Bell* decision. 526 U.S. at 1151-52. After some initial discovery, the trial court granted summary judgment for the State of Alabama. The trial court (which was reversed) set forth reasoning almost identical to the Department's arguments in this case. *Vulcan Lands, Inc.*, 6 So. 3d at 1152-53 ("[Vulcan Lands] offered no specific evidence of a domestic competitor, and consequently there is no injury and therefore no refund due.") (internal citation omitted). The appellate court firmly rejected this reasoning. *Id.* at

1155. It concluded that "because the holding of the United States Supreme Court in *South Central Bell Telephone Co. v. Alabama* established, as a matter of law, that Alabama's franchise-tax scheme discriminated against Vulcan Lands, Vulcan Lands was not required to prove that it had a domestic competitor who was favored by Alabama's franchise-tax scheme in order to establish its right to a refund." *Id.* The appellate court analyzed and discussed most of the cases the Department relies upon here, including *McKesson*, in its decision. *See id.* at 1153-55.

The State of Alabama appealed to the Alabama Supreme Court, which affirmed the appellate court's decision. *Ex parte Surtees*, 6 So. 3d 1157, 1163 (Ala. 2008). The Alabama Supreme Court specifically considered *McKesson*'s guidance concerning the Department's "favored competitor" requirement. *Id.* at 1162-63 ("Seizing on *McKesson*'s use of the term 'favored competitors,' the [State] attempts to support the trial court's holding that Vulcan failed to identify sufficiently a specific competitor for the purpose of proving that it suffered an injury."). It concluded that "there is no indication that, by its use of the term 'competitors,' the Court [in *McKesson*] intended to confine the class of litigants receiving refunds, as the Department proposes, to those that could actually name certain domestic entities that mirrored them in corporate structure and operation." *Id.* The Court remanded the case, so the trial court could fashion a proper remedy for Vulcan Lands. *Id.* at 1164.

Despite the undeniable parallels, the Department claims its position is different from the one rejected in *Vulcan Lands* because it "is not requiring SCE to identify a 'mirror image' domestic taxpayer." Answering Brief at 28. That is, however, precisely what the Department purported to require through its expert testimony. Indeed, the Department's expert Dr. Richard McCann set forth a five-step test to demonstrate discrimination that required far more than just a "mirror image domestic taxpayer." According to Dr. McCann, SCE must show particular

times when Mohave was displaced in the wholesale market by an in-state generator whose bid price was lower specifically because it was exempt from comparable sales tax on its fuel. JA, vol. VII, pp. 1420:22-1421:8. The *Vulcan Lands* courts certainly would have rejected such a claim. *See Ex parte Surtees*, 6 So. 3d at 1163 (affirming appellate court ruling that "Vulcan Lands was not required to prove that it had a domestic competitor who was favored by Alabama's franchise-tax scheme in order to establish its right to a refund."). This Court should reach the same conclusion.

In addition to *McKesson* arguments, SCE also argued that it is entitled to a refund because Nevada's tax scheme violates internal inconsistency and imposes an illegal tariff on interstate commerce in minerals. *See* Opening Brief at 17-19. The Department's primary response to these arguments is that SCE has not properly or timely brought these claims in this case. *See, e.g.,* Answering Brief at 21 (arguing that SCE's operative complaint "never mentions several other theories of relief" sought by SCE with respect to its Commerce Clause Claim and suggesting, for example, that SCE should have specified in its complaint the applicable prong(s) of the U.S. Supreme Court's test for Commerce Clause challenges); *see also id.* at 33, 35. The Department provides no legal support for its arguments, and as explained by this Court, "'[n]otice pleading' requires plaintiffs to set forth the facts which support a legal theory, but does not require the legal theory relied upon to be correctly identified." *Liston v. Las Vegas Metro. Police Dep't,* 908 P.2d 720, 723 (Nev. 1995). Furthermore, "[a] plaintiff who fails to use the precise legalese in describing his grievance but who sets forth the facts which support his complaint thus satisfies the requisites of notice pleading." *Abarra v. State*, 342 P.3d 994, 996 (Nev. 2015) (quoting *Liston,* 908 P.2d at 723). There is no question that SCE's complaint alleges as its Second Claim For Relief that Department's imposition of use tax violates the Commerce Clause and sets forth facts supporting its claims. JA, vol. I, pp. 116-129. Nothing further is required.

The Department's interpretation of NRS 372.270 and NRS 372.185(2) (exempting from use tax only minerals extracted in Nevada) violates internal consistency because purchases and sales of minerals extracted outside of Nevada would always be disadvantaged (taxed more heavily) relative to purchases and sales of minerals extracted in Nevada. *See* Opening Brief at 17-19. In response, the Department misapplies an article discussing the reasons that there can be no internal inconsistency with respect to a "garden variety" sales tax. Professor Pomp's article explains that where a sale occurs wholly in a single state, the internal consistency test is not needed – even if goods sold at some point traveled in interstate commerce or their value was enhanced by work done in another state. In such "garden variety" transactions, there is a single sale in a single state and no danger of multiple sales or use taxes being imposed. In contrast, this transaction occurred in *two* states with taxable events occurring in *two* states (change of possession in Arizona and use in Nevada). Internal consistency is essential in such situations.

The Department further relies on a recent case in Alaska – *Tesoro Corp. v. State of Alaska, Dep't of Revenue*, 312 P.3d 830 (Alaska 2013), but the facts of *Tesoro* are entirely distinguishable. The alleged internal inconsistency in that case actually resulted in favorable treatment for the taxpayer, whereas the admitted internal inconsistency in Nevada's mineral taxation scheme caused SCE to pay millions of dollars because of Nevada's facially discriminatory mineral taxation scheme. That money – not to mention the competitive advantages and disadvantages associated with it – is by no means hypothetical. Thus, *Tesoro* has no relevance in this case.

Nor has the Department rebutted the illegal tariff arguments. SCE has never alleged that the Department "is assessing use tax in order to protect a Nevada coal market." *See* Answering Brief at 35. Instead, SCE alleges that NRS 372.270 and NRS 372.185 operate as a tariff because out-of-state minerals are taxed more

heavily than in-state minerals. *Maryland v. Wynne*, _ U.S. _, 135 S. Ct. 1787, 1805 (2015) ("the internal consistency test and economic analysis... confirm that the tax scheme operates as a tariff and discriminates against interstate commerce, and so the scheme is invalid.").

3. SCE has presented evidence of discrimination

Given the District Court's conclusion that Nevada's mineral taxation scheme is unconstitutional, SCE is entitled to a full refund without showing the existence of advantaged competitors. However, even if a showing of competition were required, SCE has provided evidence that it was disadvantaged by the imposition of the use tax and is entitled to a refund. *See* Opening Brief at 20-24. As summarized in SCE's Opening Brief, SCE presented evidence on competition different than that addressed in the *Sierra Pacific* decision.

The District Court's findings that "SCE has not been taxed differently than ...any other tax payer who has had a product delivered to Nevada for use in this State" (JA, vol. II, p. 281 (Finding of Fact 30)) and "SCE has not suffered any injury as a result of the exemption in NRS 372.270 that would entitle it to retroactive relief" (JA, vol. II, p. 262 (Finding of Fact 32))[5] are unsupported by substantial evidence and must be reversed. *Int'l Fid. Ins. Co. v. State,* 126 P.3d 1133, 1134-35 (Nev. 2006). Both the District Court and the Department assume that the relevant competitive market is coal. But the challenged statute exempts "the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS." *See also* NRS 362.010(2) ("'Mineral' includes oil, gas and other hydrocarbons, but does not include sand, gravel or water, except hot water or steam in an operation extracting geothermal resources for profit."). Nevada's annual Net Proceeds of Minerals Bulletins show that there was significant mining and production of in-state minerals during this period. JA, vol. IV, pp. 735-63, 764-93,

[5] *See also* JA, vol. II, pp. 283-86 (Conclusions of Law 12, 13, 15, 18, 26).

794-824. According to the Department Executive Director's Exemption Report, dated February 1999, the estimated exemptions taken pursuant to NRS 372.270 were $217.7 million (based on March 1998 estimated figures). JA, vol. IV, p. 615.[6] Expert testimony presented by SCE showed that minerals, including copper concentrates, stockpiles and gold slurry extracted, sold, and purchased in Nevada were exempt from sales and use taxes. JA, vol. V, pp. 889-890; vol. VI, pp. 1291:14-1294:5 (S. Byram).

Furthermore, SCE is in the business of producing electricity. For purposes of competition, all producers of electricity are substantially similar entities because all compete with each other regardless of the fuel source used to generate power. JA, vol. VII, pp. 1325:8-1327:21; vol. V, pp. 920-923. Oil, gas, and geothermal resources extracted in Nevada are subject to the net proceeds of mines tax and sales and use of those resources are exempted from sales and use tax under NRS 372.270. JA, vol. IV, pp. 743, 772, 802; vol. V, p. 926. SCE was disadvantaged by buying an interstate fuel (coal from Arizona) rather than in-state fuels. Indeed, Dr. John Jurewitz testified that domestic geothermal producers, in particular, were advantaged by the reduced burden the unconstitutional tax scheme put on their operating margins. JA, vol. VII, p. 1347:8-20. The Department makes complicated arguments regarding the production of electricity at Mohave and SCE's contractual obligation to use coal from the Black Mesa Mine, but it cannot rebut the basic evidence on presented by Dr. Jurewitz that substantially similar entities were competitively advantaged. *See* Opening Brief at 20-23. The District Court's Decision altogether fails to address the evidence presented by SCE regarding this competition.

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[6] The Department's complaints regarding the production of this document lack credibility. *See* Answering Brief at 15. This report was prepared *by the Department* and should have been produced to SCE by the Department during discovery given its clear relevance to the issues in this case.

Nor does the District Court's Decision or the Department's Answering Brief acknowledge the rules governing the confidentiality of tax returns and other taxpayer records and information and the related limitations. *See* NRS 360.255 (previously NRS 372.750); JA, vol. VII, pp. 1382:9-1383:3 (R. Pomp); Opening Brief at 23-24. Instead, the Department misleadingly argues that SCE has failed to identify the tax treatment afforded to other taxpayers on specific transactions. *See, e.g.,* Answering Brief at 14. Requiring such specificity would create an insurmountable obstacle to collecting a refund and would be inconsistent with SCE's right to "meaningful backward-looking relief" as guaranteed in *McKesson.*

4. Striking NRS 372.270 is an insufficient remedy

Under *McKesson,* when a state deprives a taxpayer of a meaningful pre-deprivation remedy (as in Nevada), due process requires the state to provide "meaningful backward-looking relief" in the form of a "clear and certain remedy." *McKesson,* 496 U.S. at 51. Although *McKesson* speaks of three remedy options, Nevada mandates a refund as the exclusive remedy available for a taxpayer in SCE's position. NRS 372.675 provides that "[n]o suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed." NRS 372.630(1) provides:

> If the Department determines that any amount, penalty or interest…has been erroneously or illegally collected or computed, … [and] [i]f approved by the State Board of Examiners, the excess amount collected or paid must…be refunded to the person…

Similarly, NRS 372.690 provides that if a judgment is rendered for the plaintiff, the amount must be credited on the amount of use tax due from the plaintiff and the balance must be refunded to the plaintiff. Consistent with these statutes, a refund has been mandated in Nevada cases where a statue is determined to violate the Constitution. *See, e.g., Nev. Dep't of Taxation v. Scotsman Mfg. Co.,* 849 P.2d 317, 319-20 (Nev. 1993) ("the State now attempts to procedurally bar [petitioner] from

obtaining a refund of the unlawfully exacted taxes. It may not do so... Having forced [petitioner] to pay the disputed tax, the State must now 'undo' the unlawful deprivation by refunding the tax... It is the only effective remedy available..."). The Department altogether fails to respond to this point, and this Court did not address the applicability of these Nevada statutes in its *Sierra Pacific* decision.

Furthermore, the Nevada Constitution prohibits the imposition of tax, other than a net proceeds tax, on minerals. Nev. Const. art. 10, § 5. Because no tax other than the net proceeds of minerals tax may be imposed on minerals, no sales or use taxes may be imposed on minerals (until the identity of the proceeds is lost). The Department therefore cannot retroactively assess sales and use taxes against persons who benefited from the statutory exemption that the lower court found unconstitutional. The statute of limitations also would prevent retroactive assessment. *See* NRS 360.355. Here again, the Department fails to respond to SCE's argument that the only remedy available to the state is to provide SCE a refund.

It is not sufficient to strike down NRS 372.270; a remedy must be provided to affected taxpayers. *See Reich v. Collins*, 513 U.S. 106, 108 (1994) ("what [a state] may not do... is hold out what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists."); *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 444-45 (1998). In this case, the required remedy must be a full refund of use tax paid by SCE on out-of-state coal during the same time that an unconstitutional exemption was available for in-state minerals.

C. SCE Is Entitled To A Credit for the Transaction Privilege Tax Paid to Arizona

The Department claims that the TPT paid in Arizona should not be credited against the Nevada use tax because "the sale clearly took place in Nevada." Answering Brief at 39. For this conclusion, the Department and the District Court

relied entirely on two provisions in the coal purchase agreements: title to the coal and risk of loss pass from Peabody to SCE in Nevada.[7] SCE has never disputed those contract terms, but the tax law of Nevada *and* Arizona define a sale for purposes of sales tax, use tax or TPT as occurring when there is a "transfer of possession." *Compare* NRS 372.060 ("'Sale' means and includes any transfer of title or possession . . . in any manner or by any means whatever") *with* Ariz. Rev. Stat. 42-5001(14) ("'Sale' means any transfer of title or possession . . . in any manner or by any means whatever"). Section 1.1(1) of the Amended Coal Slurry Pipeline Agreement between Peabody and Black Mesa Pipeline – executed at the same time as the coal purchase agreements and to which SCE is a third-party beneficiary – defines "Point of Origin" as "a point in the State of Arizona at which Peabody will deliver and Black Mesa will receive the coal . . . ." JA, vol. III, p. 527. Sections 2.3 and 3.1 of the same agreement state that "Black Mesa shall take possession of the coal on a conveyor running into said coal slurry preparation plant" and that "Peabody, at its expense, shall deliver by said conveyor the coal to be transported hereunder by Black Mesa." JA, vol.III pp. 531, 532.

Because the transfer of possession actually occurred in Arizona, the TPT was paid to Arizona. And, for purposes of seeking the TPT credit, SCE does not dispute the right of Nevada to collect use tax on the coal SCE purchased. This is a classic interstate transaction, where one state has a basis to tax it as a sale because of the transfer of possession in that state, and the second state has a basis to tax the same goods because they are used in that state. All that is required in such a situation is that Nevada provides a credit for the tax already paid on the same transaction in Arizona. Nevada's refusal to do so, however, creates an obvious and

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[7] The District Court's statement that the sale occurred in Nevada is a legal, not a factual determination. As such, it is not entitled to any deference by this Court which exercises its independent judgment on question of law. *Garcia v. Prudential Ins. Co. of Am.*, 293 P.3d 869, 872 (Nev. 2013).

unconstitutional burden on this particular sale of coal *simply because it occurred in interstate commerce.* Nevada's failure to credit the TPT paid in Arizona obviously fails the internal consistency test: if every other state refused to provide such a credit, Arizona goods would always be more expensive simply because they were in interstate commerce.

The Department attempts to avoid the obvious constitutional problems created by a refusal to credit the TPT paid by relying on differences in form between the TPT and Nevada's sales/use tax. SCE's Opening Brief already described all of the features of the TPT that make it *function* as a sales tax regardless of Arizona's choice not to *call* it a sales tax. The Department cites two Arizona decisions that emphasize the TPT is a tax on "the privilege of conducting business" rather than a direct tax on the good sold.[8] Yet the Nevada sales tax statute uses almost identical language to describe its purpose: "*For the privilege of selling* tangible personal property at retail a tax is hereby imposed . . . ." NRS 372.105 (emphasis added). The Department also suggests that the TPT on coal is a severance tax. Answering Brief at 41. This overlooks the fact that the coal is specifically listed as a transaction privilege classification (Ariz. Rev. Stat. 42-5072). An entirely separate article covers "severance taxes" which in Arizona are imposed on metalliferous minerals, not coal. Ariz. Rev. Stats. 42-5201 – 42-5206.

The other difference in form rather than substance between the Nevada sales tax and the TPT to which the Department clings is that the former is technically a liability of the buyer while the TPT is imposed on the seller. Yet the practical

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[8] Answering Brief at 39-40 (citing *Ariz. Dep't of Rev. v. Robinson's Hardware*, 721 P.2d 137 (Ariz. Ct. App. 1986) and *City of Phoenix v. West Publishing Co.*, 712 P.2d 944 (Ariz. Ct. App. 1986)). *City of Phoenix* is actually construing a municipal business license tax not the TPT. Neither case deals with the question of whether a TPT should be viewed as a sales tax for purposes of providing a credit against a use tax paid in another state.

reality recognized by both states is that the tax is typically imposed on the buyer by the seller who then remits the tax.[9] That is exactly what happened in this case. The Department's suggestion that because Peabody remitted the TPT, only it could seek a use tax credit also ignores Section 6.02 of the Amended Mohave Coal Supply Agreement which states: "[SCE] shall be entitled to all refunds of any such taxes [including sales and use taxes]." JA, vol. III, p. 410. This is the equivalent of Nevada's requirement that any sales or use tax over-collection "must, if possible, be refunded by the retailer to the person from whom it was collected." NAC 372.765(1).

Nevada's sales and use tax statutes were modeled after California's so it may be helpful for this Court to know that California's tax agency, the State Board of Equalization ("BOE"), has issued guidance indicating that those who paid *or reimbursed others* who paid Arizona's TPT are entitled to credit those amounts against use tax paid in California. *See* Cal. Board of Equalization, Sales and Use Tax Annotations, Annotation 570.1603 at http://boe.ca.gov/lawguides/business/current/btlg/vol2/suta/570-1603.html (addressing credit for tax imposed by other jurisdictions) (last visited Nov. 12, 2105).

In relying on the differences in form between the TPT and the Nevada sales tax rather than the overwhelming similarities in substance for purposes of denying SCE the credit it seeks, the Department is doing exactly the opposite of the guidance provided by the U.S. Supreme Court in *Complete Auto Transit v. Brady*. The Court endorsed decisions that "have considered not the formal language of the

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[9] Nevada's sales tax is structured to ensure that as long as the buyer obtains a receipt showing payment of the tax (which the seller is legally required to provide), the buyer has no further obligation for the tax payment. NAC 372.770. Indeed, Nevada's definition of its sales tax states: "a tax is hereby imposed *on all retailers* . . . ." NRS 372.105 (emphasis added).

tax statute but rather its practical effect." *Id.* at 279. "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question of whether the tax produces a forbidden effect." *Id.* at 288. Here, the Department is trying to rely on formalism to achieve the forbidden effect of discriminating against interstate commerce by denying the credit. It is up to this Court to prevent such an obviously impermissible result.

III. CONCLUSION

For all of the reasons stated in SCE's Opening Brief and above, SCE requests that the Court reverse the District Court's Decision denying a refund to SCE and order a full refund of the use taxes SCE paid in the period from March 1998 through December 2000, plus interest owed. Alternatively, the Court should order a refund in the amount of the Arizona TPT paid to Arizona for the coal used at Mohave during this time period, plus the applicable interest.

Dated this 13TH day of November, 2015.

By: _____

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6972 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13TH day of November, 2015.

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CERTIFICATE OF SERVICE

This document was filed electronically with the Nevada Supreme Court on November 13, 2015. Electronic service of this document shall be made in accordance with the Service List as follows:

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