No. 70 Original

IN THE

Supreme Court of the United States

October Term, 1975

ARIZONA,
Plaintiff,

v.

NEW MEXICO,
Defendant.

On Motion for Leave to File Original Action

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Should this Court exercise its original jurisdiction over a challenge by one state to the tax laws of another state if one of the plaintiff state's own political subdivisions and all other utilities of the plaintiff state upon which the legal incidence of the tax falls are already engaged in state legal proceedings against the tax which will dispose of all constitutional issues, and if neither the plaintiff state nor its citizens will suffer any actual damage during the pendency of this state litigation?

II. Does the original jurisdiction of the Supreme Court extend to a challenge by a state to the tax laws of another state on the grounds that those laws infringe upon the federal constitutional rights of individual citizens and of electrical utilities doing business in the plaintiff state?

III. Does New Mexico's tax structure as to electrical energy violate the "equivalent taxation" rule reaffirmed by this Court in *Public Utility District No. 2 of Grant County v. State of Washington,* 82 Wn.2d 232, 510 P.2d 206 (1973), app. dism'd for want of a substantial federal question, 414 U.S. 1106 (1974)?

COUNTER-STATEMENT OF THE CASE

This action raises the question of the validity of one aspect of New Mexico's tax structure with respect to electrical energy.

Receipts from the sale of electricity are taxed under New Mexico's Gross Receipts and Compensating Tax Act, 72-16A-3, N.M.S.A. 1953 (1973 Supp.). The rate of the tax is 4%.

The New Mexico Electrical Energy Tax Act, Chapter 263, Laws 1975 (a copy of Chapter 263 is attached to plaintiff's Complaint at p.8) imposes a tax on the privilege of generating electricity in New Mexico for the purpose of sale at the rate of 4/10 of one mill per kilowatt hour generated. The tax is non-discriminatory on its face: it taxes all generation regardless of what is done with the electricity after generation.

The statutory provision which is the sole basis for plaintiff's theory of unconstitutional discrimination is contained in Sec. 72-16A-16.1(B) of the New Mexico Gross Receipts and Compensating Tax Act (Sec. 9B of Chapter 263, Laws 1975):

> "On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state."

To illustrate the operation of this provision, assume, as is actually the case, Public Service Company of New Mexico (as well as numerous other utilities in New Mexico) generates and sells power at retail in New Mexico. It may credit the amount of the electrical energy tax it must pay to New Mexico against the *greater amount* of its New Mexico gross receipts tax liability. However, neither Arizona Public Service Co., nor Tucson Gas & Electric Co., nor Salt River Project, a political subdivision of Arizona (all Arizona utilities upon which the legal incidence of the generation tax falls, as it does upon New Mexico utilities generating electricity in New Mexico) will be able to take such a credit because their sales of power are outside the state. They have no New Mexico gross receipts tax liability against which to credit electrical energy tax. Thus, the practical effect of New Mexico's statutory scheme of taxation is to impose a tax no greater than 4% on the generation, production or distribution of electricity within New Mexico.

It is significant, as will be discussed in the argument following, that all three Arizona utilities have filed a declaratory judgment action in a New Mexico court claiming that the electrical energy tax is unconstitutional. Thus, all the issues Arizona wishes to raise in this forum will eventually come to this Court via appeal of the state proceedings.

ARGUMENT

I. Even Assuming That New Mexico's Tax Structure With Respect To Electrical Energy Is Arguably Unconstitutional, Which It Is Not, Arizona's Motion Should Be Denied Under Established Precedents Of This Court.

Arizona seeks to bring before this Court two causes of action against New Mexico. The first is proprietary in nature. It is based on two grounds: (1) Arizona is itself a consumer of electricity and will, it says, sustain an increased economic

burden because New Mexico's electrical energy tax will be passed on to it* (Complaint, first cause of action, VII and VIII). (2) Arizona's political subdivision, Salt River Project, generates electricity in New Mexico (Complaint, first cause of action, VI) and is subject to the generation tax.

Its second cause of action is as *parens patriae* for its citizens, to protect their alleged rights to be free of discrimination against interstate commerce and invidious classification.

In submitting that this Court should deny Arizona's motion, we begin with the proposition that the Court will exercise its original jurisdiction only where it is clearly shown that resort to this extraordinary form of action is required. In its recent decision in *Illinois v. City of Milwaukee,* 406 U.S. 91, 93-94 (1972), the Court noted that:

> "It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.' . . . We construe 28 USC Sec. 1251(a) (1), as we do Art III, Sec. 2, cl 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."

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* If it is passed on in the future, it will not be because New Mexico's generation tax requires it. The legal incidence of the tax is upon the generator; only the economic burden would then be on purchasers of electricity such as Arizona. See *First Agricultural Bank v. State Tax Commission.* 392 U.S. 339 (1967), *Gurley v. Rhoden,* ____ U.S. ____, 95 S.Ct. 1605, 44 L.Ed.2d 110 (1975). Arizona's status in this respect, then, is no different from all consumers of goods or services who have at best a remote interest in the litigating of the validity of the tax.

See also *Washington v. General Motors Corp.*, 406 U.S. 109 (1972).

The Court also has recently reaffirmed its view that disputes over the states' imposition of taxes ordinarily should not be entertained in an original action. In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 497 (1971), Justice Harlan, speaking for the Court, said:

> "As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. *Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes,* motor vehicles, decedents' estates, business torts, government contracts, and so forth. *It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies.*" [Emphasis added.]

A. There Is Now Pending An Action In A New Mexico Court Brought By Arizona's Political Subdivision, Salt River Project, Arizona Public Service Co., And Tucson Gas & Electric Co. Which Will Effectively Dispose Of All Constitutional Claims Arizona Is Attempting To Bring Before This Court.

It is significant that Arizona asks for no monetary damages in its prayer for relief, only that the generation tax be declared unconstitutional. This is so because Arizona has not sustained any damages. The only way there could be any damage to Arizona itself or to its citizens is if the three Arizona utilities generating electricity in New Mexico are held liable for the tax. Then, says plaintiff, they will be allowed by plaintiff's own Corporation Commission (see A.R.S. Sec. 40-361 *et seq.*) to pass on the tax to consumers.

Although the first returns of electrical energy tax were due September 15, 1975, (Secs. 5, 11, Chapter 263, Laws 1975 [Complaint Exhibit "A"]), the three Arizona utilities chose not to pay the tax but to file a declaratory judgment action in the District Court for Santa Fe County, New Mexico, Case No. 50245. The Complaint alleges all the constitutional infirmities raised by Arizona in this action, and more.* Thus, the very same issues which Arizona asks this Court to review are being heard by a New Mexico court of general jurisdiction in the ordinary course of its business. If on appeal the New Mexico Supreme Court should hold the tax unconstitutional, Arizona will have been vindicated, and neither it nor its citizens will have been harmed because no Arizona utility will have paid New Mexico any tax during the pendency of the litigation. If the New Mexico Supreme Court holds the tax constitutional, the issues will come to this Court by way of direct appeal under 28 U.S.C. Sec. 1257 (2). If this Court upholds the tax, Arizona can, of course, have no cause of action against a constitutional tax. The action begun in the Santa Fe County District Court will ultimately dispose of all the contentions Arizona wishes this Court to hear now, and Arizona is participating in that action through its political subdivision, Salt River Project. There is, thus, no sound reason for this Court to hear Arizona's complaint, and this is especially true in view of the long-standing congressional and judicial policy not to intervene in state tax matters. 28 U.S.C. Sec. 1341; *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293 (1943); *Toomer v. Whitsell,* 334 U.S. 385 (1948); *Matthews v. Rodgers,* 284 U.S. 521 (1932).

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* A copy of the Complaint is printed in Appendix A attached hereto. A copy of New Mexico's motion to dismiss the Complaint is printed in Appendix B. This motion tests the constitutional merits of the Complaint. It also asks that the Court dismiss for lack of subject matter jurisdiction, which is merely a contention that the *forum* for litigating plaintiff's constitutional arguments should change to administrative proceedings under Sec. 72-13-38, N.M.S.A. 1953 (1973 Supp.) because the plaintiffs are not claiming a refund.

If the Court should accept jurisdiction over Arizona's complaint, New Mexico would move the Court to consider staying any further proceedings in this case until appeal of the state case to this Court has been perfected. Such action would be particularly appropriate in order to avoid duplicative effort in the two forums.

B. The Privileges And Immunities Clause Of Article IV And The Equal Protection Clause Of The Fourteenth Amendment Upon Which Arizona Relies May Be Invoked Only By Individual Citizens And Not By States. It Would Be Inappropriate To Grant Jurisdiction Over Arizona's Proprietary Claim Under The Commerce Clause Where All Arizona Utilities Are Already Litigating The Constitutionality Of The Tax And That Litigation Will Resolve The Issues Arizona Raises In The Complaint.

That this Court should not grant Arizona's motion is evident from *Massachusetts v. Missouri,* 308 U.S. 1, 17 (1939). There the Court refused to hear Massachusetts' attempt to enjoin Missouri from taxing property in trusts established by a decedent Massachusetts domiciliary, holding that original jurisdiction could not be invoked on behalf of its residents to challenge the imposition of taxes by Missouri. Here, too, if Arizona's citizens are denied equal protection and denied privileges and immunities accorded New Mexicans, they themselves may raise the claims. The constitutional guarantees of these two clauses extend to individuals and not to states. A state is not a "person" entitled to equal protection of the laws under the Fourteenth Amendment, *Wisconsin v. Zimmerman,* 205 F.Supp. 673 (W.D. Wis. 1962), *cf. South Carolina v. Katzenbach,* 383 U.S. 301, 323-24 (1966), nor a "citizen" entitled to the rights of the privileges and immunities clause. *Hague v. C.I.O.,* 307 U.S. 496, 514 (1939); *Paul v. Virginia,* 75 U.S. 168, 178-80 (1868). Indeed, it is noteworthy that *Austin v. New Hampshire,* 420

U.S. 656 (1975), upon which Arizona relies, was successfully pursued by individual taxpayers, as has every other challenge brought before the Court to the validity of a tax on privileges and immunities or equal protection grounds. See *e.g., Wheeling Steel Corp. v. Glander,* 337 U.S. 562 (1949); *Toomer v. Witsell,* 334 U.S. 385 (1948); *Travis v. Yale & Towne Mfg. Co.,* 252 U.S. 60 (1920); *Travellers Insurance Co. v. Connecticut,* 185 U.S. 364 (1902); *Ward v. Maryland,* 79 U.S. (12 Wall) 418 (1870). Whatever the result might be of an individual action brought by an Arizona consumer, it is clear that Arizona has no *parens patriae* cause of action on equal protection or privileges and immunities grounds.

As for its proprietary right of action, defendant submits that it should also not be heard by this Court. Arizona must, of course, represent an interest of her own and not merely that of her citizens or corporations. *Arkansas v. Texas,* 346 U.S. 368, 370 (1953). True, in *Pennsylvania v. West Virginia,* 262 U.S. 553 (1922), the Court did grant original jurisdiction over a commerce clause claim that a state was, by regulatory action against gas utilities, shutting off the supply of natural gas to neighboring states heavily dependent on the gas. But in this case New Mexico is not taking any action which will cut off or even reduce the flow of interstate commerce in electricity; it is merely taxing the generation of electricity, an activity which for over four decades has been held a local event that the states are free to tax. *Utah Light & Power Co. v. Pfost,* 286 U.S. 165 (1932). Moreover, Arizona's political subdivision, Salt River Project, is at present participating as a party plaintiff in a declaratory judgment action in New Mexico which will dispose of all the constitutional arguments Arizona asks to raise here. And as long as the New Mexico litigation lasts, the Arizona utilities will pay no generation tax, hence Arizona will not have to bear any increase in the price it pays for electricity. Thus, in view of the existence of that litigation Arizona will never be damaged by the tax, and the only substantial interest Arizona is advocating here is that of her utilities. We submit that this Court should not assume jurisdiction over so insubstantial a proprietary claim as Arizona's.

II. New Mexico's Electrical Energy Tax Neither Discriminates Unconstitutionally Against Interstate Commerce Nor Does It Burden Interstate Commerce.

A. New Mexico's Tax Structure Subjects The In-State Disposition Of Electricity To A Greater Rate Of Taxation Than Electricity Generated For Sale Outside The State; Hence, Under Well-Established Precedents Of This Court The Act Does Not Discriminate Against Interstate Commerce.

The heart of plaintiff's argument is the foremost contention in its brief that New Mexico discriminates against the interstate commerce carried on by Arizona Public Service Co., Tucson Gas & Electric Co. and Salt River Project. These utilities generate electricity in New Mexico but sell it in Arizona.

Plaintiff's argument is simple: only those utilities generating electricity in New Mexico that sell the electricity in New Mexico are entitled to the gross receipts tax credit. This discriminates, plaintiff says, against Arizona utilities generating electricity in New Mexico. This contention is misconceived because it rests upon (1) a misunderstanding of the scope and operative effect of New Mexico's tax structure as to electricity; (2) the assumption that the Arizona utilities in generating electricity are engaged in interstate commerce; and (3) a reliance on cases of this Court which are not on point. Moreover, plaintiff fails to cite the cases which are controlling, the most important of which is *Public Utility District No. 2 of Grant County v. State of Washington,* 82 Wn.2d 232, 510 P.2d 206 (1973), appeal dismissed for want of a substantial federal question, 414 U.S. 1106 (1974). Others are *South Carolina Power Co. v. South Carolina Tax Comm'n,* 52 F.2d 515 (E.D.S.C. 1931), aff'd 286 U.S. 525 (1932); *Hinson v. Lott,* 75 U.S. 148 (1869); *Gregg Dyeing v. Query,* 286 U.S. 472 (1931); *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937); *Southern Pacific Co. v. Gallagher,* 306 U.S. 167 (1939); *Doscher v. Query,* 21 F.2d 521

(E.D.S.C. 1927); and *Oldetyme Distillers, Inc. v. Gordy,* 17 F. Supp. 424 (D.Md. 1936). Furthermore, plaintiff fails to discuss or distinguish *Alaska v. Arctic Maid,* 366 U.S. 199 (1961), a case which squarely rejected the very contention plaintiff makes in this case.

The fundamental flaw in plaintiff's discrimination argument is that it is based on too narrow a view of the question. Plaintiff would look solely to the question of how the generator of electrical energy is taxed. In taking this narrow approach, it ignores two critical points. First, the practical operation and effect of a tax on the subject or article of commerce, *not the tax status of a particular taxpayer,* controls in determining whether a tax discriminates against interstate commerce under the Commerce Clause. There must be taken into account the impact of the total scheme of state taxation, rather than just the impact on a particular taxpayer.

Second, there is no discrimination against interstate commerce if the commodity of commerce, in this instance electricity, is subject to equivalent taxation by New Mexico. Receipts from sales of electrical energy at retail in New Mexico are taxed at the rate of 4%; the Electrical Energy Tax burden on Arizona utilities generating in New Mexico will never be greater than that. In fact, it will be substantially less. Thus, there is equivalence of taxation as is required under the cases discussed below.

These two points will be discussed in subsections 1 and 2 which follow.

1. The Tax Burden On A Particular Taxpayer Or Particular Taxable Incident Is Not Controlling. The Total Tax Structure Must Be Considered In Determining Whether An Unconstitutional Discrimination Exists.

We are not here concerned primarily with the impact of a particular tax on particular taxpayers. Rather, the basic inquiry

must be whether or not New Mexico's total tax structure discriminates against interstate commerce. The correctness of this broad approach has been recognized by this Court in resolving the discrimination question in the early case of *Hinson v. Lott,* 75 U.S. 148 (1869), and the more recent use tax discrimination cases of *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937), and *Southern Pacific Co. v. Gallagher,* 306 U.S. 167 (1939). It was also recognized by the Supreme Court of Washington and this Court in an electrical energy tax case so analogous to this case as to be dispositive of the issue here presented, *Public Utility District No. 2 of Grant County v. State,* 82 Wn.2d 232, 510 P.2d 206 (1973), appeal dismissed for want of a substantial federal question, 414 U.S. 1106 (1973).*

In the *Public Utility District No. 2* case, the Washington Supreme Court had before it a Washington tax on generation of electricity which allegedly discriminated against utilities that sold electricity out of state. Instead of a credit system like New Mexico's, Washington taxed the sale of power at every level of distribution, but allowed a *deduction* for receipts from resale of the power in-state. If the power was resold out-of-state, the deduction was not available. The utilities argued that the unlawful discrimination occurred because the wholesaler or generator who sold for resale in the state received the deduction, while the wholesaler or generator who sold to an Oregon utility for resale in Oregon did not. To this argument the Washington court responded:

> ". . . a proper analysis must take the whole scheme of taxation into account to determine whether the actual operation of that taxing structure in its relationship to intrastate and interstate commerce results in an unconstitutional discrimination against the latter. [Here the

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* The appeal to this Court was based on the contention that the Washington electrical energy tax discriminated against interstate commerce in violation of Article I, Sec. 8 of the United States Constitution. The dismissal by this Court means that the case was decided *on the merits* and that lower courts presented with the same issue are bound by the decision. *Hicks v. Miranda,* ____ U.S. ____, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

Court footnotes 12 U.S. Supreme Court and state court decisions.]

* * *

"*Considered in isolation,* as urged by respondents, the Washington tax deduction provision may also be discriminatory; it was intended to apply solely to sales for resale within this state. Alone, it may be invalid, but *it does not stand alone,* and this fact, and the failure of the respondents and the trial court below to so recognize, results in their abbreviated analysis. This isolated evaluation led the trial court in Silas Mason Co. v. Henneford, 15 F.Supp. 958 (E.D.Wash. 1936), rev'd, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937), to declare invalid the tax in question. Similarly, here, it could lead us to strike down the tax assessment without having correctly evaluated the taxing scheme's operation.

"This scheme contains no constitutional infirmity, for 'There is no demand in [the] Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's Constitutional power.' Gregg Dyeing Co. v. Query, 286 U.S. 472, 480, 52 S.Ct. 631, 634, 76 L.Ed. 1232 (1932). A similar deduction provision, RCW 82.03.430(6), was at issue in Crown Zellerbach in which a unanimous court found that to disallow the deduction ignores the lawful purpose behind its operation. Imposition of actual tax liability is the purpose advanced by such statutes in an effort to avoid double or triple tax liability as to particular products or activities. 'In other words, the policy is to impose *actual liability* for payment of tax only once. . .' Crown Zellerbach Corp. v. State, supra, 45 Wash. 2d at 753, 278 P.2d at 308." 510 P.2d at 210 [Emphasis added.]

In *Hinson v. Lott, supra,* the combined effect of a distiller's (manufacturing) tax and a merchant's tax on the sale of imported liquor was considered. The merchant's tax was attacked on the ground that it discriminated against interstate commerce, by reason of the fact that it applied only to the sale of liquor

imported into the state. This Court sustained the tax, holding that no discrimination existed, in view of the fact that locally produced liquor, while not subject to the merchant's tax, was subject to the distiller's tax. These taxes were equivalent in amount but imposed on different taxpayers.

In the *Gallagher* and *Henneford* cases, this Court sustained use taxes imposed on products purchased without the state, holding that no discrimination existed in view of the fact that sales taxes were imposed on products sold within the state. This approach has been used to strike down, as well as sustain, state taxes. Thus, in *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963), a use tax was found invalid as applied to an out-of-state fabricator using the fabricated goods in Louisiana, but this Court reaffirmed the broad approach of analyzing the entire tax structure. 373 U.S. 69-70.

These cases illustrate the proposition that it is the practical effect of the *total state tax burden* as applied to the commodity of commerce, here electrical energy, which ultimately controls.

2. The New Mexico Tax Structure With Respect To Electrical Energy Does Not Discriminate Against Interstate Commerce.

As clearly established by the cases discussed in the preceding subsection, the total tax burden imposed on different taxpayers or imposed on different aspects of one subject of taxation, here electricity, must be considered together in analyzing a claim of discrimination against interstate commerce. If the commodity of commerce (in *Hinson,* liquor, in *Southern Pacific Co. v. Gallagher* and *Henneford,* tangible personal property and in *Public Utility District No. 2* and in this case electrical energy) is subject to equivalent taxation by the state, whether ultimate use and consumption be within or outside this state, there is no discrimination.

The only basis for any discrimination argument is the credit against gross receipts tax allowed by Sec. 72-16A-16.1(B),

N.M.S.A. 1953 (1975 Interim Supp.), the text of which was set forth previously in this brief. The obvious purpose of this provision is to collect a tax only once from in-state sellers, not to impose the generation tax in addition to the 4% gross receipts tax. The in-state sale of electricity generated in New Mexico is not exempted; it is taxed, just as the out-of-state electricity is, and at the significantly *higher* rate of 4%. The legislative purpose is no different from that found by the Washington Supreme Court in the case of *Public Utility District No. 2 v. State, supra,* where it sustained a privilege tax on electricity so close to the tax at issue here as to the foreclose plaintiff's commerce clause contentions in this case.

The tax in *Public Utility District No. 2 v. State* was a privilege tax on the light and power business measured by gross income. The tax was imposed at every level of distribution. The deduction which allegedly violated the commerce clause read as follows, 510 P.2d at 207, fn. 2:

> "Deductions in computing tax. 'In computing tax there may be deducted from the gross income the following items:
> " '. . . (2) Amounts derived from the sale of commodities to persons in the same public service business as the seller, *for resale* as such *within this state. . .*' " [Emphasis added.]

The public utility districts sold power at wholesale to Washington utilities for resale in Washington. The income from these sales was deductible. They also sold at wholesale to Oregon utilities for resale in Oregon. The income from these sales was not deductible, producing the alleged discrimination. The Washington Supreme Court conceded that, viewed in isolation, the deduction provision could be discriminatory, but it went on to rule that the provision must also be considered in the light of the whole statutory framework for taxation of the subject matter:

> "*The* public utility *tax on electrical power* originating in this state *is to be imposed only once* under the Washington taxing scheme. The deduction here at issue permits this singular tax imposition by preventing the pyramiding

effect of the public utility tax, which is otherwise certain to occur. The only relevant difference between the present case and Crown Zellerbach is that, rather than having an interrelated tax structure (manufacturing-wholesaling) imposed, this case has a shifting tax structure in which singular tax liability exists but shifts to another utility. By so doing, the in-state distribution of the use of power is *not* exempted and is taxed, just as is the out-of-state distribution of power. Equal treatment is the theme of this system. H & D Communications Corp. v. Richland, 79 Wash.2d 312, 484 P.2d 1141 (1971). The out-of-state utility is in no worse position than its instate competitor. The state is playing no favorite with its resident businesses at the expense of similarly situated out-of-state enterprises.

* * *

"The confusion results, in part, because the respondents look only to their status as complaining public utilities at the time of their sales to in-state or out-of-state purchasers, and not to the impact of the total tax structure on the subject matter here involved, the disposition and use of power. *If the whole tax scheme is evaluated, the tax deduction that is made at the sale to a Washington utility is made up at the time the Washington utility buyer sells to its customers.* Thus, 'In the instant case, there is no burden on interstate commerce that is not placed on intrastate commerce.' H & B Communications Corp. v. Richland, supra, 79 Wash.2d at 314, 484 P.2d at 1144. The in-state and out-of-state disposition of power is equally treated. There is tax equivalence here and no discrimination on interstate commerce.

"Judgment reversed." 510 P.2d at 211. [Emphasis added.]

Similarly, New Mexico's intention with respect to electrical energy generated and sold by utilities in New Mexico is that the transactions be taxed only once. Consequently, the legislature has provided that the electrical energy tax may be credited against the gross receipts tax due on subsequent sales in New Mexico. Obviously, the same result could have been accomplished by imposing the type of tax and deduction sustained

in the Washington *Public Utility District No. 2* case. The tax effect is the same in both structures; the difference lies only in the form of the two systems, not in their substance.

There are a number of other precedents which strongly support the constitutionality of New Mexico's choice to allow the electrical energy tax credit against gross receipts tax. These cases consider not the impact of a particular tax on particular taxpayers, but whether the total tax structure with respect to electrical energy discriminates against interstate commerce.

A South Carolina statute containing the credit feature of New Mexico's tax scheme was considered in *South Carolina Power Co. v. South Carolina Tax Commission,* 52 F.2d 515 (E.D.S.C. 1931), aff'd 286 U.S. 525 (1932). South Carolina imposed a tax of 5/10 of one mill upon each kilowatt hour of electric power *generated* in South Carolina and also an excise tax of 5/10 of one mill upon each kilowatt hour of electricity *sold* in the state. This statute provided that if the seller subject to the sales tax procured electric power which was subject to the payment of the privilege tax, a *credit* on the sales tax in the amount of the privilege tax already paid by the person generating the electricity would be allowed. Utilities attacked the South Carolina taxes as unconstitutionally burdening and discriminating against interstate commerce. In commenting upon this statutory scheme the court noted:

> "The evident purpose of the act is to impose a tax upon the current used within the State and to impose it at the source or as soon as the current becomes subject to the jurisdiction of the taxing power, but not to impose but once. . . . If current produced as well as sold within the state were subjected to the sales tax such current would rest under a double burden of taxation. To avoid this and at the same time to preserve the system of taxing at the source, current which is produced within the state is taxed at the time of generation but is relieved of the sales tax, which is equal in amount, with the result that all currents sold within the state, whether produced there or brought in from another state, pays exactly the same tax." 52 F.2d at 521

In resolving the question of validity of the tax on the generation of electrical current, the court upheld the tax on the basis of taxable events *preceding* interstate commerce on authority of *Oliver Iron Mining Co. v. Lord,* 262 U.S. 172 (1923), *Hope Natural Gas Co. v. Hall,* 274 U.S. 284 (1927) and *American Manufacturing Co. v. St. Louis,* 250 U.S. 459 (1919). In reference to current brought into the state which was subject to the sales tax the court said:

> "The point that the tax on sales is a discrimination against current which has passed in interstate commerce, because current which has paid the local generation tax is exempted from the sales tax, has already been considered in discussing the points raised under the Fourteenth Amendment. The cases of Hinson v. Lott, supra, 8 Wall.148, 19 L.Ed. 387 and Doscher v. Query, supra (D.C.) 21 F. (2d) 521, 525, sufficiently answer this proposition." 52 F.2d at 526.

Citing the *South Carolina Power* and *Hinson* cases, *Oldetyme Distillers, Inc. v. Gordy,* 17 F.Supp. 424 (D.Md. 1936) also held that a whiskey manufacturing tax credit against a subsequent sales tax did not discriminate against interstate commerce.

The totality of a state's pattern of taxation was recognized by this Court in the license tax case of *Alaska v. Arctic Maid,* 366 U.S. 199 (1961). Alaska imposed a "license" tax upon only the business of operating freezer ships and other floating cold storages, measured by the value of fish obtained for processing through freezing. In fact, the tax fell only upon out-of-state businesses because they were the only ones who operated freezer ships. The ship operators purchased fish caught in Alaskan territorial waters, froze the fish and then transported the fish to the State of Washington for canning. They alleged that the Alaskan taxing scheme discriminated against their interstate businesses because (1) there was no tax on fish caught and frozen in Alaska and destined for canning in Alaska, and (2) fish processors selling fresh frozen fish in the Alaskan consumer market were taxed at a lower rate.

This Court first found that the license tax was imposed upon an occupation made up of local activities within the reach

of Alaska's taxing authority, citing *Oliver Iron Mining v. Lord, supra,* and *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954). It then held that the tax in question did not discriminate against interstate commerce because in-state businesses which had to pay other local taxes rather than the license tax, were not preferred against out-of-state competitors. The Court reasoned that there could be no discriminatory preference in favor of local canners because they paid a greater tax upon fish obtained for canning. The Court stated:

> "When we look at the tax laid on local canners and those laid on 'freezer ships', there is no discrimination in favor of the former and against the latter. For no matter how the tax on 'freezer ships' is computed, it did not exceed the six per cent tax on the local canners. Hence cases such as Pennsylvania v. West Virginia [citation omitted] which hold invalid state laws that prefer local sales or interstate sales, are inapposite." 366 U.S. at 204-205.

In this case, the generation tax on electrical energy, no matter how it is computed, does not exceed the 4% burden on in-state disposition of power.

In *Gregg Dyeing Co. v. Query,* 286 U.S. 472 (1931), this Court upheld a complementary taxing statute imposed on gasoline brought into the state for storage, use and consumption against the contention that the statute discriminated against interstate commerce. In disposing of this argument, the Court construed a separate statute *in pari materia* and concluded it imposed an equivalent tax on use and consumption of gasoline in the state.

Henneford v. Silas Mason Co., supra, Southern Pacific Co. v. Gallagher, supra, and *Hinson v. Lott, supra,* also support the proposition that New Mexico's generation tax and gross receipts tax credit work no discrimination against plaintiffs because the New Mexico burden on in-state disposition of electricity is greater than the generating tax on electricity taken out of New Mexico.

New Mexico's tax structure with respect to electricity is not distinguishable constitutionally from the electrical energy tax cases of *Public Utility District No. 2* and *South Carolina Power Co.*; the liquor cases of *Hinson v. Lott* and *Oldetyme Distillers;* the sales and use tax cases of *Gallagher* and *Henneford v. Silas Mason Co.*; and the license tax case of *Arctic Maid.* These cases establish that the tax burden imposed on different taxpayers or imposed on different incidents of taxation must be considered together in resolving the discrimination issue. And they held that there is no discrimination against interstate commerce if the commodity of commerce, here electrical energy, is subject to equivalent taxation by the state, whether or not the ultimate use and consumption is within or without the state.

The issue of discrimination against interstate commerce is a practical one, not an abstract or academic question. As stated by this Court in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 fn. 2 (1940):

> "Despite mechanical or artificial distinctions sometimes taken between the taxes deemed permissible and those condemned, the decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage." [Reference to numerous cases follows in the footnote.]

In the *Arctic Maid* case, the Court reasoned that there could be no such discriminatory competitive preference, since Alaskan processors freezing fish for the local retail market were not in competition with processors freezing fish for canning out of state. This was precisely the same reasoning approved by this Court in the *Public Utility District No. 2* case where it was held that there was no discriminatory preference for in-state business because:

> ". . . the public utility districts selling out-of-state are not in competition with one who sells in-state." 510 P.2d at 210.

Similarly, the Arizona utilities taxed under the Electrical Energy Tax Act are not in competition with New Mexico electrical utilities, and plaintiff does not allege that they are.

New Mexico seeks to tax the generation of electrical energy in this state. All generators of electrical energy in this state must pay the tax. That the electrical energy tax may be credited against gross receipts tax is only to prevent in-state power from being subjected to more than a 4% tax. It does not have the effect, under New Mexico's tax structure, of exempting the in-state generation and sale of power. This state's tax structure on electrical energy is designed to subject to one tax, but only one tax, the commodity of electrical energy. The taxation of this subject does not discriminate against interstate commerce.

In its complaint (second cause of action, Par. IV) and brief (pp. 21, 23, 26) Arizona makes much over its allegation that the New Mexico legislature intended to discriminate against Arizonans and interstate commerce. This allegation is reminiscent of the one made in *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922). There, plaintiffs claimed that the Governor of Pennsylvania advocated enactment of a tax on coal production because it would exact "tribute" from interstate commerce. This Court said, 260 U.S. 258-59:

> "The contention that the tax is a regulation of interstate commerce seems to be based somewhat upon the declaration of the Governor of the State of its effect upon consumers in other States. We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a State impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it. . . ."

B. The Electrical Energy Tax Act Does Not Burden Interstate Commerce. The Generation Of Electricity Is A Local Activity Which New Mexico May Tax.

The question whether New Mexico's generation tax discriminates against the interstate commerce of the Arizona utilities because of the presence of the credit against gross receipts taxes has been answered by the ample precedents of this Court. Leaving the discrimination-credit question, we turn to the question whether the generation tax burdens interstate commerce. Here, too, the case law of this Court indicates that it does not. The tax is imposed upon the local activity of generation. The New Mexico legislature intended to tax "the privilege of generating electricity in this state for the purpose of sale;" this is not a tax on interstate commerce.

The following cases all support the proposition that the states may tax an intrastate activity such as the generation of electricity: *Utah Power & Light Co. v. Pfost,* 286 U.S. 165 (1932); *Oliver Iron Mining Co. v. Lord,* 262 U.S. 172 (1923); *Hope Natural Gas Co. v. Hall,* 274 U.S. 284 (1927); *American Manufacturing Co. v. St. Louis,* 250 U.S. 459 (1919); *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954); *Heisler v. Thomas Colliery Co.,* 260 U.S. 245 (1922); and *Federal Power Commission v. Union Electric Co.,* 381 U.S. 90 (1964).

Utah Power & Light Co. v. Pfost is precisely on point. There the appellants generated electricity in intrastate commerce and also transmitted electricity in interstate commerce, just as the Arizona utilities involved in this case do. The activity of generation was taxed by Idaho under a statute indistinguishable from New Mexico's:

> "any individual . . . engaged in the generation of . . . of . . . electrical energy . . . for . . . sale . . . shall . . . pay thereon a license tax of one-half mill per kilowatt hour. . . ." 286 U.S. at 175.

The Court held that the tax did not, as to electricity transmitted outside the taxing state, impose an unconstitutional burden on interstate commerce. Just as Arizona contends here, Utah Power & Light Company argued that it was the interstate transmission which constituted the subject of taxation since the

transmission could not be separated from the generation or production of electrical energy. In disposing of Utah Power's argument, this Court found that the generation or production of electrical energy is analogous to the manufacture of a more tangible product and concluded that the Idaho tax was imposed on a valid local privilege.

After analyzing the process by which electrical energy is created and transmitted, the Court concluded, 286 U.S. 181-82:

> "We are satisfied, upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rules that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture. Cornell v. Coyne, 192 U.S. 418, 428, 429, 48 L.ed. 504, 508, 509, 24 S.Ct. 383. 'Commerce succeeds to manufacture, and is not a part of it.' United States v. E.C. Knight Co., 156 U.S. 1, 12, 39 L.ed. 325, 329, 15 S.Ct. 249."
>
> "Without regard to the apparent continuity of the movement, appellant, in effect, is engaged in two activities, not in one only. So far as it produces electrical energy in Idaho, its business is purely intrastate, subject to state taxation and control. . . . The situation does not differ in principle from that considered by this court in Oliver Iron Min. Co. v. Lord, 262 U.S. 172, 67 L.ed. 929, 43 S.Ct. 526. There the State of Minnesota has imposed an occupation tax on the business of mining ores. . . ."

Utah Power & Light remains good law. See, *e.g., Parker v. Brown,* 317 U.S. 341, 360 (1943); *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954); *Federal Power Commission v. Union Electric Co.,* 381 U.S. 90 (1964).

In *Michigan-Wisconsin Pipe Line Co. v. Calvert, supra,* the Court dealt with a tax on the activity of "gathering gas" as applied to an interstate pipeline company. It struck down the tax, holding that it was upon interstate commerce itself. The

Court distinguished such a tax from valid taxes imposed upon local commerce before interstate commerce has begun, citing *Utah Power & Light Co. v. Pfost, supra; Hope Natural Gas Co. v. Hall, supra* (tax on production of gas is not violative of the commerce clause since production precedes interstate commerce); and *Oliver Iron Mining Co. v. Lord, supra* (mining of ore is local event, not part of interstate commerce, which state is free to tax). Two similar cases hold that manufacturing, *American Manufacturing Co. v. St. Louis, supra,* and mining of coal, *Heisler v. Thomas Colliery Co., supra,* are all events preceding interstate commerce which the states may tax.

Under long-established cases of this Court, then, New Mexico's generation tax very clearly does not burden interstate commerce.

III. New Mexico's Electrical Energy Tax Structure Does Not Violate The Equal Protection Or Privileges And Immunities Clauses Of The United States Constitution.

Plaintiff contends that the New Mexico legislature has without reasonable basis classified Arizona utilities generating electricity, upon whom the legal incidence of the tax falls, differently from other taxpayers of the same class. However, Plaintiff fails to note that under both the equal protection and privileges and immunities clauses, the legislature has very broad power to classify for taxation purposes. In fact, there is a rational basis for distinguishing between generators of electricity who are subject to New Mexico gross receipts tax on the subsequent sale of the power and those who are not.

Concerning the power of state legislatures to classify for taxation purposes, the Court in *Madden v. Kentucky,* 309 U.S. 83, 88 (1940), said:

> "This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation,' and the passage of time has only served to underscore the wisdom of that

> recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally, classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that *in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.* The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." [Emphasis added; footnotes omitted.]

It then upheld a state's classification taxing deposits in banks outside the state at 50 cents per thousand and deposits in banks within the state at only 10 cents per thousand.

In *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973), reh. den., 411 U.S. 910 (1973), the Court upheld a state *ad valorem* personal property tax imposed on corporations which was not imposed on individuals. The court there stated the equal protection test in the following language:

> "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. Harper v. Virginia Board of Elections, 383 U.S. 663, 666. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, [citing as an example a tax that discriminates against interstate commerce such as one on the "gathering of gas" shipped interstate, Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157 (1954)] the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." 410 U.S. at 359.

Of course, as discussed in this brief, the generation tax is not a tax on interstate commerce, nor does New Mexico's tax structure discriminate against interstate commerce.

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959) laid down the following test:

> ". . . Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it."

Thus, the only inquiry to be made is whether there is any reasonable basis for classifying or treating generators of electricity who do not sell that electricity in New Mexico any differently than generators who do.

Presumably, plaintiff says that the class for purposes of their argument consists of all generators of electricity. Only those who sell their electricity in New Mexico are entitled to credit electrical energy tax against gross receipts tax. This works an unconstitutional discrimination, it says, against generators who do not sell electricity in this state. In other words, it is the fact that the utilities in plaintiff's state are not New Mexico gross receipts taxpayers and have no gross receipts tax liability against which to credit electrical energy tax which produces the alleged invidious discrimination.

The rational basis for allowing the credit of electrical energy tax against gross receipts tax is the obvious legislative intent to tax the commodity of electricity, from generation to consumption, once and only once.

The precedents which uphold New Mexico's tax structure against the argument that it discriminates against interstate commerce have the same force for equal protection and privileges and immunities purposes. So long as the total tax burden on in-state generators and sellers of electricity is equal to or, as in this case greater than the burden on generators who sell outside the state, there is no unlawful discrimination against interstate commerce, and there can be no unlawful discrimination on equal protection or privileges and immunities grounds. As a class, then, the Arizona utilities whose interest plaintiff represents are treated equally, for their tax burden is no greater than the in-state taxpayer's burden. For example, Public Service Co. of New Mexico is subject to a 4% tax, which is

a higher rate than any of the Arizona utilities will ever have to pay.

In *South Carolina Power Co. v. South Carolina Tax Commission,* 52 F.2d 515 (E.D. So.Car. 1931), aff'd 286 U.S. 525 (1932), which also involved an electricity generation tax credit against subsequent sales tax, the credit was attached as violative of the equal protection clause. The Court unequivocally rejected the utilities' contention:

> "It is argued that the sales tax . . . violates the equal protection clause of the Federal Constitution . . . because it exempts from the tax sales of current upon which the generation tax has already been paid. All current sold within the state, whether produced there or brought in from another state, pays exactly the same tax." 52 F.2d at 521.

Plaintiff cites *Austin v. New Hampshire,* 420 U.S. 656, 95 S.Ct. 1191 (1975) as "a case richly suggestive of the situation here confronted." (Br. 25) In fact the case is simply not apposite. In contrast to New Mexico's generation tax which applies to all taxpayers in a non-discriminatory manner,* under New Hampshire's commuter tax ". . . no resident of New Hampshire is taxed on his foreign income. Nor is the domestic earned income of New Hampshire residents taxed. In effect, then, the State taxes only the income of nonresidents working in New Hampshire. . . ." 95 S.Ct. 1193-94. Moreover, in *Austin* the nonresident taxpayers themselves were asserting their right to non-discriminatory treatment. Here Arizona purports to assert those personal rights on behalf of its citizens, for which the original jurisdiction of this Court is not intended. *Massachusetts v. Missouri,* 308 U.S. 1 (1939).

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* Even taking the electrical energy tax credit against gross receipts tax, New Mexico generators who sell their electricity in New Mexico are taxed at the rate of 4%.

CONCLUSION

In view of the fact that litigation pending in the New Mexico courts, which will eventually find its way to this Court, will resolve each constitutional issue Arizona attempts to present here; the fact that Arizona's interest in striking down the tax at issue is remote; and, as we submit, the fact that New Mexico's tax structure as to electricity is clearly constitutional under the precedents of this Court, Arizona's motion for leave to file its complaint should be denied.

Respectfully submitted,

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APPENDIX A

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

ARIZONA PUBLIC SERVICE COMPANY
EL PASO ELECTRIC COMPANY, SALT
RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT
SOUTHERN CALIFORNIA EDISON
COMPANY, and TUCSON GAS &
ELECTRIC COMPANY,

Plaintiffs,

vs.

No. 50245

FRED O'CHESKY, Commissioner of
Revenue, BUREAU OF REVENUE, and
STATE OF NEW MEXICO,

Defendants.

COMPLAINT

Plaintiffs bring this action for declaratory judgment pursuant to the New Mexico Declaratory Judgment Act, Chapter 340, Laws 1975, with respect to the constitutionality and validity of the Electrical Energy Tax Act, Chapter 263, Laws 1975, and for their complaint herein, state:

1. Arizona Public Service Company, an Arizona corporation, generates, transmits, distributes and sells electrical energy within the State of Arizona, and is regulated as a public service corporation by the Arizona Corporation Commission.

2. El Paso Electric Company, a Texas corporation, generates, transmits, distributes and sells electrical energy within the States of New Mexico and Texas, and is regulated as a public utility in New Mexico by the New Mexico Public Service Commission and in Texas by the cities of El Paso, Van Horn, Anthony and Clint.

3. Salt River Project Agricultural Improvement and Power District (hereinafter "Salt River Project"), a political subdivision of the State of Arizona, operating a federal reclamation project pursuant to contracts with the Secretary of the Interior, generates, transmits, distributes and sells electrical energy within the State of Arizona.

4. Southern California Edison Company, a California corporation, generates, transmits, distributes and sells electrical energy within the State of California, and is regulated as a public utility by the California Public Utilities Commission.

5. Tucson Gas & Electric Company, an Arizona corporation, generates, transmits, distributes and sells electrical energy within the State of Arizona, and is regulated as a public service corporation by the Arizona Corporation Commission.

6. Fred O'Cheskey is Commissioner of the Bureau of Revenue of the State of New Mexico. The Bureau of Revenue is the agency of state government charged with the administration and enforcement of the Electrical Energy Tax Act.

7. The Four Corners Power Plant is an electrical generating station composed of five generating units and related facilities located on Indian lands leased from the Navajo Nation under Leases dated December 1, 1960 and July 1, 1966, duly approved by the Navajo Tribal Council and the Acting Secretary of the Interior.

8. Arizona Public Service Company owns and operates generating units Nos. 1, 2 and 3 at the Four Corners Power Plant. Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Southern California Edison Company and Tucson Gas & Electric Company each owns an undivided interest in generating units Nos. 4 and 5 at the Four Corners Power Plant.

9. The San Juan Generating Station is an electrical generating station composed of two generating units (one operational and one under construction) and related facilities located in San Juan County, near Waterflow, New Mexico.

10. Public Service Company of New Mexico and Tucson Gas & Electric Company each owns an undivided one-half (1/2) interest in the San Juan Generating Station.

11. Certain of the plaintiffs (Arizona Public Service Company and El Paso Electric Company) sell electrical energy generated from the Four Corners Power Plant to a foreign country, Mexico.

12. As shown on the Map of Principal Transmission Lines annexed hereto as Exhibit "A", the electrical system of each plaintiff is directly interconnected with the system of each other plaintiff and with the electrical systems of Public Service Company of New Mexico, the U. S. Bureau of Reclamation, and Utah Power and Light Company. Southern California Edison Company's system is also directly connected with San Diego Gas & Electric Company, the Department of Water and Power, City of Los Angeles, the Pasadena Department of Water and Power, and Pacific Gas & Electric Company; its system is indirectly but substantially interconnected with the several Pacific Northwest systems and through them to other utility systems in the western United States. The interconnected transmission lines thus constitute an interstate grid encompassing the West.

13. As a consequence of the system interconnections described in the preceding paragraph, the demand for electricity in the major urban centers served by the plaintiffs in Arizona, southern California, and the El Paso area of West Texas determines in substantial degree the amount of electrical energy generated at generating stations located in New Mexico (as well as those in other states). The electrical energy generated in New Mexico in response to such demand to which each plaintiff is entitled from its generation facilities is instantaneously transmitted over existing transmission lines to that plaintiff's service area.

14. All of the plaintiffs' above-described transactions in the generation and transmission of electrical energy at the Four Corners Power Plant and the San Juan Generating Station, and the distribution and sales of such electrical energy, are in the course of commerce among the States and the Navajo Tribe of

Indians, except for the aforesaid sales of electrical energy to Mexico, certain relatively insignificant sales made by Arizona Public Service Company within New Mexico to Utah International Inc., for operation of the Navajo Mine which provides the fuel for the Four Corners Power Plant, and for certain sales by El Paso Electric Company within its service area in the State of New Mexico. All other sales or exchanges of electrical energy in New Mexico by any plaintiff are wholesale sales to other electric utility companies on the interconnected systems in interstate commerce under the exclusive jurisdiction of the Federal Power Commission. Such interstate sales give rise to no New Mexico gross receipts tax liability under the New Mexico Gross Receipts and Compensating Tax Act.

15. Each plaintiff pays income, ad valorem, franchise and other taxes imposed by the State of New Mexico or its political subdivisions on it and other taxpayers similarly situated, and income, ad valorem, sales and use (or their equivalent), franchise, excise and other taxes imposed by the state of its incorporation on it and other taxpayers similarly situated.

16. Section 3 of the Electrical Energy Tax Act, Chapter 263, Laws 1975 (hereinafter the "Act"), purports to impose on persons generating electricity a privilege tax of four-tenths of one mill "on each net kilowatt hour of electricity generated in New Mexico" for the purpose of sale.

17. Subsection 9B of the Act provides that the electrical energy tax paid on electricity generated and consumed in New Mexico may be credited against the gross receipts tax due New Mexico. No credits of any type are provided with respect to the electrical energy tax imposed upon electricity generated in New Mexico but transmitted and consumed outside New Mexico.

18. Subsection 9C of the Act directs that the credit for electrical energy tax paid on electricity generated and consumed in New Mexico shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and further requires the assignee of

such credit to reimburse the assignor for the amount of the credit so assigned.

19. The practical operation and effect of Sections 3 and 9 of the Act is to tax the generation of electricity in New Mexico but shift the incidence of such tax to those who sell or consume that electricity outside New Mexico since the person generating and selling electricity for consumption in New Mexico receives either a credit (under Subsection 9B) against his gross receipts tax due New Mexico or a reimbursement (under Subsection 9C) in an amount equal to the electrical energy tax payable on such electricity.

20. Plaintiffs' retail sales of electrical energy transmitted from generating facilities in New Mexico to plaintiffs' respective service areas in Texas, Arizona and California are subject to certain taxes imposed by those states, or the political subdivisions thereof, or both. Such taxes are variously denominated as sales or other types of excise taxes, but are uniformly imposed upon, or passed on to consumers of electricity in those states.

21. There is no provision of law in Texas, Arizona or California whereby any of the plaintiffs are entitled to any credit, offset or rebate for the electrical energy tax imposed on them by New Mexico.

22. Public Service Company of New Mexico, an electric public utility regulated by the New Mexico Public Service Commission, with respect to its share of electrical energy generated at the Four Corners Power Plant and the San Juan Generating Station, will in practical effect sustain no additional tax burden under the Electrical Energy Tax Act due to the provisions of Subsections 9B and 9C of the Act permitting the amount of electrical energy tax paid to be assigned or credited against its gross receipts tax liability due the State of New Mexico.

23. El Paso Electric Company will in practical effect sustain no additional tax burden under the Electrical Energy Tax Act with respect to the electrical energy generated in New Mexico and sold by it to consumers in New Mexico due to the provisions

of Subsections 9B and 9C of the Act allowing the electrical energy tax to be credited against its New Mexico gross receipts tax liability.

24. Plains Electric Generation and Transmission Cooperative, a New Mexico corporation, generates electrical energy at its generating plant near Algodones, New Mexico, and transmits and sells electrical energy solely to New Mexico electric utilities which are its members; however, by reason of Subsections 9B and 9C of the Act, it will incur no additional tax burden due to the Electrical Energy Tax Act.

25. Plaintiffs are informed and believe, and therefore allege, that no additional tax liability under the Electrical Energy Tax Act is incurred by any other person (as defined in the Electrical Energy Tax Act) engaged in the same business as plaintiffs upon electrical energy generated and consumed in New Mexico, due to the availability of the crediting provisions provided for under Subsections 9B and 9C of the Act.

26. Plaintiffs are informed and believe, and therefore allege, that all, or virtually all, of the additional taxes claimed to be due under the Electrical Energy Tax Act after application of Subsections 9B and 9C of the Act, will be borne by those persons, including plaintiffs, engaged in the generation of electricity in New Mexico which is transmitted across and consumed outside the boundaries of the State of New Mexico.

27. Plaintiffs are informed and believe, and therefore allege, that the Act was enacted for the purpose of and the view to placing the exclusive burden of paying additional tax revenues to the State of New Mexico upon transactions in commerce among the several states and with the Indian Tribes.

28. The language of the Act, coupled with the practical application of the tax, constitutes a tax on the privilege of engaging in commerce among the several states.

29. Plaintiffs contend that the Act is unconstitutional and void for each and every one of the following reasons:

A. The Electrical Energy Tax Act violates the Commerce Clause of Article I, Section 8 of the United States Constitution by deliberately and invidiously discriminating against and imposing direct and multiple burdens upon each plaintiff's interstate commerce in the transmission and sale of electricity.

B. Application of the Electrical Energy Tax to these plaintiffs, measured by electricity generated in New Mexico for transmission and sale in interstate commerce, is arbitrary, capricious and unreasonable and denies to each plaintiff the equal protection of the law, and the rights, privileges and immunities enjoyed by other members of the class defined as persons generating electrical energy in New Mexico, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution, and of Article II, Section 18, and Article IV, Section 26 of the New Mexico Constitution.

C. The Act deprives plaintiffs of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution.

D. The Act violates Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the United States Constition.

30. Plaintiffs are informed and believe, and therefore allege, that defendants contend the Act is constitutional with respect to the matters set forth in paragraph No. 29 of this Complaint.

31. The plaintiffs, being persons whose rights, status or other legal relations are affected by the Act, request that the Court determine the questions of validity arising under the Act.

32. A genuine controversy exists between the plaintiffs and defendants with respect to the matters hereinbefore alleged; however, there is no controversy respecting the amount of the tax which would be payable by any plaintiff, if the Act is valid, nor with respect to the form or accuracy of any assessment of tax thereunder.

33. Due to the necessity to construe and apply provisions of the United States Constitution and the New Mexico Constitution in order to resolve the controversy between plaintiffs and defendants, plaintiffs have no other plain, speedy and adequate remedy.

34. All conditions precedent to the commencement and maintenance of this action have occurred or been met.

WHEREFORE, plaintiffs pray:

A. That this Court adjudge and declare the Electrical Energy Tax Act, Chapter 263, Laws 1975, to be unconstitutional and void.

B. That upon final hearing and determination the defendants be enjoined from enforcing the Electrical Energy Tax Act and plaintiffs have such other and further relief as may be proper in the premises.

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APPENDIX B

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

Arizona Public Service Company, et al., Plaintiffs,

vs.

Fred O'Cheskey, et al., Defendants.

No. 50245

MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure, Defendants Fred O'Cheskey, the Bureau of Revenue and the State of New Mexico move the court to dismiss Plaintiffs' complaint on the grounds that:

1. This Court lacks jurisdiction over the subject matter of this action because of Sec. 72-13-36, N.M.S.A. 1953 which provides:

> No court of this state has jurisdiction to entertain any proceeding by a taxpayer in which he calls into question his liability for any tax or the application to him of any provision of the Tax Administration Act [72-13-13 to 72-13-92], except as a consequence of the appeal by him to the court of appeals from the action and order of the commissioner all as specified in Sec. 72-13-38, N.M.S.A. 1953 Comp., or except as a consequence of a claim for refund as specified in Sec. 72-13-40 N.M.S.A. 1953 Comp.

2. Inasmuch as the Electrical Energy Tax Act does not, as a matter of law, violate any of the federal or New Mexico constitutional provisions which plaintiffs allege it does, the complaint fails to state a claim upon which relief can be granted.

Defendants' reasons and legal precedents upon which this motion is based are set forth in the brief annexed hereto.

/s/ Toney Anaya
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Attorney General

/s/ Jan Unna
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CERTIFICATE OF SERVICE

I certify that the foregoing Motion, together with the brief in support thereof, was served by mailing a copy to each opposing counsel of record this 10th day of November, 1975.

/s/ Jan Unna
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Bureau of Revenue
Assistant Attorney General