

ORIGINAL

In the

Supreme Court of the United States

ARIZONA PUBLIC SERVICE COMPANY, et al.,)	
)	
Appellants,)	
)	
v.)	No. 77-1810
)	
ARTHUR B. SNEAD, etc., et al.,)	
)	
Appellees.)	

Washington, D. C.
February 26, 1979

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

ARIZONA PUBLIC SERVICE COMPANY, ET AL.,

Appellants,

v.

ARTHUR B. SNEAD, ETC., ET AL.,

Appellees.

No. 77-1810

Washington, D. C.

Monday, February 26, 1979

The above-entitled matter came on for argument at
10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DANIEL J. McAULIFFE, ESQ., 3100 Valley Center,
Phoenix, Arizona 85073; on behalf of the
Appellants.

JAN E. UNNA, ESQ., Special Assistant Attorney
General of New Mexico, P. O. Box 630, Santa Fe,
New Mexico; on behalf of the Appellees.

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on behalf of the Appellants

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on behalf of the Appellees

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on behalf of the Appellants - Rebuttal

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Arizona Public Service Company v. Snead.

Mr. McAuliffe, will you proceed whenever you are ready.

ORAL ARGUMENT OF DANIEL J. McAULIFFE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. McAULIFFE: Mr. Chief Justice, and may it please the Court:

I had not intended to present separately the underlying facts of this proceeding nor a description of the proceedings which bring us here except as they may be pertinent to argument or to questions from the Court. I would be happy to state the facts separately if the Court so desires, otherwise I will proceed with the argument.

QUESTION: We will leave that entirely in your hands, counsel.

MR. McAULIFFE: I believe that they are adequately set forth in the briefs.

Essentially, Mr. Chief Justice and the Court, this is a discrimination case. It involves the constitutionality of the New Mexico Electrical Energy Tax Act. Let me explain initially exactly how that Energy Tax Act operates, and I think you will understand the discriminatory operation of the tax.

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Section 3 of the tax purports to impose a levy on the generation of electricity generated in New Mexico for the -- it states that it is on the privilege of generating electricity for sale. While that appears even-handed, section 9 of the Act significantly affects the way that tax operates. Section 9 is the credit provision. And the two pertinent provisions we believe are sections 9(B) and (C).

Section 9(B) provides that a generator who produces electricity in New Mexico which will be consumed in New Mexico may take an energy tax that is imposed and credit it against a gross receipts tax liability which will incur upon the retail sale of electricity.

Again, that credit provision of section 9(B) is available and applies only if the electricity is generated and consumed in New Mexico.

Section 9(C) deals with a separate situation, because if you look at the wholesaler of electricity, the local generator, for example, who will sell the electricity initially for resale, the section 9(B) credit is of no assistance to that entity, for the simple reason that the gross receipts tax does not apply to a sale for resale at the wholesale level. As a result, there is no gross receipts tax liability against which to credit the energy tax assessment. Section 9(C) takes care of that situation. Indeed, it was included in the Act specifically to take care of that situation.

Indeed, it was included in the Act specifically to take care of that situation.

What section 9(C) provides is that the credit granted by section 9 will be assigned forward by the wholesale seller, which for purposes of argument I will call the generator. It generally is -- there is some confusion generated when you are trying to describe both parties to that transaction. The generator is normally the seller in the wholesale transaction. The generator assigns that credit forward to the purchaser in the wholesale transaction who is generally the retail seller, in exchange --

QUESTION: Within the state or out, or could it be either?

MR. McAULIFFE: The credit is assigned forward, it is only with respect to electricity that will be consumed in New Mexico.

QUESTION: The party who generates the electricity may sell it to a wholesaler within the state or without, is that so?

MR. McAULIFFE: That is correct, Mr. Chief Justice, he may. Again, the section 9(C) credit though will be limited to --

QUESTION: To just the one?

MR. McAULIFFE: -- to just the one, where the electricity is eventually consumed in New Mexico. In exchange

for the assignment forward of that credit, the generator will eventually receive a monetary reimbursement from the retailer in the amount of any credit actually received by application against the gross receipts tax liability of the retailer.

The net effect of these provisions throughout the course of this litigation has been undisputed.

The energy tax applies only to electricity which is generated in New Mexico and transmitted to other states for retail sale and consumption. It collects no revenue whatsoever from electricity which is generated and consumed in the State of New Mexico. We contend that tax is discriminatory against interstate commerce.

QUESTION: But if you look at the overall effect of the tax, the tax structure of New Mexico, New Mexico consumers of electricity may well pay just as much as consumers in other states. Isn't that true?

MR. McAULIFFE: Not if you -- at the consumer level, I am not sure that is true, Mr. Justice Rehnquist, because then you are taking into account whatever tax may be applied at the consumption level and the state of consumption. New Mexico consumers pay a total tax or the total tax -- we can take it all the way down to the level of consumption in New Mexico -- is a 4 percent gross receipts tax imposed by the state. And when we get to the constitutional argument, our position is -- that the state's position is obviously that that saves the

energy tax, but our position is that even when you look at the whole scheme of taxation, looking at the treatment of wholesalers, you do not have that equality of treatment. You have a facial equivalence looking at the scheme as a whole, but at the wholesale level there is no New Mexico tax.

QUESTION: When you say the wholesale level, you mean sales by the generator to others who in turn sell at retail?

MR. McAULIFFE: Sell at retail, that's correct, Mr. Justice Rehnquist. The initial aspect of the discrimination issue is that which involves the Tax Reform Act of 1976, which was passed during the pendency of this litigation. We have particular reference to section 2121(a) which is codified as Title 15, United States Code, section 391. That statute provides in effect that no state may impose a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state producers, generators, wholesalers, retailers, or consumers. The statute also defines what is discriminatory, and that is if it imposes a greater tax burden on electricity, whether directly or indirectly, on electricity which is generated and transmitted in interstate commerce.

We believe that the New Mexico electrical energy tax clearly satisfies that definition. There has never been any dispute that it is a tax on or with respect to the

generation or transmission of electricity, and it is discriminatory. It imposes a greater tax burden on electricity which is generated and transmitted to other states, states outside of New Mexico. That has never been disputed. As a matter of fact, the legislative history of the statute we believe confirms that.

QUESTION: Doesn't the legislative history show that that federal law was enacted with this statute as a direct target?

MR. McAULIFFE: Yes, it does, Mr. Justice Stewart.

QUESTION: Then, of course, it was amended and your brother on the other side claims that it was during the course of its being amended it was whittled down to being almost meaningless and not to cover this statute.

MR. McAULIFFE: Well, it was not really amended. Let me explain what the course of the legislative history was. There was a provision in the Senate Finance Committee, which was reported to the Senate floor and passed by the Senate. This was the provision that Senator Domenici moved to strike in its entirety, and that said that if the state imposed a higher gross or net tax on electricity, then that was the statutory definition of discrimination at that point.

QUESTION: Then the Senators from a couple of the other states, West Virginia and Washington, got disturbed about it.

MR. McAULIFFE: We have no legislative record of that, Mr. Justice Stewart, and I don't believe that the state's brief cites anything in the legislative record to support that contention. There was a bill introduced approximately a year before the Tax Reform Act which would have stricken down all state generation taxes. There was a hearing held on that bill in March of 1976, and representatives from the States of West Virginia and Washington appeared and questioned whether -- as a matter of fact, I think the reference they used in the hearings was this is an over-reaction to the specific situation in Arizona and New Mexico, it goes too far, you're not striking a discriminatory tax. That bill, we have no idea what happened to it. We then pick up a separate legislative history --

QUESTION: Anyway, it was not enacted?

MR. McAULIFFE: It was not enacted. When we get to the Tax Reform Act, now the change that was made was when the differing versions passed by the House of Representatives and the Senate went to a conference committee, and the conference committee changed the language to its present formulation. The conference committee report, both in the House and in the Senate, says that it is adopting the Senate amendment. There is no other explanation for the change, and I think without inquiry and speculation of the legislative record, we are entitled to assume that they adopted the intent of the Senate

as well. And the intent of the Senate, at least as reflected in the Senate was quite clear. The Senate Finance Committee describes the type of tax they are talking about and it describes on all fours the electrical energy tax of the State of New Mexico. Senator Domenici appeared at the time the bill was introduced for debate and moved to strike it in its entirety, and the exchange between he and Senator Fannin and Senator Goldwater makes perfectly clear that what his concern was, that this would reach the New Mexico tax, and Senator Domenici's amendment was defeated. So we think the legislative history is quite clear on that one point.

The lower court in effect we believe disregarded this statute and said that it incorporated a constitutional test. We submit that is a very strained reading of it. The statute refers to not only a tax, it refers to a particular class of taxes, a tax on or with respect to the generation or transmission of electricity.

I turn then to the constitutional argument. Again, the energy tax, as we have described, is discriminatory in its actual operation. The state contends that although the --

QUESTION: Mr. McAuliffe, just before you leave the statute, of course, you rely primarily on the second sentence of the statute, rather than the first, because --

MR. McAULIFFE: I don't know that we would say we rely any more on one sentence than the other, because the

first sentence --

QUESTION: It talks about discrimination against out-of-state manufacturers, and there is no out-of-state manufacturers being discriminated against here, is there?

MR. McAULIFFE: According to state of residence, they are out of state, but the --

QUESTION: Well, that is not what it means, is it?

MR. McAULIFFE: That's correct. We would rely on the second -- the second sentence contains the test of discrimination.

QUESTION: In effect, you read that as broadening the first sentence then, basically?

MR. McAULIFFE: I read --

QUESTION: The first sentence literally just doesn't apply, as I read it.

MR. McAULIFFE: Well, the first sentence says that no state shall discriminate, which is --

QUESTION: Against out-of-state manufacturers, producers, et cetera, but you are not an out-of-state producer within the meaning of this, are you?

MR. McAULIFFE: I don't know that -- the statute doesn't define what an out-of-state producer is. I would argue that it refers to a producer who is producing electricity principally for consumption out-of-state.

QUESTION: That is not what it says.

QUESTION: That is not what it says.

MR. McAULIFFE: It says out-of-state manufacturers, producers --

QUESTION: It doesn't talk about production for sale out-of-state. It seems to me the first sentence would apply to an out-of-state generating plant that was selling electricity into your state and you had a higher tax on that electricity than on locally produced electricity, but that is not this case. But the second sentence I would say does read on your case.

MR. McAULIFFE: I would agree with you, Mr. Justice Stevens.

Turning then to the constitutional argument, the state's defense of the statute is that you can't view the energy tax in isolation, that you have to look at the state's entire scheme of taxation. Even adopting that as the constitutional test, it does not save the energy tax because we believe that that test involves considerably more than simply looking at tax incidences and tax rates and discovering whether those are so glaring in equality.

If that were the analysis, and that is the analysis the state employs, then the Halliburton case would have been decided differently, because in the Halliburton case there was facial tax equivalence between the sales tax and the use tax. The difficulty in Halliburton was that one component of that

facially equivalent tax structure affected a class of tax-payers differently, depending upon whether they were involved in interstate commerce or not. That is exactly what happens here when you look at the wholesale transaction.

Again, if the wholesaler sells that electricity for consumption in New Mexico, it will eventually receive a tax, a private tax rebate from the retail seller in the amount of any credit actually received which will wholly erase any energy tax liability. The interstate wholesaler, the wholesaler who markets that electricity which is consumed in other states receives no such credit and pays the energy tax.

In effect, the interstate transaction is taxed, the intrastate transaction is tax-free.

QUESTION: Do the opinions below indicate how substantial a portion of the total business the wholesaling of electricity is?

MR. McAULIFFE: They do not, Mr. Justice Rehnquist. The opinions below do not address the issue of discrimination of wholesalers at all. In the appendix in our answers to the Bureau of Revenues' interrogatories, reading them together with the affidavits which were submitted in connection with our initial motion for summary judgment, you will find the most complete figures available are for 1974, and they are only partial. They do not include figures for Southern California Edison. They indicate that our purchases of

wholesale electricity were approximately 4.5 million kilowatt hours of electricity and our sales of electricity at the wholesale level were approximately 7.5 million kilowatt hours, for a total of 1.2 billion kilowatt hours of electricity. That is roughly 10 to 12 percent of the total electricity generated by us in New Mexico. That is the approximate volume of it. It is, of course, going to fluctuate year by year, depending upon demand and whether particular facilities are on-line or off-line, but I think that is a rough, rough approximation.

Under the Halliburton case, the test is whether the component tax provides equal treatment to in-state and out-of-state taxpayers similarly situated. We contend that this tax does not. When you compare the situation of the wholesaler who sells intrastate with the situation of the wholesaler who sells interstate, there is no even-handed treatment. They are subject to disparate burdens and that is discriminatory. And although there has been a significant change in recent years, a reformulation of the test which this Court will apply to state taxation in interstate commerce, that principle remains unchanged, and that is that a state tax may not discriminate against interstate commerce.

We also contend that this tax imposes undue burdens on interstate commerce. The state's response to this is that the tax cannot impose an undue or what used to be called a

multiple burden on interstate commerce, because it only applies to the act of generation which only happens in New Mexico. We contend that that is a fiction. As a practical matter, you cannot -- at the time electricity is generated in New Mexico under the state's own regulations, it is subject to potential credit. Whether the potential credit becomes actual or whether it vanishes depends upon a subsequent determination as to the state of consumption. At the time that determination is made, that electricity is already in the transmission or pipeline, if you will, traveling at the speed of light. The tax, whether it is a tax on sale or a tax on consumption, liability for that tax, the assessment for the amount of that tax that is due cannot be made at the point of generation, it can only be made at the time that it is determined where that is consumed. So we contend that the tax is perfectly analogous to the tax in Michigan-Wisconsin Pipe Line v. Calvert.

There the tax was imposed on the taking of gas, taking of natural gas, and the principle vice of the tax was that it was imposed on the entire volume of gas taken. This Court has subsequently held that the vice there was that it was unapportioned to activities within the state. This is exactly the same tax. This is a privilege tax, just as the tax in Michigan-Wisconsin was. This is a tax which is imposed on the entire volume of gasoline that is taken -- the entire volume of electricity taken outside of the state. This is

just as much a tax on the exit from the borders of New Mexico of electricity as was the tax in Michigan-Wisconsin.

QUESTION: Are you saying that a state cannot make the generation of electricity a taxable event?

MR. McAULIFFE: No, I'm not, Mr. Justice Rehnquist. What I am saying is that this tax does not do that, because this tax -- this does not impose a levy on all generation of electricity, and because it credits or exempts certain generation, you cannot determine whether you are liable for this tax until after generation happens. It has to be transformed and transmitted, and the place of consumption determined before you know whether this tax is due.

A straight-forward generation tax, such as was involved in Utah Power & Light, it can be determined at the point of generation, whether that tax has to be paid. It can't be done here. The State of New Mexico's Bureau of Revenue concedes that when in its regulations it says that energy that is generated at that point in time is subject to a potential credit. The Act doesn't refer to any such potential credit concept. But if you are going to straight-forwardly apply this tax, then you have to have a potential credit at that point, because at that point the tax is potential. It is held in abeyance until such time as you determine the place of consumption.

QUESTION: Mr. McAuliffe, you may have covered this

and I might have missed it, but does the state give a credit on the gross receipts tax to an out-of-state generator who might sell electricity within the state?

MR. McAULIFFE: Well --

QUESTION: For a similar tax imposed by the other state.

MR. McAULIFFE: Yes, it does. That is section 9(A).

QUESTION: 9(A) does that?

MR. McAULIFFE: Yes. All that provides is that if there is a tax, a generation tax imposed by another state and the energy is transmitted to New Mexico and consumed there, then you are entitled to take -- if it is retailed in New Mexico, you will incur the gross receipts tax and you are entitled to take a credit against that gross receipts tax.

QUESTION: What is the amount of the credit?

MR. McAULIFFE: It is whatever tax is imposed by the other state.

QUESTION: Even if it was a full 4 percent, then conceivably they would pay no gross receipts tax?

MR. McAULIFFE: I would assume so, Mr. Justice Stevens. Our position is that the debtor obviously cannot cure the problem. That is the same offer of reciprocity that was made in *Austin v. New Hampshire*. It is exactly the situation that the Congress was concerned with when it passed the Tax Reform Act, that what you would be producing is a taxing

war between the states over the subject of electricity.

This is, Mr. Chief Justice and the Court, exactly what this Court described in the Complete Auto Transit case, in the footnote. This is a privileged tax, it is a tailored privilege tax. It has to be subjected to strict scrutiny, and when it is it produces the effects which this Court has always held are prohibited by the Commerce Clause. It discriminates against interstate commerce, pure and simply, and it transgresses the provisions of the Tax Reform Act of 1976.

Mr. Chief Justice, if there are no further questions, I reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Unna.

ORAL ARGUMENT OF JAN E. UNNA, ESQ.,

ON BEHALF OF THE APPELLEES

MR. UNNA: Mr. Chief Justice, and may it please the Court:

The heart of this case is in two issues, the Tax Reform Act, section 391, and the constitutional case law. I want to discuss the constitutional case law first and then turn to the Tax Reform Act provision. In discussing first the constitutional case law, I want to weave it in with the actual operation of the tax to show why New Mexico's tax restructuring with its Electrical Energy Tax Act is clearly nondiscriminatory under the case law from this Court.

QUESTION: As long as you are going to talk about the constitutional issues first, you would agree, we would have to decide the statutory issue first, don't you think?

MR. UNNA: Yes, and I think the statutory issue is the more important issue, really. Before the Electrical Energy Tax Act which established this generation tax and the tax credit was enacted, the tax on electricity generated in New Mexico but sent elsewhere, to Southern California or Arizona, was zero. There was no tax burden whatsoever on electricity generated and consumed or sent outside the state. There was, however, a local tax, a gross receipts or a sales tax on electricity sold in New Mexico, a 4 percent gross receipts tax. So if I use Arizona Public Service, one of the generators and sellers of electricity elsewhere, an exporter of electricity from New Mexico, compare that with Public Service Company, which is the largest generator and retailer of electricity in the state, compare their burdens for ease of comparison, for illustration purposes, Arizona Public Service was subject to absolutely no tax burden before this generation tax was passed. Public Service Company of New Mexico, however, was subject to a 4 percent burden. Then we have the generation tax passed in 1975, with the credit at .4 of a mil per kilowatt hour, which works out to a 2 percent, approximately a 2 percent tax.

After the Electrical Energy Tax Act, we have Arizona

Public Service now subject to a 2 percent tax burden, a generation tax burden, no gross receipts tax burden because it doesn't sell its electricity in New Mexico --

QUESTION: Mr. Unna, could I interrupt you once more?

MR. UNNA: Yes.

QUESTION: You say no tax burden whatsoever. Don't they pay real estate tax and personal property tax and income tax and various other taxes?

MR. UNNA: Yes, Mr. Justice, but the burden on electricity per se was zero.

QUESTION: I see.

MR. UNNA: And for purposes of at least as I read the --

QUESTION: You don't want us to look at the total picture, we just look at those on electricity per se?

MR. UNNA: Yes, the commodity of the electricity as it is referred to in the case law.

After the Electrical Energy Tax Act is passed, we have Public Service now subject to a 2 per cent generation tax burden also, but it is allowed to credit this 2 percent burden against its 4 percent gross receipts tax liability, so that its total burden is 4 percent, that is the 2 percent generation tax burden and 4 percent gross receipts tax minus the 2 percent generation tax, producing a total burden of 4 percent. So the in-state burden -- I am referring to in-state meaning

electricity generated and consumed in Mexico -- the in-state burden is 4 percent; the out-of-state is 2 percent. Obviously the burden on electricity, the in-state electricity is greater than on the out-of-state electricity.

I want to emphasize that all generators in New Mexico pay the tax. It is not true that the tax is applied only to out-of-state electricity, that is electricity generated in New Mexico, moving outside the state. Public Service Company and everybody in New Mexico pays the tax as well. They simply are allowed to credit that energy tax, the generation tax against their gross receipts tax liability.

QUESTION: Does the record indicate whether Arizona Public Service sells at retail any of its electricity in New Mexico?

MR. UNNA: A minor portion is sold to the company that mines coal at the Four Corners Power Plant, and it is a miniscule amount and basically I think that is all they sell in New Mexico. All of this electricity from the Four Corners plant and the San Juan generating station, these two plants in northwest New Mexico, all of that basically moves outside the state except for Public Service Company of New Mexico and El Paso Electric. Those are two generators who also sell electricity in New Mexico, a small portion of it.

Let me give the Court three hypotheticals which will I hope illustrate the non-discriminatory aspects of the tax.

In the first hypothetical, assume the state has a 2 percent generation tax and no other taxes on electricity per se, and that is obviously non-discriminatory because the 2 percent tax applies to all electricity, no matter where it is sold. In the second example, assume that the state later imposes a sales tax of 2 percent, a flat 2 percent. The total tax burden on in-state electricity would then be 4 percent, and the total tax burden on out-of-state electricity would be 2 percent, only the 2 percent generation tax. Obviously, again, the burden is greater on the in-state electricity than out-of-state electricity, and it is non-discriminatory.

In the third example, assume that the state had only a sales tax and no generation tax, it later decides to add a generation tax but does not want to raise the total tax burden for in-state electricity so it allows that 2 percent generation tax to be credited against its sales tax, and this is not a hypothetical at all, it is actually New Mexico's situation. The total tax burden on in-state electricity is still 4 percent, and the total tax burden on electricity generated but marketed and sold elsewhere is still 2 percent, and the burden is greater on in-state.

QUESTION: Mr. Unna, you omit the possibility that electricity sold elsewhere may be subject to a tax elsewhere.

MR. UNNA: Under the constitutional case law, that is not relevant, in my reading of it, in any event. The

inquiry is that a state's structure ends at the borders of the state that you are looking at.

QUESTION: But it is true nevertheless.

MR. UNNA: What?

QUESTION: That that electricity may be subject to a tax at the retail level.

MR. UNNA: Oh, of course. Of course, a like burden, in fact.

QUESTION: Isn't it also true that so far as New Mexico generators of electricity go, those who generate or that part of the electricity that they generate that is sold inside of New Mexico is not subject to any generation tax and that part of the electricity that the generators, the New Mexico generators sell that is sold outside of the state is --

MR. UNNA: No, Your Honor, that is not true. All generators pay the tax --

QUESTION: But those who generate electricity that is sold in New Mexico get it back.

MR. UNNA: They get the credit for it against their gross receipts tax.

QUESTION: They get it all back, don't they?

MR. UNNA: Yes, but they pay a higher tax.

QUESTION: And those who sell electricity that is in turn sold at retail outside of New Mexico don't get it back.

MR. UNNA: Not from New Mexico. There is no way we

could give it back --

QUESTION: From anybody.

MR. UNNA: Well, they may get it from Arizona, I don't know.

QUESTION: But so far as New Mexico goes, the net effect is that the sellers of electricity, the wholesale sellers of electricity that in turn is sold in-state are not taxed and those who sell electricity at retail out of state are taxed, isn't that correct? Or have I missed something?

MR. UNNA: No, you haven't. The net effect of it is true, but it is easy to slide over the fact that in-state generators do actually pay this tax, the generation tax.

QUESTION: Isn't the net effect the test?

MR. UNNA: The total tax burden under the constitutional case law is the test.

QUESTION: Not on all taxpayers in the state, the total tax burden on a single taxpayer.

MR. UNNA: On the commodity, electricity.

QUESTION: By a taxpayer. Maybe five different people pay taxes with respect to the commodity of electricity, but you have to measure it by its effect on a taxpayer, don't you?

MR. UNNA: I'm not sure that the case law says that you couldn't add up the total tax burden on different taxpayers so long as it is on the commodity of electricity. You

don't have to have one single -- as I read Public Utilities District No. 2, the '73 case, Alaska v. Arctic Maid, involving fish and local canners, it doesn't say that you have to have one taxpayer and compare the burden on one taxpayer. You add up the total tax burden on the commodity -- in the Alaska v. Arctic Maid, a '61 case, it was fish, local canners versus one out-of-state or interstate transaction. You don't have to have just one taxpayer.

As far as the record goes here with respect to wholesale sales, however, there is no factual record, for example, that there is any in-state generator like Public Service Company that even makes a wholesale sale. As far as what is being argued by the other side, that is basically an afterthought because the record has no facts even to show that, that there is even a wholesale -- I presume, I don't have the facts either, that there are wholesale --

QUESTION: Is there any way you could tax the gas sold in New Mexico?

MR. UNNA: The electricity?

QUESTION: Yes, sir.

MR. UNNA: Yes, I think that the way we have it, the tax structure that we have is --

QUESTION: How would you tax it?

MR. UNNA: The way we have, Your Honor.

QUESTION: You say you give it back. Well, you

can't give the money back from Arizona --

MR. UNNA: No, we have no control over --

QUESTION: -- because you never give any money to Arizona.

MR. UNNA: No.

QUESTION: So Arizona couldn't give it back.

MR. UNNA: Well, Arizona is free to do whatever it wants to with --

QUESTION: But here I just don't understand how you can with a straight face say that there isn't a difference.

MR. UNNA: Well, under the --

QUESTION: When you end up at the end of the year, there is a difference.

MR. UNNA: The total tax burden on electricity is different, is 4 percent for in-state, the total tax --

QUESTION: Is there a difference at the end of the year?

MR. UNNA: I'm sorry?

QUESTION: Is there a difference at the end of the year between electricity that is sold to Arizona and the electricity that is sold in New Mexico?

MR. UNNA: Yes.

QUESTION: Is there a difference in the tax paid?

MR. UNNA: Yes, the tax burden on in-state electricity that is sold in New Mexico is twice the burden on electricity

that is generated and sold in Arizona.

QUESTION: Well, if you add by two different taxpayers.

MR. UNNA: Yes. I see, it was your question --

QUESTION: I am talking about the generator, that is what I am talking about. Doesn't he pay less if he sells his electricity in New Mexico?

MR. UNNA: No, he pays more, Your Honor. He pays a 2 percent generation tax and he pays in effect a 2 percent gross receipts tax, and that is 4 percent, yes, he does.

QUESTION: The generator pays a 2 percent generation tax that he gets back if the electricity is ultimately sold inside the state, isn't that right?

MR. UNNA: Yes, sir, but he gets it back against his sales tax or gross receipts tax which he also pays. That is a 4 percent tax burden.

QUESTION: I didn't think the generator for selling wholesale was subject to a gross receipts tax.

MR. UNNA: Well, there is no factual record on it, but I am taking ---

QUESTION: Isn't that correct, as a matter of Arizona law? Or have I misunderstood that, too?

MR. UNNA: What, Your Honor?

QUESTION: That a sale by the generator at wholesale is not subject to the gross receipts tax.

MR. UNNA: A sale by a New Mexico generator is not subject to the gross receipts tax?

QUESTION: Yes. Is that correct?

MR. UNNA: Yes.

QUESTION: But the net result of a transaction is that the electricity, each kilowatt hour that goes outside the state pays a higher tax after the refund has been adjusted than that consumed within the state, is that not correct?

MR. UNNA: It's not correct. The net result for purposes of the constitutional case law is that a higher tax is paid on in-state electricity.

QUESTION: Well, let's forget what it is for, let's just talk about the mathematics of it.

MR. UNNA: All right.

QUESTION: Does each kilowatt hour which goes across the borders of the state into another place ultimately pay a higher tax than that consumed within the state?

MR. UNNA: No, Your Honor, it doesn't. The electricity generated in New Mexico and sent to Arizona pays the 2 percent generation tax. Electricity generated in New Mexico and consumed in New Mexico pays the 2 percent generation tax, that 2 percent generation tax is then credited against a 4 percent gross receipts tax, so that ultimately the total burden on in-state electricity is 4 percent, the total burden on out-of-state electricity is 2 percent, and under the

constitutional case law that in the equivalence of taxation rule under the Public Utilities District No. 2 case, Alaska v. Arctic Maid and the South Carolina Power case --

QUESTION: Mr. Unna --

MR. UNNA: -- the relevant inquiry is at the borders, stops at the borders of the state that you are looking at. You don't weigh the sister state's burdens into the equation.

QUESTION: But is it not correct that before the generation tax was paid, there was a 4 percent gross receipts tax, period, that is all there was, and then Arizona decided that it wanted to -- New Mexico, I keep getting mixed up -- New Mexico wanted to get some money out of the generation so they are placing a tax -- there are two plants in the Four Corners area, one sells entirely within the state and one sells entirely without the state. The entire burden of the new tax falls on the plant that falls outside the state, does it not?

MR. UNNA: That's true. There is an additional burden as a result of the Electrical Energy Tax Act, and that additional burden isn't shared by in-state electricity. The in-state --

QUESTION: So of the two power plants I described, just one of them would really bear the entire burden of the new tax, one sells out-of-state and one sells in-state.

MR. UNNA: That's right. There is an additional tax

burden that is not shared by in-state electricity, but the relevant -- that is not the test under the constitutional case law. The constitutional case law test is whether there is a greater tax burden on the out-of-state electricity than on in-state electricity, and the out-of-state electricity has moved basically from zero to 2 percent. They weren't paying any tax before.

QUESTION: Well, is your position basically that New Mexico's tax is not all that different from the use tax that states devised in the thirties to make up for lost revenue in a situation that they couldn't get by sales taxes?

MR. UNNA: That is basically it, yes. In those cases, those are equivalent taxes, say, a 4 percent use tax and a 4 percent sales tax. Here the tax burden is even greater on in-state electricity, it is 4 percent versus 2 percent. The equivalence of taxation rule allows a state to do exactly what New Mexico has done in restructuring its taxation with respect to electricity.

QUESTION: Mr. Unna, perhaps I am wrong, but isn't the distinction really on what one looks at? If one looks at the energy tax in isolation, it is discriminatory. If one looks at the entire burden, according to your approach, it is non-discriminatory.

MR. UNNA: Yes. Your Honor, the case law is very clear, that you are not to look at -- as I read the cases, one

is not to look at the tax in isolation, one is to add up the total tax burden.

QUESTION: How about just looking at wholesalers? How about looking at the entire tax burden on wholesalers of energy?

MR. UNNA: Well, if you look solely at the tax burden on a generator and a wholesaler, all generators and wholesalers pay the tax. The in-state generator and wholesaler actually pays the tax, too.

QUESTION: I know, he pays it but he gets it given back. He gets it given back to him.

MR. UNNA: That's true.

QUESTION: So in net effect he doesn't pay it.

MR. UNNA: If --

QUESTION: If he doesn't pay it and you can look around all you want to and he doesn't pay a gross receipts tax.

MR. UNNA: But he does. He actually pays it but then gets a credit on an even higher tax for in-state electricity.

QUESTION: The wholesaler does?

MR. UNNA: Yes.

QUESTION: The higher tax is imposed on the ultimate consumer, isn't it?

MR. UNNA: Not in our state, Your Honor. It is imposed on the same Public Service Company or the retailer of

electricity, the legal incidence of the tax is on the seller in New Mexico.

QUESTION: The retail seller.

MR. UNNA: Yes.

QUESTION: Not therefore on the wholesaler or on the generator.

MR. UNNA: No, that's true.

QUESTION: Are there any wholesalers of electricity in New Mexico?

MR. UNNA: The record is silent as to whether there is any wholesale selling of electricity. Most of it, I submit from my experience as a consumer in New Mexico as well, is not --

QUESTION: The people who retail generate?

MR. UNNA: Most of the electricity where I come from is sold by Public Service Company in New Mexico and it generates --

QUESTION: What if there were a generator of electricity in New Mexico who was a wholesaler and sold to retailers in New Mexico of electricity, what if there was one of those in New Mexico?

MR. UNNA: What about it?

QUESTION: Well, what about him, he would get forgiven his energy tax --

MR. UNNA: The only purpose of the mandatory credit

and the forgiveness of the paying back of the generation --

QUESTION: But he would never pay any gross receipts tax.

MR. UNNA: He would pay the generation tax.

QUESTION: He would get it back?

MR. UNNA: He would get it back against a higher --

QUESTION: Well, he wouldn't pay any gross receipts tax, if there was such a person as I am talking about.

MR. UNNA: Yes. That is speculative. There is nothing in the record to indicate that there is such a person.

QUESTION: Well, is it just natural to assume that there isn't?

MR. UNNA: No, but the record is silent, it wasn't a point that was developed by the utilities in this case. It was never tried in the lower court, in the trial court. If the case wasn't tried, the case was submitted on cross motions for summary judgment, but there is no factual information on a discrimination against wholesalers. To my way of thinking, the argument about discrimination against wholesalers assumes the very proposition of discrimination that we are arguing about, because they would have -- you have assumed that the tax burden on in-state generators is zero and there is still a 4 percent gross receipts tax burden. That is not the case. The tax burden on in-state generators is in fact still 2 percent. There is an equivalent tax burden of generators, and

then we've in effect only lowered our gross receipts tax.

QUESTION: Just that one point, but that 2 percent he can't get back from anybody?

MR. UNNA: The out-of-state?

QUESTION: Yes. Isn't that right?

MR. UNNA: He can't get back from New Mexico.

QUESTION: That's right.

MR. UNNA: Right.

QUESTION: Mr. Unna, could I focus on section 391 for a minute. When that came out of the Senate, is there any question that it concededly was aimed to invalidate New Mexico's tax?

MR. UNNA: There is no question that it is aimed at invalidating New Mexico's tax.

QUESTION: Well, what legislative history is there in connection with that statute to suggest that the Congress' adoption of the phrase "greater tax burden" signaled a design to shift the focus of the discrimination inquiry into the state tax system as a whole?

MR. UNNA: I don't know that the Senate Finance -- the Senate Finance Committee version, there was a great difference I think in the -- well, not a great difference, there was a difference between the Senate Finance Committee version and the greater tax burden version. In my view, the proponents of the test had a problem in that they couldn't

invalidate West Virginia's tax structure with respect to electricity or they would --

QUESTION: This was the barrier, West Virginia, wasn't it?

MR. UNNA: Yes, and they would have lost their whole test of discrimination to invalidate New Mexico's tax, if they would have hurt Washington and West Virginia.

QUESTION: And you think because of the West Virginia barrier you had a completely different result then as to New Mexico than when it left the Senate?

MR. UNNA: No, I think they had to water down the test so substantially, however, that it resulted in a restatement of the case law, and the test of discrimination in the second part of section 391 I think makes that very clear.

QUESTION: And New Mexico benefits accordingly?

MR. UNNA: Of course, if it is a restatement, then our tax is constitutional and if it is a restatement under the constitutional case law, there is no question that New Mexico's tax structure would survive intact.

QUESTION: Does it make some difference in this case whether the business of generating and selling electrical energy is set up like the grocery business, where you have three levels, manufacture, at least you used to have manufacturer, wholesale and retail, or whether there is some difference between the two?

MR. UNNA: No, I don't think it makes any difference. I don't quite understand the thrust of your question.

QUESTION: Well, my thought is that our cases have said the practicalities influence a great deal whether a tax is discriminatory or not and who bears the burden and that sort of thing. And if in fact the concept of someone who wholesales electricity does not loom large in the business of the generation and distribution of electrical energy, should that play any part in our decision as compared to a situation where there are three identifiable tiers, a manufacturer, a wholesaler and a retailer?

MR. UNNA: Well, I think that wholesaling doesn't play a large part in the distribution of electricity. In the record, in response to our interrogatory, there are some answers about wholesaling of electricity amongst the plaintiffs and among in-state utilities, but those are economy interchanges, simply one utility gets low and needs more electricity, it takes some more of one of the other's as part of the power pool. But there is no record here basically on wholesaling of electricity, and to my knowledge basically we have in-state generators who also retail and --

QUESTION: Do you have an REA in your state?

MR. UNNA: No, we don't.

QUESTION: You don't.

MR. UNNA: Not to my knowledge. There are some

federal power lines, but the REA to my knowledge is not in our state.

QUESTION: I had the impression that in your brief you had argued somewhere, and I can't put my finger on it now, that the producing state has to suffer all the environmental disadvantages of presumably coal or oil or whatever is used to produce it, or if it is atomic, all of those risks, whatever they are, and that that justified a different treatment for the electrical energy which was exported where the consumers would not have to suffer the subject of these environmental disadvantages. Am I right, that you have argued that?

MR. UNNA: No, I have not argued a constitutional case law of discrimination in --

QUESTION: There is something like that in your brief.

QUESTION: Page 35 in your brief.

MR. UNNA: We have argued -- consistently the utilities raised below, at the trial level that their rights, 14th Amendment, due process rights were being violated by this tax which raised a question --

QUESTION: Stick with my question, if you don't mind, counsel.

MR. UNNA: Sure.

QUESTION: Do you argue that the state in which the generator is located puts up with a lot of burdens that the

consuming state or the Republic of Mexico doesn't have to suffer?

MR. UNNA: Oh, yes.

QUESTION: And if so, that would appear to mean that you are undertaking to justify a differential treatment between in-state and out-of-state consumption.

MR. UNNA: I'm not saying we can discriminate because there is so much pollution.

QUESTION: Then what is the argument for?

MR. UNNA: Well, to show nexus with the taxing state, that there were a tremendous amount of costs and benefits to the utilities as a result of having their plants in the northwest corner of New Mexico, just to set the case in context. It was submitted on cross motions for summary judgment and we wanted to make sure that it was well established at the trial level that there was nexus sufficient for taxing purposes.

QUESTION: Mr. Unna, let me ask you a question about the legislative history of the statute, with specific reference to West Virginia. Do I correctly understand that the difference between the West Virginia generating tax and the tax that we have before us here is in West Virginia there was no credit against any gross receipts tax?

MR. UNNA: No, you are correct. In West Virginia, it is a tax on the gross proceeds of electricity.

QUESTION: I see.

MR. UNNA: And there was fear that the Senate Finance Committee version of higher gross or net tax would sweep up West Virginia's tax and incur the wrath of Senator Byrd, and so the tax then was --

QUESTION: The fear was based on the fact that the total tax burden might be taken to include taxes imposed by neighboring states on the retail sale, is that the idea, whereas West Virginia had no gross receipts tax?

MR. UNNA: No, I think the fear was simply using the word "gross."

QUESTION: I see.

MR. UNNA: Gross, it would have swept up the gross proceeds tax, it would have said that the burden is higher. The test was significantly changed though to put in the greater tax burden language on electricity, and that is straight out of the case law. That is the case law test for --

QUESTION: There is a significant difference between West Virginia and New Mexico, is the absence in that state of the credit against it?

MR. UNNA: Yes. But the higher gross or net tax language seemed to focus on a credit situation such as New Mexico's and look at a generation tax in isolation, and then when that language was abandoned, higher gross or net tax, we moved straight to the greater tax burden test which is precisely the constitutional test, and that is why I say it is

a restatement.

QUESTION: Taking the analogy a step further, if we go back to my hypothetical of two power plants in the Four Corners area, one selling out-of-state and one selling in-state, if you had followed what -- if you had done what West Virginia did, both would have paid the 2 percent tax without any credit?

MR. UNNA: Yes. I think West Virginia had a tax on a different level of distribution, but under the total tax burden test that wouldn't make any difference, and so I think -- also I am not familiar with West Virginia's tax situation exactly, but I think the rate of taxes for the two different plants was slightly different. I think that the in-state burden was greater than -- that is, using your two plants example, the one plant producing in-state electricity would have been at a higher tax burden than the one going outside the state.

QUESTION: Is that because there is another tax in addition to the generating tax?

MR. UNNA: Yes, I think there were two tax systems there involved, but that is also our case.

The difference between the Senate Finance Committee version and the final form of the test, the greater tax burden test is significant because that is the operative test of discrimination under section 391. And if you changed the test

of discrimination, you have changed the whole ball game as far as discrimination goes.

It is also important in the legislative history of section 391 that nowhere does it repudiate the constitutional case law test of discrimination. So we end up with two tests of discrimination existing side by side, supposedly one in 391 is a new test, but its language is couched in terms of the constitutional case law test; moreover, it doesn't repudiate the constitutional case law test. That --

QUESTION: In your argument, the statute is meaningless and unnecessary, is that correct, if it doesn't add or subtract anything from the constitutional --

MR. UNNA: It is sterile legislation, Your Honor.

QUESTION: Sterile legislation.

MR. UNNA: But that is all politically that the utilities were able to accomplish, and that is set forth clearly I think on pages 85 through 88 of the appendix, where Arizona Public Service's counsel writes directly to Senator Fannin proposing the greater tax burden test to get around West Virginia, and the strategy is made very clear at the end of page 88 when he says, "Finally, it is imperative that a clear legislative history be made." Without it, we could dream up another dozen arguments. So they knew they had an innocuous test basically that restated the case law, and so they wanted to make legislative history.

QUESTION: Of course, isn't that all the legislative history you have, those two letters?

MR. UNNA: No, there is legislative history about the discriminatory nature of New Mexico's tax.

QUESTION: But beyond the Senate, aren't those two letters all the legislative history you have?

MR. UNNA: Yes.

QUESTION: Once the bill came out of the Senate, went to the House and into conference, you have two letters, no more?

MR. UNNA: I think basically that is all we have, and I think --

QUESTION: Isn't that pretty thin legislative history to support your view, when it was so clear in the Senate side that the bill was aimed at the New Mexico tax?

MR. UNNA: Well, it was so clear but it related to a different test of discrimination, Your Honor. It related to higher gross or net tax. That is a substantially different test.

QUESTION: Exactly --

MR. UNNA: The Senate Finance Committee --

QUESTION: How did it overcome -- how was it overcome by those two letters?

MR. UNNA: The test was changed and none of the official legislative history relates to the second test, the

greater tax burden test, and that is the crucial test we have here. So all the legislative history is irrelevant to the final test that was enacted.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. McAluffe, do you have anything further?

ORAL ARGUMENT OF DANIEL J. McAULIFFE, ESQ.,

ON BEHALF OF THE APPELLANTS -- REBUTTAL

MR. McAULIFFE: Thank you, Mr. Chief Justice. A few very brief points.

Mr. Justice Blackmun, if I might clarify one thing. They do not have those two letters after the bill leaves the Senate. Those two letters are both at least a month and a half prior to the debate on the Senate floor, the letters in the appendix.

The state asks us to entertain several assumptions as a basis for justifying the tax. The first is that we should assume that there are no wholly intrastate New Mexico wholesalers. The problem with that, may it please the Court, is that if there are no wholly New Mexico intrastate wholesalers, then why is section 9(C) in the Act? And in our treatment of the legislative history before the state legislature, it is very clear that what -- which is set forth in our opening brief -- that what they were concerned with was the fact that an intrastate wholesaler, which plenty of them

exist, could not take advantage of the section 9(B) credits. So obviously the New Mexico legislature was legislating to take care of a specific situation which did in fact exist.

The second assumption they ask us to entertain is that New Mexico has in fact passed some different tax, that they have in effect reduced their sales tax to 2 percent and imposed a generation tax even-handedly. I think we have adequately shown that that is not in fact what they have done and we cannot save this tax by referring to some hypothetical tax which New Mexico might have enacted but concededly did not.

The final assumption is that the constitutional case law establishes an equivalence of tax rule. I think that is an over-statement in --

QUESTION: Let me ask you, just as a matter of fact, take the Public Service Company, is that the name of one of the companies in New Mexico?

MR. McAULIFFE: Public Service Company of New Mexico, that's right.

QUESTION: It generates and it sells at retail?

MR. McAULIFFE: That's correct, Mr. Justice.

QUESTION: When it gets all through with paying its gross receipts tax and its generating tax, whatever you call it, it is paying how much?

MR. McAULIFFE: Four percent.

QUESTION: It pays 4 percent.

MR. McAULIFFE: Assuming that it pays the gross receipts tax.

QUESTION: Yes.

MR. McAULIFFE: I'm not sure whether it pays it or whether it just collects it from the consumer.

QUESTION: Whatever it is, it is going to -- it comes out at 4 percent?

MR. McAULIFFE: That's correct.

QUESTION: It is paying 4 percent. That particular company is paying 4 percent.

MR. McAULIFFE: For the -- where it both generates and retails, that's correct.

QUESTION: Exactly. Now, your clients pay 2 percent?

MR. McAULIFFE: That's correct, 2 per cent energy tax.

QUESTION: Now, why do you say -- why is that there is a discrimination -- is there a discrimination there against you?

MR. McAULIFFE: Not at that level. But, you see, we are not comparable at that level because we don't retail in New Mexico. You are comparing Public Service Company to Mexico's retail transaction with our wholesale transaction.

QUESTION: Yes.

MR. McAULIFFE: What we say is that we are wholesalers, that is a significant segment of economic activity. Public Service Company of New Mexico also engages in the wholesale transaction. At the wholesale level, Public Service Company of New Mexico pays nothing. It will receive back, if it sells --

QUESTION: Who does it sell wholesale to?

MR. McAULIFFE: I believe it sells to Plains Electric G&T. There is a reference in there, in the New Mexico legislative history that there is at least a Southwest Co-op which could not recoup the entire energy tax liability as the tax was initially formulated.

QUESTION: Do you mean the co-op is a generator?

MR. McAULIFFE: I believe that is correct. It was a wholesaler or a --

QUESTION: Now, you say Public Service Company also sells wholesale?

MR. McAULIFFE: That's correct.

QUESTION: And to whom does it sell?

MR. McAULIFFE: I don't believe the record reflects that. I believe in the legislative history before the --

QUESTION: Well, do you know, does the record reflect that it sells wholesale?

MR. McAULIFFE: In the legislative history before the New Mexico legislature, there are references to the fact

that they are a New Mexico intrastate wholesaler.

QUESTION: The particular record before us doesn't reflect that?

MR. McAULIFFE: Yes, the transcript on this appeal will include the legislative history before the New Mexico legislature, wherein the discussion of the need for the section 9(C) credit they discuss it specifically on the basis that it is necessary to save wholesalers from the impact of the energy tax, the New Mexico intrastate wholesalers. What is bothering me at the moment is that memory does not serve me as to whether they identify particular intrastate wholesalers to whom they are trying to protect.

QUESTION: They save them from the tax and they don't pay the gross receipts tax?

MR. McAULIFFE: Not on the wholesale transaction, that is correct, the gross receipts tax will not apply to a wholesale transaction.

QUESTION: Was this wholesale argument that you are making now made to the New Mexico Supreme Court?

MR. McAULIFFE: Yes, it was, Mr. Justice Rehnquist, and it was not dealt with in the opinion of the court below.

That concludes my treatment of the final assumption, which is that we only look at the facial tax equivalence. The rule is that taxpayers pay taxes, and we look at the treatment of individual taxpayers, similarly situated

taxpayers. That is what Halliburton says. And when we look at similarly situated taxpayers in this case at the wholesale level, again under the constitutional test, as the state advocates it to be, this tax is discriminatory.

If there are no further questions, Mr. Chief Justice, I will --

QUESTION: Mr. McAuliffe, may I ask one other question.

MR. McAULIFFE: Yes, Mr. Justice.

QUESTION: Could the state come out about the same and would you agree that it would be constitutional to do it this way, to impose the 2 percent generation tax on both the in-state and out-of-state sellers and to reduce the gross receipts tax across the board to 2 percent? That would have been constitutional, I suppose.

MR. McAULIFFE: I suppose -- I have never focused specifically on that question. I think it would remove the credit provision in the discriminatory treatment of which we complain at the present time.

QUESTION: The dollars would probably come out about the same, wouldn't they?

MR. McAULIFFE: Again, I am not sure of that. I have never tried to cost that out.

QUESTION: Thank you.

MR. McAULIFFE: I believe my time is expired, Mr.

Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:00 o'clock a.m., the case in the above-entitled matter was submitted.)

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