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Taxing of Electrical Energy: An Analysis of Arizona Public Service Company v. Snead

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NOTES AND COMMENTS

TAXING OF ELECTRICAL ENERGY: AN ANALYSIS OF *ARIZONA PUBLIC SERVICE COMPANY v. SNEAD*

The Electrical Energy Tax Act[1] was enacted in 1975 by the State of New Mexico to provide revenue for highway construction[2] and to assist low-income New Mexico residents in the payment of their utility bills.[3] The Act placed a tax on all electrical energy generated in New Mexico. The tax imposed on electricity sold in New Mexico was credited fully against any amount owed under the state's gross receipts tax.[4] The tax paid on electricity sold out-of-state was not eligible for this credit because the out-of-state sales were not subject to New Mexico's gross receipts tax.[5] In effect, the tax burden on in-state sales remained at the level existing before the enactment of the New Mexico Electrical Energy Tax Act while out-of-state sales incurred a new tax burden.

In *Arizona Public Service Company v. O'Cheskey,*[6] the New Mexico Supreme Court held that the Electrical Energy Tax Act (hereinafter the Act) was constitutional.[7] The Act had been challenged on the bases of a potential conflict between it and a federal statute and the potential discriminatory burden that the Act placed upon interstate electricity.[8] Since the New Mexico Supreme Court found that

1. N.M. Stat. Ann. § § 7-18-1 to 6, 7-9-80 (1978).
2. Albuquerque Tribune, March 21, 1975, at C-11.
3. Utility Supplement Act, N.M. Stat. Ann. § § 27-6-1 to 10 (1978).
4. A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

   B. 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.

   C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit.

   N.M. Stat. Ann. § 7-9-80 (1978).
5. N.M. Stat. Ann. § 7-9-1 to 81 (1978).
6. 91 N.M. 485, 576 P.2d 291 (1978). Plaintiffs appealed the New Mexico Supreme Court decision to the United States Supreme Court. A substitution of parties was made after Arthur Snead succeeded to the functions of the previous defendant, Mr. O'Chesky. The Supreme Court opinion in this case, rendered in April, 1979, reversed the New Mexico Supreme Court decision and is reported at 99 S. Ct. 1629 (1979).
7. *Id.* at 490, 576 P.2d at 296.
8. *Id.* at 488, 576 P.2d at 294.

the energy tax did not impose a greater tax burden on interstate commerce,[9] the court concluded that the tax did not conflict with Section 2121(a) of the Tax Reform Act of 1976,[10] which prohibits state discriminatory taxes on the generation and transmission of electricity.[11] The court also concluded that the Electrical Energy Tax did not violate the Commerce Clause of the United States Constitution.[12]

The United States Supreme Court in *Arizona Public Service Company v. Snead*[13] reversed the New Mexico Supreme Court and held that the Electrical Energy Tax did violate the federal statute and was, therefore, invalid under the Supremacy Clause.[14] This note will examine the relationship between the state statute and the federal statute in light of the preemption doctrine and the Commerce Clause.

THE TWO COURT DECISIONS

The Arizona Public Service Company and four other large utility companies[15] were subject to the Electrical Energy Tax because of their generation of electricity in the Four Corners area of New Mexico.[16] They sued the Commissioner of the Bureau of Revenue[17] and the State of New Mexico.[18] The plaintiffs sued in a New Mexico district court and sought a declaratory judgment on the grounds that the energy tax was void and unconstitutional because it violated the Commerce Clause.[19] After the original complaint was filed, Congress

9. Thus, while the out-of-state electricity must bear an *additional* tax that it was not previously required to bear, payment of this tax does not result in a "greater tax burden" on that electricity. *Id.*

10. Tax Reform Act of 1976, § 2121(a), 15 U.S.C. § 391 (1976).

11. S. Rep. No. 94-938, Part I, 94th Cong., 2d Sess. 437-38, *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 3865-66.

12. 91 N.M. 485, 489-90, 576 P.2d 291, 295-96 (1978).

13. 99 S. Ct. 1629 (1979).

14. *Id.* at 1634.

15. El Paso Electric Company, Salt River Project Agricultural Improvement & Power District, Southern California Edison Company and Tucson Gas & Electric Company were the four other plaintiffs.

16. 91 N.M. 485, 487, 576 P.2d 291, 293 (1978).

17. The Bureau of Revenue is now called the Revenue Division of the Taxation and Revenue Department, after the passage of the N.M. Executive Reorganization Laws, 1977 N.M. Laws, ch. 249.

18. Record, vol. 1, at 1, Arizona Pub. Serv. Co. v. O'Chesky, 91 N.M. 485, 576 P.2d 291 (1978).

19. U.S. Const. art. I, § 8, cl. 3. Plaintiffs also alleged that the tax violated the Import-Export Clause, the Privileges and Immunities Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution. U.S. Const. art. I, § 10, cl. 2; U.S. Const. art. IV, § 2, cl. 1; and U.S. Const. amend. XIV, § 1.

enacted Section 2121(a) of the Tax Reform Act of 1976.[20] Plaintiffs amended their complaint to include an allegation that the energy tax conflicted with that statute and the Supremacy Clause of the Constitution.[21] After the state district court granted defendants' motion for summary judgment,[22] the plaintiffs appealed to the New Mexico Supreme Court.[23]

The New Mexico Supreme Court upheld the Act against both the preemption claim and the Commerce Clause claim. Section 2121(a) provides:

> No State . . . may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.[24]

In deciding whether the federal statute prohibited the energy tax, the court examined both the direct and indirect burden placed on interstate commerce by the tax.[25] The New Mexico Supreme Court concluded that the tax did not directly place a greater tax burden on interstate electricity than on intrastate electricity since the energy tax was imposed on all electricity generated in New Mexico.[26] In order to determine if the energy tax indirectly imposed a greater tax burden on interstate electricity, the state court examined the entire tax structure of New Mexico.[27] The energy tax, four-tenths of one mill ($.0004), was levied on each net kilowatt hour of electricity generated in New Mexico.[28] This resulted in approximately a two percent tax being imposed on the amount of electricity generated.[29] The two percent tax was credited fully against the state's gross receipts tax of four percent[30] which was imposed on the sale of intrastate electricity. The effect of the credit was to nullify the impact of

20. Tax Reform Act of 1976, § 2121(a), 15 U.S.C. § 391 (1976).
21. Record, vol. 4, at 710 to 720; Arizona Pub. Serv. Co. v. O'Chesky, 91 N.M. 485, 488, 576 P.2d 291, 294 (1978).
22. Record, vol. 5, at 993 to 994.
23. *Id.* at 995.
24. Tax Reform Act of 1976, § 2121(a), 15 U.S.C. § 391 (1976).
25. 91 N.M. 485, 488, 576 P.2d 291, 294 (1978).
26. *Id.*
27. *Id.*
28. N.M. Stat. Ann. § 7-18-3 (1978).
29. 91 N.M. 485, 487, 576 P.2d 291, 293 (1978).
30. N.M. Stat. Ann. § 7-9-80 (B) (1978).

the energy tax on electricity which was sold intrastate. The intrastate electricity, however, was still burdened by an overall four percent tax, of which two percent was energy tax and two percent was gross receipts tax, while the electricity sold in other states was burdened with a new two percent tax.[31] The court concluded that the tax did not indirectly place a greater tax burden on interstate electricity since electricity sold within the state bore the greater tax rate and, thus, the greater tax burden.[32] Since the Electrical Energy Tax imposed neither a direct nor indirect burden on interstate electricity, the New Mexico Supreme Court concluded that there was no conflict between the state statute and the federal statute.

The New Mexico Supreme Court also held that the Electrical Energy Tax Act was not violative of the Commerce Clause.[33] This holding resulted from the court finding that the state energy tax did not place out-of-state businesses at a competitive disadvantage with local businesses.[34] The court also relied on the finding that the energy tax did not impose a multiple tax burden on the electricity sold outside the state because the generation of electricity, which was the activity taxed in this case, was strictly a local activity.[35] The generation of electricity would only be taxed once.[36]

Plaintiffs appealed the New Mexico Supreme Court decision to the United States Supreme Court on substantially the same grounds as their appeal to the New Mexico Supreme Court.[37] The United States Supreme Court found that the New Mexico Electrical Energy Tax Act did indirectly burden interstate electricity and was violative of the federal statute.[38] Having made that finding, the Court did not need to reach the constitutional issues and, therefore, did not consider whether the energy tax violated the Commerce Clause.[39]

The United States Supreme Court determined that the federal statute's prohibition of discriminatory state taxes on the generation of electricity was applicable to the Electrical Energy Tax. The Court, reasoning that the federal statutory language required an examination of the tax in isolation,[40] considered only the Electrical Energy Tax. By examining the energy tax only, the Supreme Court con-

31. 91 N.M. 485, 488, 576 P.2d 291, 295-96 (1978).
32. *Id.*
33. 91 N.M. 485, 489-90, 576 P.2d 291, 295-96 (1978).
34. *Id.* at 489, 576 P.2d at 295.
35. *Id.* at 490, 576 P.2d at 296.
36. *Id.*
37. Arizona Pub. Serv. Co. v. Snead, 99 S. Ct. 1629, 1632 (1979).
38. *Id.* at 1634.
39. *Id.* at 1632.
40. *Id.* at 1634.

cluded that, "[b]ecause the electrical energy tax by *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute."[41]

THE PREEMPTION DOCTRINE CLAIM

The utility companies claimed that the Electrical Energy Tax Act was in violation of the preemption doctrine. Rooted in federal supremacy notions,[42] the preemption doctrine provides that when a state statute and a federal statute conflict, either directly[43] or potentially,[44] the state statute must fall.[45] The purpose of the preemption doctrine is to prevent the states from frustrating the purposes and objectives of the federal government in areas requiring national uniformity[46] and in areas of enumerated federal concern.[47] A conflict is present when there is a contradiction in the two statutes[48] or when there is an expressed or implied congressional intent that the federal statute be exclusive.[49]

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41. *Id.*

42. The Supremacy Clause, Article VI, Section 2 of the Constitution, is the source of the preemption doctrine. The clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the Supreme Law of the Land ... and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, § 2.

43. 2. That the question of supremacy cannot arise, except in the case of actual and practical collision. 3. That such collision must be direct and positive, and the state law must operate to limit, restrict or defeat the effect of a statute of Congress.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 40-42 (1824); Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

44. And where the federal government, ... has enacted a complete scheme of regulation, ... states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

45. "[T]o guard against a conflict in practice, the law of congress is made supreme." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 41 (1824). Of course, both governmental bodies must be acting within the legitimate scope of their powers when enacting the statutes in order to necessitate an inquiry into conflict. Congress has the power to regulate interstate commerce and may protect interstate commerce from any direct restrictions or impositions placed on commerce by the states. The United States Senate Finance Committee, in passing the bill which created Section 2121(a), expressed its belief that it clearly had the power by reason of the Commerce Clause to enact the federal statute. The State of New Mexico had the power to enact a tax on electricity generated within its borders to raise revenues for legitimate state purposes.

46. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963).

47. Perez v. Campbell, 402 U.S. 637, 649 (1971).

48. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 42 (1824).

49. Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 771-72 (1947).

To determine if a conflict will result from the enforcement of two statutes, an inquiry must be made as to whether the state law can coexist compatibly with the general purpose of the federal law.[50] Even if the state law could coexist with the federal law, the state law may still be invalid if Congress has intended either expressly or by implication that a federal statute occupy the field.[51] The question of congressional intent is resolved in the same manner as are all other questions of legislative intent: if the plain meaning of the statute is indiscernible, the legislative history of the statute is examined to determine whether Congress intended its power over the subject to be exclusive.[52]

To determine if a conflict existed between the New Mexico Electrical Energy Tax Act and Section 2121(a) of the Tax Reform Act of 1976, the New Mexico Supreme Court examined the tax in terms of its direct and indirect burden on interstate electricity.[53] The court found no greater direct or indirect burden on electricity sold out-of-state as compared to that sold in-state.[54] The court supported its finding that no greater indirect burden was placed on interstate electricity by reasoning that a state can shift its tax burden from sole reliance on a gross receipts tax to reliance on both the gross receipts tax and an energy tax. To arrive at its finding that the federal statute did not prohibit New Mexico's energy tax,[55] the court examined the effect of the entire tax structure of the state on the generation of electricity rather than examining the Electrical Energy Tax in isolation.

The United States Supreme Court applied the prohibition found in Section 2121(a) to the New Mexico Electrical Energy Tax and determined that the state statute did collide with the federal statute.[56] The Court concluded that the language of Section 2121(a) required a consideration of the specific tax's effect on the activity taxed.[57] Consideration of the effect of the entire tax structure of the state on the activity was dismissed by the Court as being contrary to the federal statute. By examining the tax in isolation, the Supreme Court determined that the tax was discriminatory within the meaning of Section 2121(a).[58] The tax credit provision of the Electrical Energy

50. Note, 12 Stan. L. Rev. 208, 209-10 (1959).
51. Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton, 377 U.S. 252, 259-60 (1964).
52. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-52 (1963).
53. 91 N.M. 485, 488, 576 P.2d 291, 294 (1978).
54. *Id.*
55. *Id.*
56. Arizona Pub. Serv. Co. v. Snead, 99 S. Ct. 1629, 1634 (1979).
57. *Id.*
58. *Id.*

Tax placed *no* tax burden on locally consumed electricity while electricity sold out-of-state bore the entire burden of the two percent energy tax.[59] The Supreme Court buttressed this conclusion by noting that the legislative intent of Congress in enacting Section 2121(a) was clearly to invalidate the New Mexico Electrical Energy Tax Act.[60]

The United States Supreme Court's decision in *Arizona Public Service Co. v. Snead* rests upon its determination that Section 2121(a) had independent vitality and was not a mere codification of the Commerce Clause. Because of this determination, the Court examined the energy tax in isolation. When considered in isolation, the energy tax seems, although assessed against all generation of electricity, to have been borne only by the electricity sold outside the state. The electricity sold in New Mexico received a full credit for the energy tax paid, which negated the energy tax liability. The tax indirectly resulted in a greater tax burden falling on electricity generated and then transmitted in interstate commerce. The tax was thus within the prohibition of Section 2121(a) and continued validity of the state tax would frustrate the federal purpose.

If the Court had determined that Section 2121(a) codified the Commerce Clause, then the Court would have examined the entire tax structure of the state. The Court states in *Arizona Public Service Co. v. Snead* that the constitutional test of the Commerce Clause requires an examination of the entire tax structure and the Court has applied this test frequently in the past.[61] If the entire tax structure of New Mexico had been considered in determining the applicability of Section 2121(a) to the energy tax, the state energy tax may well have fallen outside the prohibition of discriminatory electricity taxes under Section 2121(a). The credit provision simply reduced the amount of gross receipts tax owed to the state. When considered in light of both the energy tax and the gross receipts tax, the in-state sale of electricity had a greater tax burden than the interstate sale.[62] Under that analysis the prohibition found in Section 2121(a) would not be applicable because interstate electricity would not bear a greater tax burden, either directly or indirectly, than would intra-

59. *Id.*

60. *Id.* at 1632-34.

61. In *Halliburton Oil Well Co. v. Reily,* the United States Supreme Court stated that in order to properly analyze the state use tax in question, "the whole scheme of taxation [must be taken] into account." *Halliburton Oil Well Co. v. Reily* involved a Commerce Clause challenge only and did not involve any preemption doctrine issue. *See also* Gregg Dyeing Co. v. Query, 286 U.S. 472, 479-80 (1932).

62. The electricity sold in-state had an overall tax burden of four percent. This four percent included a two percent energy tax assessed and a two percent gross receipts tax assessed.

state electricity. The state law, because it would have been compatible with the federal law, would have been valid if the entire tax structure of New Mexico had been examined.[63]

Even if no collision exists between a state statute and a federal statute, a state statute may still be invalid if Congress intended a federal statute to preempt the field. An intent to exclude a state from legislating in a given area may be expressed in the language of the federal statute itself[64] or it may be found in the statute's legislative history.[65] The congressional intent of federal exclusivity may also be inferred if the state law frustrates an objective of the federal law.[66]

The language in Section 2121(a) prohibits any state from imposing a discriminatory tax upon the generation of electricity.[67] If the New Mexico energy tax were construed to be a discriminatory tax on its face, then Congress expressly intended to prohibit New Mexico's imposition of the tax. If the energy tax were not clearly discriminatory, an implied congressional intent to exclude this type of tax may be found in the legislative history of Section 2121(a). It is this implied congressional intent that Section 2121(a) be exclusive that caused the New Mexico Electrical Energy Tax Act to be invalidated.

Section 2121(a) of the Tax Reform Act was introduced into the Senate by Senator Paul Fannin of Arizona.[68] Senator Fannin told the Senate that "[t]his problem is primarily confined to the States of Arizona and New Mexico where Arizona power companies are subject to a discriminatory tax imposed by the State of New Mexico."[69] As the Supreme Court noted, Senator Fannin's remarks seemed to have been directed towards the New Mexico Electrical Energy Tax Act.[70] In approving the bill, the United States Senate Finance Committee found that only *one state* had placed a discriminatory tax upon the production of electricity within its boundaries and sold for consumption outside the state.[71] The Senate Commit-

63. It is the opinion of Justices Rehnquist and White in their concurring opinion in *Arizona Public Service Co. v. Snead* that if the federal statute had been a codification of the Commerce Clause, then an examination of the entire tax structure would have been appropriate, and the energy tax would have been held valid.

64. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 232-33 (1974).

65. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-52 (1963).

66. Perez v. Campbell, 402 U.S. 637, 652 (1971).

67. Tax Reform Act of 1976, §2121(a), 15 U.S.C. §391 (1976).

68. 121 Cong. Rec. 19213 (1975); S. 1957, 94th Cong., 1st Sess. (1975) (codified at 15 U.S.C. §391 (1976)).

69. 122 Cong. Rec. 5382 (1976).

70. Arizona Pub. Serv. Co. v. Snead, 99 S. Ct. 1629, 1633 (1979).

71. S. Rep. No. 94-938, Part I, 94th Cong., 2d Sess. 437, *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 3866.

tee was undoubtedly referring to New Mexico.[72] Senator Pete Domenici of New Mexico proposed an amendment to Fannin's bill which would have stricken the bill entirely.[73] During the floor debates on the Domenici amendment, reference was made to the effect the bill would have on the New Mexico Electrical Energy Tax Act.[74] Domenici's amendment was defeated and Congress passed Senator Fannin's bill with no further comment.[75] This activity by the Senate indicates that Congress intended Section 2121(a) to preempt the Electrical Energy Tax Act.[76]

The New Mexico Supreme Court failed to consider the legislative history of Section 2121(a) or any other factors to determine if Congress had intended to exclude the state from imposing the Electrical Energy Tax Act. The United States Supreme Court did consider the history,[77] however, and concluded that Congress expressly intended to invalidate the Act.

THE COMMERCE CLAUSE CLAIM

The considerations in the Commerce Clause claim[78] put forth by the plaintiffs were closely related to those in the preemption claim. Both claims focus on the burdens placed on interstate commerce by the state energy tax. The constitutional challenge of the Commerce Clause is concerned with the prohibition against undue burdens that discriminate against interstate commerce. The Commerce Clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."[79] A state may regulate interstate commerce but it may

72. Senator Paul Fannin sat on the Senate Finance Committee and sponsored the bill. His purpose in sponsoring the bill is clear from the text accompanying footnote 74.

73. 122 Cong. Rec. S12712 (daily ed. July 28, 1976).

74. *Id.* at S12712 to S12717.

75. 122 Cong. Rec. D1093 (daily ed. August 6, 1976).

76. The legislative history of Section 2121(a) is limited to comments made on the floor of the Senate and to the brief findings of the Senate Finance Committee. Reference was made during these sessions only to the New Mexico Electrical Energy Tax Act. This fact raises a strong presumption that Congress, in enacting Section 2121(a), intended to preempt the only state tax to have been considered, the New Mexico energy tax. A contention made by appellees was that the legislative history may not have been applicable to Section 2121 (a) as the language of the section was changed by a House-Senate Conference Committee before the bill was signed into law. The statutory test for whether a state tax would be found discriminatory was changed from a tax that results in "payment of a higher gross or net tax" on interstate electricity to one that results in a "greater tax burden" on interstate electricity. The original test was intact at the time of the comments made by Senators Fannin and Domenici and of the Senate Finance Report. However, the purpose of the bill remained the same after the change in wording.

77. Arizona Pub. Serv. Co. v. Snead, 99 S. Ct. 1629, 1633-34 (1979).

78. U.S. Const. art. I, § 8, cl. 3.

79. *Id.*

not inhibit the free flow of commerce.[80] In the area of state taxation, the concern is that the state tax only those activities or people that it has the power to tax within its borders.[81] The United States Supreme Court did not reach a consideration of the Commerce Clause claim because the Court found the Act to be preempted by Section 2121(a).

The New Mexico Supreme Court did consider the Commerce Clause claim. The court applied two tests to determine if the Act was constitutional under the Commerce Clause. The tests applied were the "discrimination test" and the "multiple burden test."[82] The discrimination test provides that a tax is discriminatory if it places an extra burden only on interstate commerce or erects barriers which place out-of-state businesses at a disadvantage when competing locally.[83] The multiple burden test provides that a tax is unconstitutional if it subjects interstate commerce to similar taxes by other states resulting in multiple taxation.[84] A tax must satisfy both tests to be found non-violative of the Commerce Clause.[85]

In applying the discrimination test, the New Mexico Supreme Court did not consider whether the Electrical Energy Tax placed an *extra* burden on interstate commerce.[86] The court only concluded that the tax did not place out-of-state businesses at a disadvantage when competing locally because the tax credit provision was available to all businesses who sold electricity in New Mexico.[87] This conclusion may not have been relevant as very little local competition occurs. The out-of-state producers of electricity sell almost all of their electricity outside of New Mexico.[88]

Proper application of the discrimination test requires a determination of whether the tax placed an *extra* burden on interstate commerce beyond the burden borne by intrastate commerce. The Electrical Energy Tax applied equally to all producers whether they were out-of-state businesses or in-state businesses.[89] All electricity was taxed at the point of generation.[90] Its destination was irrelevant.

80. Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945).
81. Memphis Gas Co. v. Stone, 335 U.S. 80, 95 (1948).
82. 91 N.M. 485, 489, 576 P.2d 291, 295 (1978).
83. *Id.*
84. *Id.*
85. Memphis Gas Co. v. Stone, 335 U.S. 80, 87 (1948).
86. The court did consider burdens placed on interstate commerce when it found Section 2121(a) not applicable to the New Mexico Electrical Energy Tax Act. It, however, considered "greater tax burdens" placed on interstate commerce, not "extra burdens." The result of considering the latter are different. 91 N.M. 485, 488, 576 P.2d 291, 294 (1978).
87. *Id.* at 489, 576 P.2d at 295.
88. Record, vol. 5, at 954.
89. N.M. Stat. Ann. § 7-18-3 (1978).
90. *Id.*

In-state businesses did, however, receive a tax credit for the taxes paid at the point of generation.[91] In effect, this credit negated their liability for the energy tax. Out-of-state businesses did not receive the tax credit unless they sold electricity within the state. It may be argued, therefore, that the electricity sold outside the state bore the entire burden of the energy tax. This would surely be an extra burden under the definition of the discrimination test used by the state supreme court.

In applying the multiple burden test, the New Mexico Supreme Court concluded that since it was the generation of electricity that was being taxed and since the generation occurred only within New Mexico, there was little chance of a multiple tax burden falling on that same activity.[92] Generation of electricity was found to be a local and separate activity by the United States Supreme Court in *Utah Power and Light Company v. Pfost.*[93] It is comparable to production or manufacturing activities which have traditionally been viewed as local in nature.[94] The determination that an activity is separate from interstate commerce and local in nature, however, is not sufficient grounds for a state tax to be held constitutional. The activity must also be one that "does not lend itself to repeated exactions in other state[s]."[95] Since the generation of electricity occurs only once, a tax on the generation cannot be exacted at more than one point.

If the generation of electricity is not regarded as local and therefore out of the realm of interstate commerce,[96] but is regarded as part of interstate commerce, then the activity, though protected by the Commerce Clause, may be taxed by a state if properly apportioned.[97] The standards established in a recent United States Supreme Court decision, *Complete Auto Transit, Inc. v. Brady,*[98] which allow a state to tax interstate commerce are: 1) the tax must be fairly apportioned; 2) it must be related to state-provided services; 3) it must be nondiscriminatory of interstate commerce; and, 4) it must be applied to an activity having a substantial nexus with the

91. N.M. Stat. Ann. § 7-9-80 (B) (1978).

92. 91 N.M. 485, 490, 576 P.2d 291, 296 (1978).

93. 286 U.S. 165, 181 (1932); *See also* Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604 (1938).

94. American Manufacturing Co. v. City of St. Louis, 250 U.S. 459 (1919); Cornell v. Coyne, 192 U.S. 418 (1904); United States v. E. C. Knight Co., 156 U.S. 1 (1894).

95. Memphis Gas Co. v. Stone, 335 U.S. 80, 87 (1948).

96. It may be argued that the generation of electricity can no longer be regarded as a local activity which is not a part of interstate commerce now that Congress' power to proscribe taxation of it has been judicially recognized by the court in *Arizona Public Service Co. v. Snead.*

97. *Id.* at 93.

98. 430 U.S. 274 (1977).

taxing state.[99] The New Mexico Supreme Court did not consider the tests set out in *Complete Auto* although it is the most recent statement on state taxation of things arguably in interstate commerce.

The New Mexico Electrical Energy Tax Act placed a tax on the activity of generation of electricity. The activity occurs only within New Mexico, which made the tax fairly apportioned and which supplied the necessary nexus to the taxing state. The tax was related to state-provided services because the State of New Mexico maintains highways in the Four Corners area[100] and provides community services to workers employed by the businesses.[101] Revenues generated by the energy tax were specifically reserved for highway improvements in the Four Corners area.[102] Thus, the energy tax directly related to the provision of services by the state to the energy producers. The tax met three of the four requisites found in *Complete Auto Transit, Inc. v. Brady.*[103] The Electrical Energy Tax did not meet the fourth standard, which is that the tax must be nondiscriminatory of interstate commerce. This unresolved issue of discrimination against interstate commerce was sidestepped twice by the New Mexico Supreme Court when the court did not fully examine the preemption claim or the discrimination test under the Commerce Clause claim. The issue was resolved by the United States Supreme Court when it found the New Mexico Electrical Energy Tax Act to be invalid because of its discriminatory effect on interstate commerce.

CONCLUSION

The United States Supreme Court, in a unanimous decision, found the New Mexico Electrical Energy Tax Act to be invalid because of a violation of the preemption doctrine. This decision was reached because the Court construed the pertinent federal statute as having independent vitality apart from the Commerce Clause. Such a determination allowed the Court to avoid a consideration of the constitutional issues raised by the New Mexico tax. If the Court had construed the federal statute as a mere codification of the Commerce Clause, the result may have been different. In that case, the Court would have had to consider the constitutional issues and the validity of the New Mexico tax may have been upheld.

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99. *Id.* at 279.
100. *Supra* note 2.
101. Record, vol. 5, at 817 to 831.
102. *Supra* note 2.
103. 430 U.S. 274 (1977).