

IN THE SUPREME COURT OF THE STATE OF NEVADA

RURAL TELEPHONE COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION
OF NEVADA, AN ADMINISTRATIVE
AGENCY OF THE STATE OF NEVADA,

Respondent.

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Case No. 69612
District Court Case No.
15 OC 00188 1B

APPELLANT RURAL TELEPHONE COMPANY'S OPENING BRIEF

**(Appeal from Order of the First Judicial District Court of the
State of Nevada In and For Carson City)**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Rural Telephone Company is an Idaho corporation qualified to do business in Nevada as a foreign corporation. It has no parent corporation and no publicly held corporation owns 10% or more of Rural Telephone Company's stock. Partners and associates of ALLISON MacKENZIE, LTD. have appeared for Rural Telephone Company in the proceedings before the Public Utilities Commission of Nevada and the District Court and will appear on behalf of Rural Telephone Company in this appeal.

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_____ /

APPELLANT RURAL TELEPHONE COMPANY'S OPENING BRIEF

Appellant, RURAL TELEPHONE COMPANY ("RURAL"), by and through its counsel, ALLISON MacKENZIE, LTD., hereby files its Opening Brief in accordance with Nevada Rules of Appellate Procedure ("NRAP") 28 and 32.

I.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction over this case because this is an appeal from the District Court's dismissal of RURAL's Petition for Judicial Review. NRS 703.376 provides that an appeal may be taken to this Court within sixty (60) days after service of the order or judgment of the District Court in the same manner as in other civil appeals. See NRAP 3A(b)(1).

On December 8, 2015, the District Court entered its Order Denying Motion to Dismiss for Lack of Jurisdiction, Denying Motion for Extension of Time, Striking Opening Brief, and Dismissing Petition for Judicial Review (“Order”). Joint Appendix (“JA”) Volume (“Vol.”) 2 at 0272-0279. Written notice of the entry of the District Court’s Order was served on December 9, 2015. JA Vol. 2 at 0280-0290. Thereafter, RURAL timely filed its Notice of Appeal, pursuant to NRAP 4(a)(1), on January 14, 2016. JA Vol. 2 at 0291-0293.

II.

ROUTING STATEMENT

This case is presumptively retained by this Court pursuant to NRAP 17(a)(9) because this case relates to an appeal of a final decision of the Public Utilities Commission of Nevada (“Commission”).

III.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in determining it did not have authority pursuant to NRS 703.373 to grant RURAL an extension of time to file its memorandum of points and authorities in support of its timely filed Petition for Judicial Review.

2. Whether the District Court erred in determining RURAL failed to cite any legal authority to support its Motion for Extension of Time.

IV.

STATEMENT OF THE CASE

This is an appeal from an Order Denying Motion to Dismiss for Lack of Jurisdiction, Denying Motion for Extension of Time, Striking Opening Brief, and Dismissing Petition for Judicial Review Order entered on December 8, 2015, by the Honorable James E. Wilson Jr., District Judge, First Judicial District Court of the State of Nevada in and for Carson City.

On August 19, 2015, RURAL timely filed its Petition for Judicial Review requesting that the District Court review a final decision issued by the Commission on July 22, 2015. JA Vol. 1 0001-0063. On September 18, 2015, the Commission issued notice to RURAL that the stipulated record of proceeding under review had been submitted to the District Court. JA Vol. 1 at 0090-0099.

Pursuant to NRS 703.373(6), RURAL had until October 19, 2015, being thirty (30) days from the date the Commission gave written notice that the record had been filed with the District Court, to file a memorandum of points and authorities in support of RURAL's Petition for Judicial Review. On October 16, 2015, three (3) days prior to the prescribed filing date, RURAL filed a Motion for

Extension of Time requesting that the District Court allow RURAL a thirty (30) day extension of time until November 18, 2015, to file a memorandum of points and authorities in support of its Petition for Judicial Review. JA Vol. 0103-0114.

On October 26, 2015, the Commission filed an Opposition to RURAL's Motion for Extension of Time and Countermotion to Dismiss. JA Vol. 1 at 0115-0145. RURAL's Motion for Extension of Time and the Commission's Countermotion to Dismiss were fully briefed and submitted to the Court for decision. JA Vol. 1 at 0146-0221.

On November 18, 2015, RURAL filed a memorandum of points and authorities in support of its Petition for Judicial Review. JA Vol. 2 at 0222-0271.

Although NRS 703.373(10) expressly mandates that "[a]ll actions brought under this section have precedence over any civil action of a different nature pending in the court," the District Court did not expeditiously rule on RURAL's Motion for Extension of Time. Rather, the District Court waited more than more than fifty (50) days after RURAL's Motion for Extension of Time had been filed on October 16, 2015, and issued an Order on December 8, 2015, denying RURAL's request for an extension of time, striking RURAL's memorandum of points and authorities, and dismissing RURAL's Petition for Judicial Review. JA Vol. 2 at 0272-0279.

The District Court erred when it failed to expeditiously consider RURAL's Motion for Extension of Time as mandated by NRS 703.373(10). The District Court compounded its error when it dismissed RURAL's Petition for Judicial Review on December 8, 2015, even though RURAL's memorandum of points and authorities in support of its Petition for Judicial Review had already been filed with the District Court on November 18, 2015. The actions of the District Court deprived RURAL of its substantial right to appeal the final decision of the Commission in contravention of NRS 703.373.

V.

STATEMENT OF THE FACTS

A. The Parties to this Appeal.

RURAL is an Idaho corporation, qualified and doing business as a foreign corporation under the laws of the State of Nevada. JA Vol. 1 at 0002. RURAL holds a Certificate of Public Convenience and Necessity designated CPC 854, Sub 3 issued by the Commission. JA Vol. 1 at 0002. This Certificate authorizes RURAL to provide local exchange telephone service in portions of rural Washoe and Elko Counties, State of Nevada. JA Vol. 1 at 0002. RURAL is a "rural telephone company" under federal law and a small-scale provider of last resort and eligible telecommunications carrier under Nevada law. JA Vol. 1 at

0002. RURAL serves approximately 817 residential and business customers in Nevada. JA Vol. 1 at 0002.

The Commission is an administrative agency of the State of Nevada created pursuant to NRS 703.020. JA Vol. 1 at 0002. The Commission is authorized to supervise and regulate the operation and maintenance of public utilities and telephone service providers pursuant to NRS Chapters 703 and 704, and consistent with federal law. JA Vol. 1 at 0002.

B. The Final Decision of the Commission.

RURAL filed an application seeking an increase in its revenue requirement with the Commission which was designated as Docket No. 14-11006 by the Commission. JA Vol. 1 at 0002, 0008-0009. On July 22, 2015, the Commission issued a Modified Order in Docket No. 14-11006. JA Vol. 1 at 0008-0063. The Modified Order is a 56-page final decision of the Commission that prejudices the substantial rights of RURAL. In its Petition for Judicial Review, RURAL argued its due process rights were violated by the Commission's policy advisor's adversarial, investigatory and prosecutorial role during the hearing when the policy advisor also acted as an adjudicator. JA Vol. 1 at 0004-0005. In addition, RURAL contended the Commission erred by reallocating certain expenses, disallowing certain other expenses and setting RURAL's rates in

accordance with a new Commission policy improperly adopted without complying with the Administrative Procedures Act. JA Vol. 1 at 0004.

C. Procedural History of the District Court Case.

Because the final decision of the Commission prejudices the substantial rights of RURAL, RURAL timely filed a Petition for Judicial Review on August 19, 2015. JA Vol. 1 at 0001-0063. The Petition for Judicial Review and Summons were served on the Commission on August 20, 2015. JA Vol. 1 at 0064-0067. On September 18, 2015, the Commission filed a certified copy of the stipulated record of the proceeding under review in the District Court. JA Vol. 1 at 0090-0099.

On October 15, 2015, counsel for RURAL contacted counsel for the Commission and requested that the parties stipulate to a thirty (30) day extension of time, or until November 18, 2015, for RURAL to file a memorandum of points and authorities in support of its Petition for Judicial Review. JA Vol. 1 at 0110. On October 16, 2015, counsel for the Commission sent email correspondence to counsel for RURAL stating: “We are not opposed to a 10-day extension, but, considering the Commission’s anticipated workload in November/December, we would ask that you file a motion with the Court if you would like a longer continuance. Thank you.” JA Vol. 1 at 0110, 0201. On that same day (being

October 16, 2015), and three (3) days prior to the October 19th deadline for filing a memorandum of points and authorities, RURAL filed a Motion for Extension of Time requesting that the District Court allow a 30-day extension to November 18, 2015, to file a memorandum of points and authorities in support of its Petition for Judicial Review. JA Vol. 1 at 0103-0114.

On October 26, 2015, the Commission filed an Opposition to RURAL's Motion for Extension of Time and Countermotion to Dismiss. JA Vol. 1 at 0115-0145. In its Opposition, the Commission opposed an extension of time and argued that RURAL's Petition for Judicial Review should be dismissed because RURAL's failure to file a memorandum of points and authorities on or before October 19th divested the District Court of jurisdiction. JA Vol. 1 at 0115-0145. In support of its position, the Commission relied on the legislative history of Assembly Bill ("A.B.") 17 passed in 2011. JA Vol. 1 at 0115-0145. The Commission did not argue that a 30-day extension would prejudice the Commission in any way or that it opposed the extension based upon its anticipated workload.

On November 3, 2015, RURAL filed its Reply to Opposition to Motion for Extension of Time and Opposition to Countermotion to Dismiss. JA Vol. 1 at 0146-0204. In its Reply, RURAL argued that the deadline for filing a

memorandum of points and authorities under NRS 703.373 was not jurisdictional and that the legislative history of NRS 703.373 in A.B. 17 provided no support for the Commission's assertion that the briefing deadlines in NRS 703.373 may not be extended. JA Vol. 0146-0204. RURAL also argued that the Commission would have no authority to agree to a 10-day extension if the statute's timeframe to file a memorandum of points and authorities was mandatory and jurisdictional. JA Vol. 0146-0204. On November 3, 2015, RURAL submitted a Request for Submission of its Motion for Extension of Time. JA Vol. 1 at 0205-0207.

On November 13, 2015, the Commission filed its Reply to RURAL's Opposition to Respondent's Countermotion to Dismiss. JA Vol. 1 at 0208-0219. The Commission filed a Request for Submission of its Countermotion to Dismiss. JA Vol. 1 at 0220-0221.

Having not received any order from the District Court on either Motion, on November 18, 2015, RURAL filed a memorandum of points and authorities in support of its Petition for Judicial Review. JA Vol. 1 at 0222-0271.

On December 8, 2015, more than fifty (50) days after RURAL's Motion for Extension of Time had been filed on October 16, 2015, the District Court issued an Order Denying Motion to Dismiss for Lack of Jurisdiction, Denying Motion for Extension of Time, Striking Opening Brief, and Dismissing

Petition for Judicial Review. JA Vol. 2 at 0272-0279. In its Order, the District Court correctly held that RURAL's failure to timely file its memorandum of points and authorities did not divest the court of jurisdiction.¹ JA Vol. 1 at 0273-0274. However, the District Court concluded that it lacked authority to grant RURAL's request for an extension of time to file its memorandum of points and authorities in support of RURAL's Petition for Judicial Review. JA Vol. 2 at 0274-0277. The District Court also concluded RURAL failed to cite any legal authority to support its Motion for Extension of Time and the Motion must be denied for that reason as well. JA Vol. 2 at 0277-0278. As such, the District Court struck RURAL's memorandum of points and authorities in support of its Petition for Judicial Review previously filed on November 18, 2015, and dismissed RURAL's Petition for Judicial Review. JA Vol. 2 at 0278.

In its Order entered on December 8, 2015, the District Court noted its awareness of NRS 703.373(10) and the legislative mandate that judicial review of a final decision of the Commission must have priority over any other civil actions of a different nature pending in the court. JA Vol. 2 at 0278. Despite the precedence requirement, the District Court acknowledged that its handling of this case was deficient:

¹ This determination by the District Court was not appealed to this Court.

Court procedures were deficient and this case was not submitted for a decision until after Rural filed a request to submit and even then the matter was not immediately presented to the court for decision. The court's procedures have been modified to correct the deficiencies. The court apologizes for the delay.

JA Vol. 2 at 0278.

As a result of the District Court's refusal to consider RURAL's Petition for Judicial Review, a timely Notice of Appeal was filed by RURAL. JA Vol. 2 at 0291-0293.

VI.

SUMMARY OF THE ARGUMENT

The District Court's dismissal of RURAL's timely filed Petition for Judicial Review deprived RURAL of its substantial right to appeal the final decision of the Commission in contravention of NRS 703.373. The District Court's construction of NRS 703.373 was contrary to the rules of statutory construction regulating the right to appeal which should not be taken away unless clearly intended by the Legislature. The District Court's dismissal of RURAL's Petition for Judicial Review violates the policy that actions should be adjudicated on the merits. The District Court's interpretation of NRS 703.373 as prohibiting the court from granting an extension of time violates the separation of powers

doctrine and impermissibly acts as a legislative encroachment on the Court's power to do what is reasonably necessary to administer justice.

VII.

STANDARD OF REVIEW ON APPEAL

The District Court's determination that it lacked authority to extend the time for filing a memorandum of points and authority in support of RURAL's Petition for Judicial Review is a conclusion of law based on a question of statutory construction which requires *de novo* review by this Court. See Irving v. Irving, 122 Nev. 494, 496, 134 P.3d 718, 720 (2006). When reviewing the interpretation of a statute, this Court has traditionally followed the plain meaning of the statute; absent an ambiguity. See Irving, 122 Nev. at 496, 134 P.3d at 720. However, where a "statute's language is susceptible to two or more reasonable interpretations," this Court looks to "the Legislature's intent in interpreting the statute" which "may be deduced by reason and public policy." Id.

In addition, where a procedural rule established by the Legislature impermissibly acts as a legislative encroachment on the Court's power to do what is reasonably necessary to administer justice, the statute is impermissible as it violates the separation of powers doctrine. See Tate v. Board of Medical

Examiners, 131 Nev. Adv. Op. 67, 356 P.3d 506, 507 (2015); Borger v. District Court, 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004).

VIII.

ARGUMENT

A. The District Court Erred When it Dismissed RURAL's Timely Petition for Judicial Review.

Pursuant to NRS 703.373(1), “[a]ny party of record to a proceeding before the Commission is entitled to judicial review of the final decision upon the exhaustion of all administrative remedies by the party of record seeking judicial review.” (Emphasis added.) NRS 703.373(3) states, in pertinent part, “[a] petition for judicial review must be filed within 30 days after final action by the Commission on reconsideration or rehearing.”

When a petition for judicial review of a final decision of the Commission is timely filed, the district court “must” conduct a review of the Commission’s decision without a jury and such review is confined to the record. See NRS 703.373(8). Furthermore, the district court may affirm the decision or set it aside in whole or in part if the substantial rights of the petitioner have been prejudiced. See NRS 703.373(11). See also Manke Truck Lines v. Public Service Comm’n, 109 Nev. 1034, 1036 n.1, 862 P.2d 1201, 1202 n.1, (1993) (noting that the district court is not authorized to “deny” a petition for judicial review; rather,

the court may affirm the decision of the Commission or set it aside in whole or in part).

It is clear that the failure to timely file a petition for judicial review under NRS 703.373(3) divests the district court of jurisdiction to review a final decision of the Commission. See Crane v. Continental Telephone, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989). In Crane v. Continental Telephone, the aggrieved party of a final decision of the Commission failed to timely file a petition for judicial review. Crane, 105 Nev. at 401, 775 P.2d at 706. Instead, the aggrieved party filed a complaint in the district court more than six (6) months after the procedural deadline for filing a petition for judicial review under NRS 703.373. Id. at 400, 775 P.2d at 706. Thus, the district court dismissed the complaint with prejudice for lack of jurisdiction due to the failure to satisfy the procedural and time requirements of NRS 703.373. Id. at 401, 775 P.2d at 706. This Court affirmed the district court's dismissal holding that failure to file a timely petition for judicial review divests the district court of jurisdiction. Id. This Court stated that "[c]ourts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review. . . . When the legislature creates a specific procedure for review of administrative agency decisions, such procedure is controlling." Id.

Accord Washoe County. v. Otto, 128 Nev. Adv. Op. 40, 282 P.3d 719, 725 (2012) (stating that a petitioner must strictly comply with a statute's jurisdictional procedural requirements to invoke a district court's jurisdiction to review an administrative decision).

In this case, RURAL is the aggrieved party of a final decision rendered by the Commission on July 22, 2015. Therefore, RURAL is entitled to judicial review of the Commission's decision. See NRS 703.373(1). Moreover, since the final decision was issued on July 22, 2015, and RURAL filed its Petition for Judicial Review on August 19, 2015, RURAL's Petition for Judicial Review was timely pursuant to NRS 703.373(3). As such, there is and was no dispute as to the jurisdiction of the District Court to consider RURAL's Petition for Judicial Review.

B. The District Court's Dismissal of RURAL's Petition for Judicial Review Denied RURAL Its Right to Judicial Review.

In its Order dismissing RURAL's Petition for Judicial Review, the District Court erroneously concluded that it lacked authority to grant an extension of time to file a memorandum of points and authorities. JA Vol. 2 at 0274-0277. Specifically, the District Court determined that "since this court does not have inherent jurisdiction over Commission administrative decisions, the court must enforce the statutory procedures implemented by the legislature."

JA Vol. 2 at 0275. In reaching this decision, the District Court looked to the legislative history of NRS 703.373 and concluded that the Legislature intended to prevent courts from granting extensions of time. JA Vol. 2 at 0275-0277. The District Court's reasoning, however, is flawed and its decision to deny RURAL its right to judicial review of the Commission's final decision must be reversed.

A review of the legislative history of NRS 703.373 illustrates that the Legislature intended to "fast track" the judicial review process of final decisions of the Commission. See Hearing on A.B. 17 Before the Senate Government Affairs Comm., 76th Leg. (Nev. March 25, 2011). The Legislature wanted the judicial review process to take approximately 4 to 6 months, as opposed to the current 9 to 30 months.² See Hearing on A.B. 17 Before the Senate Government Affairs Comm., 76th Leg. (Nev. April 27, 2011).

² The District Court's quotation of the legislative history on page 5 of its Order is misleading. JA Vol. 2 at 0276. The question and answer in the legislative history quoted in full states:

Assemblywoman Neal: You mentioned in your testimony that you were seeking to shorten the process and now you want to be exempt from the court doing judicial review on PUC decisions. Is that correct?

David Noble: No, under NRS 703.373 there is a process for judicial review already. What NRS 233B.039 does on top of that is to allow for cross-petitions. It allows for extended briefing and new evidence to come

In its Order, the District Court misconstrued the legislative history to mean that an extension of time for filing a memorandum of points and authorities was statutorily prohibited. There is nothing in NRS 703.373 that states that the district court may not grant an extension of time. In fact, NRS 703.373(5) expressly authorizes the district court to allow the Commission additional time to file the entire record of proceeding under review. Therefore, it is incongruous that the Legislature intended for the Commission to be given additional time to meet filing requirements, yet intended to prohibit the district court from giving the aggrieved party additional time to file a memorandum of points and authorities.

Here, RURAL requested an additional thirty (30) days to file a memorandum of points and authorities in support of its timely Petition for Judicial Review. RURAL's request for a 30-day extension did not run afoul of the fast track judicial review process. In fact, counsel for the Commission had stipulated to a 10-day extension of time such that RURAL was actually requesting an additional twenty (20) days to file a memorandum of points and

in. Those were never things that were contemplated for judicial review of the PUC. It is strictly a procedural mechanism. It was a question of whether to follow NRS 703.373 or NRS 233B.039 judicial review provisions.

JA Vol. 1 at 0162.

authorities. Instead of expeditiously ruling on RURAL's Motion for Extension of Time as required by NRS 703.373(10), the District Court did not rule on the motion until more than fifty (50) days after it had been filed on October 16, 2015. The District Court's Order was issued after the 30-day timeframe provided under NRS 703.373(6) for RURAL to file its memorandum of points and authorities had passed and after RURAL had already filed its memorandum of points and authorities in support of its Petition for Judicial Review on November 18, 2015.

In addition, the District Court's determination that it lacked the authority to grant RURAL's request for an extension of time to file a memorandum of points and authorities is contrary to the law of statutory construction involving a statute regulating the right to appeal which should not be taken away unless clearly intended by the Legislature. It is well established in Nevada that "[i]f a statute is clear on its face a court cannot go beyond the language of the statute in determining the legislature's intent." Thompson v. District Court, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984). However, when "a statute is capable of being understood in two or more senses by reasonably well-informed persons, then the statute is ambiguous." Thompson, 100 Nev. at 354, 683 P.2d at 19. See also Irving v. Irving, 122 Nev. 494, 496, 134 P.3d 718, 720

(2006). Where a statute is ambiguous on its face, evidence of the Legislature’s intent may be used to determine the meaning of the statute. See Thompson, 100 Nev. at 354-55, 683 P.2d at 19.

When a statute deals with a party’s right to an appeal, or a right to judicial review of an administrative decision, such right is considered a “substantial right.” Thompson, 100 Nev. at 355, 683 P.2d at 19. This Court has consistently held in construing such statutes that a party’s substantial right to an appeal should not be taken away unless the Legislature “clearly intended” for such right to be limited by the statute. Id. (“[t]he right of appeal is a substantial right which should not be taken away unless clearly intended by the statute”). See also White v. Warden, 96 Nev. 634, 637, 614 P.2d 536, 537 (1980) (“[a]bsent a clear expression from the legislature, we will not find an intent to bar an appeal in the context of [post-conviction habeas petitions]”).

Here, NRS 703.373(6) is silent as to whether a district court may grant an extension of time for filing a memorandum of points and authorities in support of a petition for judicial review. Because the statute is silent, there is no clear indication that the Nevada Legislature intended to deny the district court its inherent authority to manage its own cases and grant an extension of time when warranted. Therefore, in accordance with this Court’s holding in Thompson, the

Legislature's silence may not be interpreted as a clear expression of the Legislature's intent to bar the district court from granting an extension of time since silence does not constitute a clear expression of legislative intent. Any doubt regarding the interpretation of NRS 703.373 should be resolved in favor of the right to appeal. See Thompson v. District Court, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984) (“[t]he right of appeal is a substantial right which should not be taken away unless clearly intended by the statute”).

Further, reason and public policy favor allowing this appeal to go forward. Extensions of time to file briefs were never discussed by the Legislature or by those testifying on the changes to NRS 703.373. There was no discussion of dismissing an appeal if the timeframes in NRS 703.373 were not complied with. Legislators did ask whether a right to appeal was taken away by the proposed changes to NRS 703.373 and were told judicial review of Commission decisions was preserved. JA Vol. 1 at 0161-0163. The statement of intent prepared by the Commission for A.B. 17 states the problems the legislation addressed was the failure to exhaust administrative remedies and no timeframe for the Commission to file the administrative record with the Court. JA Vol. 1 at 0173, 0183, 0194. A.B. 17 is consistently described as exempting the Commission from the provisions of NRS Chapter 233B. JA Vol. 1 at 0159,

0166, 0168, 0171, 0180, 0182, 0190, 0193. In one comment to the Legislators, the Commission representative stated A.B. 17 amends the timeframe for briefing to 120 days. JA Vol. 1 at 0172. Even with the 30-day extension requested by RURAL, the briefing in this case would have taken 90 days. Thus, in this case, where jurisdiction had been properly conferred on the District Court to perform judicial review, the District Court erred by inserting a prohibition into the statute that was never specifically discussed or intended and which deprived RURAL of its substantial right to judicial review. Furthermore, the Commission itself believed an extension could be granted because it was not opposed to a 10-day extension and asked RURAL to file a motion with the District Court if RURAL wanted a longer continuance. JA Vol. 1 at 0110, 0201.

The District Court's construction of NRS 703.373 lends to an improper and unjust application of the statute. Under the District Court's flawed analysis of NRS 703.373, a petition for judicial review would necessarily have to be granted if the Commission failed to timely file or request an extension to file the record of the administrative proceeding pursuant to NRS 703.373(5) or if the Commission failed to file a reply memorandum of points and authorities pursuant to NRS 703.373(7) within 30 days after service of the petitioner's memorandum of points and authorities. Under the District Court's flawed interpretation of

NRS 703.373, the District Court only has inherent authority to manage its cases and grant an extension if the Commission, one of the parties to the case, agrees to an extension. JA Vol. 2 at 0277. The District Court's construction of NRS 703.373 must be reversed because it takes away RURAL's substantial right of appeal and leads to an unjust and improper application of NRS 703.373.

C. The District Court's Dismissal of RURAL's Petition for Judicial Review Violates the Policy that Actions Should be Adjudicated on the Merits.

This Court has cautioned that dismissal for procedural errors “should be used only in extreme situations” and should be weighed against other factors including “the policy favoring adjudication on the merits.” Nevada Power v. Fluor Illinois, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992). See also Miles v. State, 120 Nev. 383, 385-86, 91 P.3d 588, 589-90 (2004) (holding that once the court acquires jurisdiction by the filing of a petition within the time required pursuant to NRS 34.726, any defects in the petition may be cured by amendment, even after the statutory time limit for filing the petition has lapsed); Forman v. Eagle Thrifty Drugs & Markets, 89 Nev. 533, 536, 516 P.2d 1234, 1236 (1973) (recognizing that defects in a notice of appeal “should not warrant dismissal for want of jurisdiction where the intention to appeal from a specific

judgment may be reasonably inferred from the text of the notice and where the defect has not materially misled the appellee”).

In Nevada Power v. Fluor Illinois, the district court dismissed Nevada Power’s complaint with prejudice for alleged discovery abuses. Nevada Power, 108 Nev. at 642-43, 837 P.2d at 1358. This Court reversed the district court’s dismissal as being an abuse of discretion because the dismissal improperly ended the case for Nevada Power. Id. at 646, 837 P.2d at 1360.

Similarly, in Fitzpatrick v. Department of Commerce, 107 Nev. 486, 488, 813 P.2d 1004, 1005 (1991), this Court held that when a petition for judicial review was timely filed, it was error for the district court to dismiss the petition on the grounds that the petitioner failed to file a timely memorandum of points and authorities. In Fitzpatrick, the petitioner did not timely file a motion requesting an extension of time to file a memorandum of points in authorities. Fitzpatrick, 107 Nev. at 488, 813 P.2d at 1005. Instead, the petitioner merely filed the memorandum after the prescribed deadline. Id. Thereafter, in response to a motion to dismiss the petition for judicial review, the petitioner argued that he had good cause for filing the memorandum beyond the filing deadline. Id. The district court refused to consider the petitioner’s alleged good cause and dismissed the petition for judicial review. Id.

In reversing the district court's dismissal, this Court noted that "the time allotted by statute for taking an administrative appeal is jurisdictional, and to invoke the appellate jurisdiction of the district court, a petition for judicial review must be timely filed." Fitzpatrick, 107 Nev. at 488, 813 P.2d at 1005 (emphasis added). This Court further stated that if a petition for judicial review is timely filed, the district court has the authority to accept a tardy memorandum of points and authorities because NRS 233B.133 allows a court to extend the time allowed for filing memoranda. Id.

In Miles v. State, 120 Nev. 383, 384, 91 P.3d 588, 588 (2004), when asked to consider "whether a district court has jurisdiction to permit an inadequately verified post-conviction petition for a writ of habeas corpus to be cured by subsequent amendment," this Court found that an inadequately verified petition is not a jurisdictional procedural failure. The Court noted that where the Legislature has not mandated that a procedural failure may not be corrected, or expressly prohibited a petitioner from curing a defect by amendment, permitting a petitioner to cure a defect would be a valid action of the district court. Miles, 120 Nev. at 385-386, 91 P.3d at 589-590. Accordingly, this Court concluded that "the district court has the discretion to permit a petitioner to amend his petition to cure an inadequate verification." Id.

In this case, the District Court dismissed RURAL's Petition for Judicial Review on the basis that it lacked statutory authority to grant an extension of time to file a memorandum of points and authorities. The District Court's action, even though it had jurisdiction to consider the judicial review, constituted a dismissal with prejudice, thereby forever barring RURAL from challenging the Commission's final decision in Docket No. 14-11006. The District Court's dismissal was an abuse of discretion because it did not consider the policy favoring adjudication on the merits and improperly ended the case for RURAL.

Further, the District Court's reasoning in its Order was inconsistent and conflicting. While, on the one hand, the District Court properly determined that failure to file a memorandum of points and authorities does not divest the court of jurisdiction, on the other hand, the District Court effectively so held by its determination that it had no authority to grant an extension and dismissed RURAL's appeal for failure to file a memorandum of points and authorities. Even if RURAL had not filed any memorandum of points and authorities, under the District Court's own reasoning, it was not deprived of jurisdiction and it should have conducted its mandatory judicial review.

Under the facts and circumstances of this case, dismissing RURAL's timely filed Petition for Judicial Review was unjust. The District Court acknowledged that its court procedures were deficient, causing delay. RURAL's memorandum of points and authorities had already been filed by the time the District Court considered RURAL's Motion for Extension of Time. There was no harm or prejudice to the Commission or to the District Court in allowing RURAL's extension of time and allowing its judicial review to go forward, nor was there any harm or prejudice cited by the District Court as a reason for dismissing RURAL's Petition for Judicial Review.³ See NRCP 61. For all these reasons, the District Court's interpretation of NRS 703.373 should be reversed.

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³ The District Court's Order striking RURAL's memorandum of points and authorities and dismissing its Petition for Judicial Review violates NRCP 61. NRCP 61 provides: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." The District Court disregarded the duty imposed by NRCP 61 and dismissed RURAL's action, affecting RURAL's substantial rights, when RURAL's memorandum of points and authorities in support of its Petition for Judicial Review had already been filed at the time the District Court issued its Order on December 8, 2015.

D. NRS 703.373 Does Not Prohibit the District Court From Exercising Its Inherent Authority to Manage Its Cases as Provided Under the Separation of Powers Doctrine.

In Nevada, this Court has recognized that the judiciary “has the inherent power to govern its own procedures.” Berkson v. LePome, 126 Nev. 492, 499, 245 P.3d 560, 563 (2010). Where a procedural rule established by the Nevada Legislature does not improperly restrict a court’s discretion in the “procedural management of litigation,” or “impinge upon the inherent power of the judiciary to economically and fairly manage litigation” the statute is permissible. Borger v. District Court, 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004).

In Borger v. District Court, this Court was asked to determine whether dismissal of a complaint was required when there was a question about the merit of an affidavit filed with the complaint. Borger, 120 Nev. at 1027, 102 P.3d at 605. Pursuant to the applicable statute, dismissal was required when a plaintiff failed to file an affidavit with his or her complaint. Borger, 120 Nev. at 1029, 102 P.3d at 606. This Court noted that although the statute required dismissal when an affidavit was omitted, the statute was silent as to whether a court may grant leave to amend the complaint where there is a question as to the merit of the affidavit submitted therewith. Id.

In Borger, this Court held that where the sufficiency of an affidavit is in question, the decision to allow an amendment of the complaint rests with the court. Id. The Court reached this conclusion by noting that while a court may not act in violation of a clear procedural directive mandated by statute, in the absence of clear statutory directive, the court may use its inherent power to decide how a case shall proceed. Id. at 1029-1030, 102 P.3d at 606. This Court stated as follows:

Although the Legislature is certainly empowered to define substantive legal remedies, “[t]he judiciary has the inherent power to govern its own procedures.” Going further, “the judiciary, as a coequal branch of government, has inherent powers to administer its affairs, which include rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice.”

Id. at 1029, 102 P.3d at 606 (quoting State v. Connery, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983) and Goldberg v. District Court, 93 Nev. 614, 615-16, 572 P.2d 521, 522 (1977)).

In Tate v. Board of Medical Examiners, 131 Nev. Adv. Op. 67, 356 P.3d 506, 507 (2015), this Court was asked to determine whether a statute prohibiting the district court from entering a stay of a decision of the Board of Medical Examiners pending judicial review violated the separation of powers doctrine. In Tate, the district court determined that although it thought injunctive

relief was clearly warranted, NRS 630.356(2) expressly precluded the court from issuing a preliminary injunction to stay the sanctions imposed on the physician by the Board of Medical Examiners. Tate, 131 Nev. at ___, 356 P.3d at 508. On appeal, this Court held that courts have the inherent power to do all things necessary to administer justice, including issuing injunctions, such that the statute at issue violated the separation of powers doctrine. Id. at ___, 356 P.3d at 510.

This Court stated as follows:

Through the adoption of NRS 630.356(2), the Legislature gave physicians the right to contest and the district courts the power to review the Board's final decisions. By simultaneously extinguishing the court's ability to impose a stay where the progression of sanctions would impair or eliminate the purpose of seeking judicial review, the statute impermissibly acts as a legislative encroachment on the court's power to do what is reasonably necessary to administer justice. This, we conclude, is a violation of the separation of powers doctrine.

Id. at ___, 356 P.3d at 511 (emphasis added).

The holdings in Tate and Borger establish that when a statute interferes with the judiciary's inherent authority to manage its own cases, the statute is unconstitutional as being a violation of the separation of powers doctrine. See Tate v. Board of Medical Examiners, 131 Nev. Adv. Op. 67, 356 P.3d 506, 511 (2015) (the Legislature may not encroach "on the court's power to do what is

reasonably necessary to administer justice”); Borger v. District Court, 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004) (as a coequal branch of government, the judiciary possesses the inherent power to protect itself and administer its affairs).

In this case, the statute under review is NRS 703.373. NRS 703.373 sets forth an expedited process for judicial review of a final decision of the Commission. Although NRS 703.373(6) states that a memorandum of points and authorities in support of a petition for judicial review must be filed within thirty (30) days of written notice that the entire record of proceeding has been filed with the district court, NRS 703.373(6) is silent as to whether a district court may grant an extension of time for filing the memorandum of points and authorities. There is no explicit prohibition against extensions. Because the statute is silent, there is no clear indication that the Legislature intended to deny the district court its inherent authority to manage its own cases and grant an extension of time when warranted. Moreover, under the separation of powers doctrine, the Legislature may not encroach on the power of the courts to do what is reasonably necessary to administer justice. Therefore, the District Court’s dismissal of RURAL’s Petition for Judicial Review must be reversed because the District Court erroneously interpreted NRS 703.373’s silence on the issue of granting an extension of time.

In addition, the District Court's analysis of its inherent authority, premised on the Commission's actions or acquiescence, is contrary to law. For example, the District Court stated in numerous places in its Order that "the Commission's and the legislature's failure to confer on courts the authority to expressly grant extensions of briefing deadlines appears to be intentional." JA Vol. 2 at 0277 (emphasis added). "The court concludes that it does not have authority to grant Rural a 30 day extension over the Commission's objection." JA Vol. 2 at 0277 (emphasis added). "Courts may, under some circumstance, have inherent authority to grant an extension. For example, if the Commission stipulated to a continuance a court may have inherent authority to grant an extension." JA Vol 2 at 0277 (emphasis added). The District Court's analysis of its own inherent powers improperly restricts the discretion of the district court and should not be upheld by this Court.

E. The District Court Erred in Finding That RURAL Did Not Cite Legal Authority in Support of Its Motion for Extension of Time.

The District Court's determination that RURAL failed to cite supporting legal authority for its Motion for Extension of Time is without merit. In its Motion for Extension of Time, RURAL noted that the proceeding was in the nature of an appeal and that the appellate rules of procedure provide for motions for extensions of time to file a brief. JA Vol. 1 at 0103-0114. Further, RURAL's

counsel filed an affidavit showing good cause for the extension request. JA Vol. 1 at 0109-0111. See Scrimmer v. District Court, 116 Nev. 507, 516-517, 998 P.2d 1190, 1196-1197 (2000) (good cause shown for purposes of extending the time to complete service pursuant to NRCP 4(i)).

It should be noted that the Commission asked RURAL to file a motion if it needed an extension of time longer than 10 days. JA Vol. 1 at 0201. The Commission indicated that its anticipated workload prevented it from agreeing to a longer extension request. JA Vol. 1 at 0201. The Commission's argument in opposition to RURAL's request for an extension of time to file a memorandum of points and authorities was that NRS 703.373 provides no statutory mechanism for extending the deadlines, and that the deadlines were jurisdictional and mandatory, citing to the legislative history of A.B. 17. JA Vol. 1 at 0115-0145. The Commission did not object to the extension based upon its anticipated workload or that there would be any prejudice to the Commission. JA Vol. 1 at 0115-0145. In its Reply, RURAL responded to all the arguments raised by the Commission in its opposition and the Commission's Countermotion to Dismiss. JA Vol. 1 at 0146-0204. The District Court's Order would not have included five pages of analysis if RURAL had failed to cite supporting legal authority for its Motion for Extension of Time. JA Vol. 2 at 0273-0277. Accordingly, the District Court's Order

determining that RURAL failed to cite any legal authority to support its Motion for Extension of Time is without merit.

IX.

CONCLUSION

Based on the foregoing, it is clear that the District Court erred when it failed to expeditiously consider RURAL's Motion for Extension of Time as mandated by NRS 703.373(10). The District Court compounded its error when it denied RURAL's Motion for Extension of Time and dismissed RURAL's Petition for Judicial Review on December 8, 2015. The actions of the District Court deprived RURAL of its right to judicial review of the final decision of the Commission in contravention of NRS 703.373. Therefore, the District Court's dismissal should be reversed and this matter remanded for judicial review pursuant to NRS 703.373.

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DATED this 5th day of July, 2016.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 7,195 words.

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

DATED this 5th day of July, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

- ☐ Placing a true copy thereof in a sealed postage prepaid envelope in the United States Mail in Carson City, Nevada
- ☐ Hand-delivery - via Reno/Carson Messenger Service
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