IN THE SUPREME COURT OF THE STATE OF NEVADA

PUBLIC UTILITIES COMMISSION OF NEVADA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and For the County of Clark, THE HONORABLE JOSEPH T. BONAVENTURE, District Judge, and THE HONORABLE WILLIAM D. KEPHART, District Judge,

Respondents,

and

SOUTHWEST GAS CORPORATION,

Real Party in Interest.
_____/

Case No.

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District Court Case No. A-19-791302-J

PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

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ROUTING STATEMENT

This writ proceeding is presumptively retained by the Supreme Court of Nevada because it is a case involving a determination of the Public Utilities Commission of Nevada. *See* NRAP 17(a)(8). Additionally, this writ proceeding raises a question of statewide public importance as a principle issue because it concerns the scope of a court's discretion in extending the legislatively-prescribed briefing schedule for judicial review of decisions where delay can harm utility ratepayers throughout Nevada. *See* NRAP 17(a)(12).

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I. RELIEF SOUGHT

The Public Utilities Commission of Nevada ("PUCN") petitions this Court for a writ of mandamus requiring Respondents to vacate a decision, memorialized in an Order dated November 11, 2019, which granted the motion of Real Party in Interest Southwest Gas Corporation ("Southwest Gas") for leave to file an unnecessary and impermissible reply brief in Eighth Judicial District Court Case No. A-19-791302-J (Southwest Gas's appeal of the PUCN's decision in Southwest Gas's recent general rate case). The PUCN further requests that this Court require Respondents to adhere to the expedited procedural schedule applicable to judicial review of PUCN decisions pursuant to Nevada Revised Statutes ("NRS") 703.373. In the alternative, the PUCN requests that this Court issue a writ of prohibition enjoining Respondents from deviating from the procedural requirements of NRS 703.373.

II. ISSUE PRESENTED

Whether a court has the authority to extend the legislatively-imposed briefing schedule applicable to judicial review of a final decision of the PUCN.

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III. NECESSARY FACTS

- On February 15, 2019, the PUCN issued a final order in PUCN Docket No. 18-05031, which granted in part and denied in part Southwest Gas's application to increase retail rates for natural gas service in Nevada ("Southwest Gas's General Rate Case").

- On March 19, 2019, Southwest Gas electronically filed with the Eighth Judicial District Court of Nevada a petition for judicial review of the PUCN's final order. (1 App. 1.)

- On April 22, 2019, the PUCN filed with the district court a certified copy of the record of the proceeding under review.

- On May 22, 2019, Southwest Gas filed a memorandum of points and authorities in support of its petition for judicial review. (1 App. 9.)

- On June 21, 2019, the PUCN and Nevada's Bureau of Consumer Protection ("BCP") each filed a reply memorandum of points and authorities in opposition to Southwest Gas's petition. (1 App. 73; 148.)

- On August 6, 2019, Southwest Gas filed a motion for leave to file a reply in support of its petition.[1] (1 App. 182.)

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[1] The PUCN was not served with Southwest Gas's motion until August 20, 2019.

- On August 8, 2019, the BCP filed an opposition to Southwest Gas's motion. (1 App. 213.)

- On August 21, 2019, one day after receiving service of Southwest Gas's motion, the PUCN filed an opposition to the motion. (1 App. 217.)

- On September 6, 2019, Southwest Gas filed a reply in support of its motion. (1 App. 234.)

- On October 15, 2019, Judge Bonaventure presided over a hearing on Southwest Gas's motion at which Southwest Gas, the PUCN, and the BCP were present in person. During the hearing, Judge Bonaventure orally granted the motion and established a procedural schedule allowing submission of sur-replies by November 1, 2019, and setting a date of December 17, 2019, for argument regarding Southwest Gas's petition for judicial review.[2]

[2] Prior to the PUCN even presenting its argument at the hearing on Southwest Gas's motion, Judge Bonaventure agreed with Southwest Gas's assertion that "[t]he more briefing there is, … the easier for the judge to decide," stating that "the Supreme Court [of Nevada] wants [the district court] to make a complete record on these things." (1 App. 241-42.) Judge Bonaventure added that the district court "wants to be fully briefed on the applicable standard of review regarding the underlying petition," presumably referring to the contents of Southwest Gas's reply, which was attached to the motion and includes an argument that the district court should apply a *de novo* standard of review, rather than a substantial evidence standard, to not just questions of law but also questions of fact. (*Id*. at 248.)

- On October 16, 2019, Southwest Gas filed a reply in support of its petition for judicial review. (2 App. 250.)
- On November 1, 2019, the PUCN and BCP each filed a sur-reply to Southwest Gas's reply. (2 App. 277; 310.)
- On November 11, 2019, Judge Kephart issued an order memorializing the procedural schedule and the court's decision to grant Southwest Gas's motion. (2 App. 333.)
- On November 14, 2019, Southwest Gas filed a notice of entry of the order granting Southwest Gas leave to file a reply.

IV. REASONS WHY THE REQUESTED WRIT SHOULD ISSUE

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion.[3] A petition for a writ of mandamus will be entertained only if "legal, rather than factual, issues are presented", and "[m]andamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously."[4]

[3] NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

[4] *Round Hill General Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (internal citations omitted).

"The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person."[5] Its "purpose is to prevent courts from transcending the limits of their jurisdiction in the exercise of judicial power."[6]

This Court has original jurisdiction to issue writs of mandamus or prohibition pursuant to the Nevada Constitution, Article 6, Section 4. In reviewing a petition for a writ of mandamus or prohibition, a court "considers whether judicial economy and sound judicial administration militate for or against issuing the writ."[7] The writ "shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law,"[8] and in certain cases, "despite the availability of an adequate legal remedy, this [C]ourt has decided to exercise its constitutional prerogative to entertain the writ"[9] "'where circumstances reveal urgency or strong necessity,' or 'where an important issue of law needs clarification and public policy is served by this [C]ourt's invocation of its original

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[5] NRS 34.320.

[6] *Mineral Cty. v. State, Dep't of Conservation & Nat. Res*., 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (citing State v. Down et al., 58 Nev. 54, 57, 68 P.2d 567, 568 (1937)).

[7] *Redeker v. Dist. Ct.*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006).

[8] NRS 34.170; *see also* NRS 34.330.

[9] *Ashokan v. State, Dept. of Ins.*, 109 Nev. 662, 667, 856 P.2d 244, 247 (1993).

jurisdiction.'"[10] "Because statutory construction is a question of law, this [C]ourt reviews the district court's interpretation of a statute de novo, without deference to the district court's conclusions."[11]

Here, a writ of mandamus is warranted to compel Respondents to follow NRS 703.373, which does not permit a reply from a petitioner who is seeking judicial review of a PUCN decision. The district court manifestly abused its discretion and acted arbitrarily and capriciously when it allowed Southwest Gas to file a reply memorandum and ignored the legislatively-prescribed briefing schedule that contemplates only a memorandum filed by the petitioner and a reply memorandum filed by the respondent. Alternatively, a writ of prohibition is appropriate to arrest the district court's deviation from the legislatively-prescribed, expedited schedule.

This Court should issue the requested writ because there is no plain, speedy, and adequate remedy available in the ordinary course of law to prevent the district court from expanding its judicial review proceedings beyond legislatively-imposed parameters. Moreover, the requested writ is urgently necessary to address an

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[10] *Walker v. Eighth Judicial Dist. Court,* 120 Nev. 815, 819, 101 P.3d 787, 790 (2004) (citing *Falcke v. Douglas County*, 116 Nev. 583, 586, 3 P.3d 661, 662-63 (2000)).

[11] *Id.* (citing *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513-14 (2000)).

important issue of law that requires clarification, and public policy is served by this Court's exercise of its original jurisdiction to protect customers of utilities in Nevada from potential increased costs and rate shocks caused by prolonged proceedings in appeals of PUCN decisions. Finally, the issuance of a writ will promote judicial economy and sound judicial administration.

A. The District Court Manifestly Abused Its Discretion and Acted Arbitrarily and Capriciously When It Disregarded the Applicable Law and Allowed Southwest Gas to File a Reply.

NRS 703.373 governs judicial review of PUCN decisions and, as this Court recently ruled in *Rural Telephone Co. v. Pub. Utils. Comm'n of Nev.*,[12] limits a reviewing court's authority to set a procedural schedule. Specifically, NRS 703.373 requires expedited briefing compared to judicial review of other agencies' decisions and provides that appeals of PUCN decisions "have precedence over any civil action of a different nature pending in the court."[13] Here, the district court abused its discretion by disregarding NRS 703.373 and allowing the very type of protracted litigation and delay that the Nevada Legislature intended to avoid for appeals of PUCN decisions. Moreover, the district court's decision to extend the briefing schedule was arbitrary because it was "founded on prejudice or preference

[12] 133 Nev. 387, 398 P.3d 909 (2017).

[13] NRS 703.373(10).

rather than on reason," and it was capricious because it was "contrary to the… established rules of law."[14]

1. NRS 703.373 does not permit a petitioner to file a reply.

"'The leading rule of statutory construction is to ascertain the intent of the [L]egislature in enacting the statute.'"[15] "'It is the duty of this [C]ourt, when possible, to interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent.'"[16] Indeed, "words within a statute must not be read in isolation, and statutes must be construed to give meaning to all of their parts and language within the context of the purpose of the legislation."[17]

Here, the legislative intent is clear: appeals of PUCN decisions were meant to be treated differently than appeals of other administrative decisions, for the specific purpose of expediting judicial review. When read within the context of

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[14] *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011).

[15] *Dezzani v. Kern & Associates, Ltd.*, 134 Nev. 61, 64, 412 P.3d 56, 59 (2018) (quoting *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 650, 730 P.2d 438, 443 (1986)).

[16] *Id*. (quoting *Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008)).

[17] *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001).

that purpose, the language of NRS 703.373 prohibits a delay-causing expansion of the briefing schedule.

a. The plain language of NRS 703.373 limits a district court's discretion with regard to the briefing schedule.

NRS 703.373 governs appeals of PUCN decisions. The language of the statute is explicit, and this Court has found its effect clear as to the scope of judicial discretion and "the Legislature's intent to provide an expedited timeline for judicial review."[18] Specifically, this Court found that NRS 703.373(3), (6), and (7) contain "mandatory language" as to timelines that must be followed by petitioners and reviewing courts.[19] Allowing the submission of an additional responsive pleading is a direct contravention of the mandatory language of NRS 703.373(7), which explicitly provides that after respondents file a reply memorandum, "***the action is at issue*** and parties must be ready for a hearing upon 20 days' notice."[20] The action (the petition for judicial review) is at issue because the briefing on the action has concluded, and the expedited process has advanced to its next stage, which provides for a possible hearing as early as 20 days after the filing of the last permitted brief. The language in NRS 703.373(7) evinces the Nevada Legislature's intent for courts to proceed quickly after petitioners and respondents

[18] *Rural Telephone, 133 Nev. at* 389-90, 398 P.3d at 911-12.

[19] *Id.*, 133 Nev. at 390, 398 P.3d at 911.

[20] NRS 703.373(7) (emphasis added).

each file a single memorandum of points and authorities; the Legislature specifically chose not to allow an opportunity for a petitioner to file a reply brief.

In interpreting NRS 703.373, this Court, in *Rural Telephone*, recognized that "'it is fair to assume that, when the [L]egislature enumerates certain instances in which an act or thing may be done, or when certain privileges may be enjoyed, it names all that it contemplates; otherwise what is the necessity of specifying any?'"[21] Further, this Court explained that "'[s]tatutes should be read as a whole, so as not to render superfluous words or phrases or make provisions nugatory.'"[22] NRS 703.373 does not provide for the "privilege" of a reply from a petitioner, indicating that the Legislature did not intend for one to be permitted. Instead, NRS 703.373(7) provides that the action is at issue and that the briefing schedule is concluded after the 30-day timeframe within which respondents may file memoranda. The provision in NRS 703.373(7) allowing courts to act expeditiously (within 20 days) to conduct a hearing after each party has filed a single memorandum illuminates the Legislature's clear intent to eliminate delays associated with prolonged briefing.

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[21] *Rural Telephone*, 133 Nev. at 389, 398 P.3d at 911 (citing *Ex Parte Arascada*, 44 Nev. 30, 35, 189 P. 619, 620 (1920)).

[22] *Id.* (citing *Clark Cty. v. S. Nev. Health Dist.*, 128 Nev. 651, 656, 289 P.3d 212, 215 (2012)).

Importantly, this Court found that only NRS 703.373(5) provides district courts with discretionary power to adjust the procedural schedule for reviewing a PUCN decision.[23] NRS 703.373(5) states that the PUCN is required to transmit the certified record to the court "within 30 days after the service of the petition for judicial review ***or such time as is allowed by the court***."[24] NRS 703.373(7), which mandates that the action is at issue after respondents file and serve their memoranda, does not include similar discretionary language that would permit a court to grant leave to parties to file additional pleadings instead of moving forward toward a decision. Had the Legislature wanted to allow a reply brief in appeals of PUCN decisions, then it would have expressly provided so in NRS 703.373.[25] It is not for the district court to include that which the Legislature has omitted.[26]

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[23] *Id*.

[24] NRS 703.373(5) (emphasis added).

[25] *Desert Fireplaces Plus, Inc. v. Eighth Jud. Dist. Ct.*, 120 Nev. 632, 637, 97 P.3d 607, 610 (2004) ("If the Legislature desired that a more specific form of notice be given to absent third parties, it would have included such a requirement in the statute."); *Boyle v. Bowman*, 96 Nev. 140, 142, 605 P.2d 1144, 1145 (1980) ("As under the present law, there is no indication that private individuals may recover on the bond and no procedures are set forth for such recovery. Had the legislature intended inclusion, it would have specifically so provided.").

[26] *Nichols v. United States*, 578 U.S. ___, ___, 136 S. Ct. 1113, 1118 (2016) ("'To supply omissions transcends the judicial function.'") (internal citations omitted); *FTC v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 67 (1959) ("We cannot supply what Congress has studiously omitted.").

b. The legislative history of NRS 703.373 does not support extending the briefing schedule for judicial review of PUCN decisions.

While NRS 703.373(7) is clear on its face and is not subject to further interpretation,[27] the legislative history is nevertheless informative as to the purpose of the statute. The legislative history of NRS 703.373 indicates that it was modeled after NRS 233B, with important exceptions: NRS 233B.133(3) permits reply memoranda from petitioners, and NRS 233B.133(6) permits courts to extend the time for filing memoranda upon a showing of good cause. Similar provisions are noticeably absent from NRS 703.373. The Legislature purposefully chose ***not*** to include within NRS 703.373 an opportunity for a petitioner to submit a reply or for any party to receive an extension of time for filing its one permitted memorandum. The legislative history signals that the exclusion of such language was purposeful to streamline judicial review of the PUCN's decisions.

In passing Assembly Bill ("AB") 17, the 76th (2011) Session of the Nevada Legislature addressed judicial review of PUCN decisions, specifically considering whether NRS 233B.039 should be amended to state that judicial review of PUCN decisions is exempt from the provisions of Chapter 233B. The Legislature heard

[27] It is well-settled in Nevada that, where a statute is clear on its face, a court may not 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).

the following testimony from the PUCN during the February 9, 2011, hearing on AB 17:

> The reason for the fast-track review of [PUCN] decisions is based on two premises: money and infrastructure. All [PUCN] decisions basically touch on one of these two issues. With regard to money, there is the issue of rate stability. The [PUCN] has, in its process, general rate cases – that is a top down review of all utilities operations, revenues, and recovery rates which are on a two to three-year cycle. If the judicial review process of a decision takes one, two, or three years, you have the potential of a spike in rates. If that happened, a [PUCN] decision would go into effect at the same time that a Supreme Court decision would go into effect. That would have the effect of spiking the rates. The other issue is carrying charges. Once [PUCN] decisions are issued, they are deemed effective. Unless there is an injunction, they go into effect immediately. Those binding rates are then recovered by ratepayers. If there is subsequently a refund or additional monies to be recovered from or to the ratepayers, there are carrying charges – basically interest on these monies that… ratepayers are going to have to pay. The shorter the time frame for judicial review that we have, the less carrying charges there are.
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> Lastly, with regard to money, there is what is called "intergenerational equities." When a rate goes into effect, there is a certain pool of ratepayers. If judicial review takes one to three years, that pool of ratepayers changes over that time and there is not an equal comparison. If a refund needs to be issued, there are some people that are going to get that refund without having paid previously and others who are no longer in the area that should have gotten that refund.
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> [NRS Chapter 233B] … allow[s] for cross-petitions. It allows for extended briefing and new evidence to come in. Those were never things that were contemplated for judicial review of [PUCN decisions].[28]

[28] 2 App. 379-381 (Minutes of the Meeting of the Assembly Comm. on Government Affairs, Seventy-Sixth Session, Feb. 9, 2011, pp. 45-47).

The legislative history of AB 17, which was proposed to the Legislature by the PUCN as Bill Draft Request ("BDR") 18-455, shows an informed and conscious decision by the Legislature to shorten the timeframe for appeals of PUCN decisions to avoid drawn-out judicial proceedings because delays in implementing final rates can negatively affect utility customers.

c. When viewed within the context of the overall statutory scheme, NRS 703.373 does not permit a reply from a petitioner.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[29] Here, the statutory scheme includes more than just NRS 703.373; it also includes NRS 233B.133, the statute that governed judicial review of PUCN decisions prior to the passage of AB 17. "[T]o ascertain the intent of the [L]egislature in enacting the statute,"[30] NRS 703.373 must be examined within the context of NRS 233B.133, which still applies to judicial review of the decisions of nearly every other administrative agency in the State. Such an examination highlights the purpose of NRS 703.373 and the Legislature's intent to expedite judicial review of PUCN decisions through the passage of AB 17.

[29] *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 1504 (1989).

[30] *Dezzani*, 134 Nev. at 64, 412 P.3d at 59.

NRS 703.373 differs from NRS 233B.133 in important ways that shorten the timelines for judicial review.[31] Whereas NRS 233B.133(1) allows a petitioner 40 days to file a memorandum of points and authorities subsequent to the agency's notice of filing of the administrative record with a court, NRS 703.373 allows only 30 days. NRS 233B.133(3) allows a petitioner to file a reply to the agency's response, but NRS 703.373 contains no provision that allows a reply from the petitioner. NRS 233B.133(4) permits the parties an option to request a hearing to delay the matter being deemed submitted, but NRS 703.373(7) provides that the action is at issue following the submission of the PUCN's brief and that the parties must be ready for a hearing upon 20 days' notice. And, whereas NRS 233B.133(6) allows a court to extend the timeline for filing memoranda upon a showing of good cause, no such provision exists in NRS 703.373.

The explicit allowance of a reply brief at NRS 233B.133(3) demonstrates that the Legislature did not intend for a reply brief to be allowed under NRS 703.373, which enumerates only the filing of a single brief by each petitioner and respondent. Again, "'it is fair to assume that, when the [L]egislature enumerates certain instances in which an act or thing may be done, or when certain privileges

[31] *See Rural Telephone*, 133 Nev. at 390, 398 P.3d at 912 (comparing and contrasting the differences between NRS Chapter 233B and NRS 703.373).

may be enjoyed, it names all that it contemplates.'"[32] This is especially true here, where the privilege at issue (filing a reply brief) is not enumerated in the *applicable* statute but is enumerated in the statute that the Legislature made inapplicable.[33] Where conflicts exist between the statutes, the differences must be given meaning.

In passing AB 17, the Nevada Legislature expressly exempted "[t]he judicial review of decisions of the [PUCN]" from the provisions of NRS Chapter 233B.[34] Thus, the timelines and flexibility, including for reply memoranda, set forth in NRS 233B.133 do not apply to judicial review of PUCN decisions. Instead, the district court's review of the PUCN's decision in Southwest Gas's general rate case is subject to the timelines and briefing schedule outlined in NRS 703.373, which, unlike NRS 233B.133, does not permit the filing of a reply brief by a petitioner seeking judicial review.

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[32] *Rural Telephone*, 133 Nev. at 389, 398 P.3d at 911 (citing *Ex Parte Arascada*, 44 Nev. at 35, 189 P. at 620).

[33] *See infra* at Sec. A(2), 16-19.

[34] NRS 233B.039(5)(d).

2. The district court's decision was arbitrary, capricious, and an abuse of discretion.

Here, the district court's decision to allow additional pleadings was "founded on prejudice or preference rather than on reason,"[35] and therefore arbitrary, because it was based on a preconceived notion that the Supreme Court of Nevada always prefers more briefing[36] and a personal preference for receiving additional briefing regarding a matter addressed in Southwest Gas's impermissible reply brief, which Southwest Gas attached to its motion for leave to file the reply.[37]

Moreover, the district court's decision was capricious because, as discussed above, it was "contrary to the… established rules of law."[38] Prior to this case, no court since the passage of AB 17 in 2011 had ever found that a reply memorandum was permissible in the normal course of reviewing a PUCN decision.[39] The

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[35] *Armstrong*, 127 Nev. at 931-32; 267 P.3d at 780.

[36] 1 App. 242.

[37] Southwest Gas spent the bulk of its reply arguing that the district court should apply a *de novo* standard of review, rather than a substantial evidence standard, to not only questions of law but also questions of fact. In granting Southwest Gas's motion, Judge Bonaventure said that the district court "wants to be fully briefed on the applicable standard of review regarding the underlying petition." (1 App. 248.)

[38] *Armstrong*, 127 Nev. at 931-32, 267 P.3d at 780.

[39] *See* First Judicial Dist. Court Case No. 17-OC-00245-1B and Second Judicial Dist. Court Case No. CV18-02497 (where the courts issued amended scheduling orders that modified the initial schedules to remove the opportunity for petitioners to file a reply) (2 App. 449-59.); *see also* First Judicial Dist. Court Case No. 16-OC-0052-1B (where the court corrected the briefing schedule to be consistent with NRS 703.373 (2 App. 460) but later granted petitioner leave to file a *limited* reply

established rules of law have, until now, been applied in a manner that reflects the legislative intent to eliminate a nonessential and time-consuming round of briefing during judicial review of PUCN decisions.

In *Smith v. Eighth Judicial Dist. Court*,[40] this Court issued a writ of mandamus to compel the district court to vacate its order denying a motion to dismiss a cross-claim that was inappropriately filed separately from an answer, in violation of Nevada Rules of Civil Procedure, Rule 7(a). There, this Court found that the district court had abused its discretion by allowing a pleading that was not permitted under the applicable law. In the instant case, the district court similarly abused its discretion by allowing Southwest Gas to file a reply brief that is not allowed under NRS 703.373.

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to address only specific alleged factual misrepresentations, not to provide any additional argument) (2 App. 463-78.); *see also* First Judicial Dist. Court Case No. 16-OC-00072-1B (where the court's initial briefing schedule limited the pleadings to those contemplated by NRS 703.373) (2 App. 479.); *see also* Eighth Judicial Dist. Court Case Nos. A-15-714586-J and A-15-714645-J (where the court issued minute orders clarifying that the provisions of NRS 703.373 will govern the procedural schedules) (2 App. 482-83.); *see also* Third Judicial Dist. Court Case No. 15-CV-01444 (where the district court issued a scheduling order allowing a reply from the petitioner but later acknowledged that it "should have conformed to the provisions of NRS 703.373.") (2 App. 484.)

Other fully-briefed appeals of PUCN decisions since the passage of AB 17 include First Judicial Dist. Court Case Nos. 13-OC-00200-1B, 15-OC-00188-1B; and Eighth Judicial Dist. Court Case No. A-19-788120-J.

[40] 113 Nev. 1343, 950 P.2d 280 (1997).

In *Walker v. Eighth Judicial Dist. Court*,[41] this Court found that the district court manifestly abused its discretion when it interpreted and applied a statute in a manner that conflicted with legislative intent. There, the district court allowed the unsealing of the petitioner's criminal records related to dismissed charges from 1989 that were similar to charges for which the petitioner was being prosecuted in 2003. The statute that the district court relied upon in unsealing the records, NRS 179.295, provides that a court may order the inspection of a person's sealed criminal records "upon a showing that as a result of newly discovered evidence, the person has been arrested *for the same or similar offense* and that there is sufficient evidence reasonably to conclude that he will stand trial for the offense."[42] The district court found that the subsequent 2003 offense was similar to the 1989 charges because both involved drug trafficking. This Court, in reviewing the legislative history of NRS 179.295, found that the Legislature intended for the statute to be used only for gathering additional information related to the prosecution of the previously *dismissed* charges. This Court concluded that the "similar offense" language simply allows the State to review the records "if the newly discovered evidence shows that perhaps the person committed a slightly

[41] 120 Nev. 815, 101 P.3d 787 (2004).

[42] NRS 179.295(2) (emphasis added).

different crime than the one for which he was previously charged."[43] This Court found that the statute did not permit the records to be unsealed for the purpose of impeaching the petitioner or enhancing his sentence in a subsequent case involving entirely separate facts.

Just like the statute at issue here, the statute at issue in *Walker* did not contain language expressly prohibiting the conduct that the district court allowed. Yet, despite the absence of language spelling out that the unsealed records could not be used for the prosecution of an unconnected offense, this Court still chose to issue a writ of mandamus because the district court's decision conflicted with legislative intent. This Court applied a common-sense approach to ensure that the statute was applied correctly in *Walker*, and it should do the same here to clarify the obvious intent of the Legislature to truncate the briefing schedule for appeals of PUCN decisions.

B. There Is Not a Plain, Speedy, and Adequate Remedy in the Ordinary Course of Law, and Even If There Were, Extraordinary Writ Relief Would Still Be Warranted.

Interlocutory orders, such as the district court's order extending the briefing schedule, are not "appealable determinations" under the Nevada Rules of Appellate Procedure ("NRAP"). Therefore, the mechanism for addressing this issue in the

[43] *Walker*, 120 Nev. at 820, 101 P.3d at 791.

ordinary course of law is an appeal of the district court's final judgment, which would be an appealable determination pursuant to NRAP 3A(b)(1). However, waiting to file an appeal and allowing the district court proceedings to continue unaltered would enable the content of the extended briefing to inappropriately influence the district court's decision-making to an unidentifiable and unquantifiable extent.

Southwest Gas's rogue reply pleading prominently features arguments related to the standard of review that were not made in its initial brief. The initial brief includes only a vague reference to the court conducting an "independent judicial review upon the facts and the law," without expressly making the argument, contained in its reply brief, that a *de novo* standard of review should apply to both questions of law and fact.[44] Notably, the "Standard of Review" section of Southwest Gas's initial brief seemingly concedes that the PUCN is afforded deference on questions of fact and only argues that an administrative agency receives no deference on *questions of law*, even qualifying its argument with a recognition that "in some cases deference is given to an 'agency's interpretation when it is within the language of the statute.'"[45] To the extent that

[44] 1 App. 44; *also see* 1 App. 32-33.

[45] *Id.* at 32 (quoting *Manke Truck Lines, Inc. v. Pub. Serv. Comm'n of Nev.*, 109 Nev. 1034, 1036-37, 862 P.2d 1201, 1203 (1993); *also see id.* at 10 (quoting *Poremba v. S. Nev. Paving*, 132 Nev. 288, 291, 369 P.3d 357, 359 (2016) (finding

Southwest Gas's initial brief includes any argument that the PUCN should not be given deference on *questions of fact*, it is camouflaged and unclear. Allowing Southwest Gas's new and/or clarified arguments to be considered by the district court is detrimental and prejudicial to the PUCN as a party to the district court proceeding.

Additionally, and importantly, initiating an otherwise unjustified appeal would only further delay a final outcome as to the rates charged to Southwest Gas's customers, exacerbating the delay and potential harm caused by the district court's decision to extend the briefing schedule. The longer it takes to implement a court-ordered adjustment, the greater the impact on rates.[46]

Finally, the opportunity for this Court to provide clarity on this issue could be lost if the district court's final judgement ultimately and correctly affirms the PUCN's order, arguably rendering the issue moot. Though the PUCN believes that the issue raised by this petition is exempt from the requirement of a live controversy because it "involves a matter of widespread importance that is capable of repetition, yet evading review,"[47] it does not view as adequate a remedy that necessitates convincing this Court to deviate from normal justiciability standards.

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that courts should "defer to an agency's interpretations of its governing statutes or regulations only if the interpretation is within the language of the statute")).

[46] *See infra* at Sec. B(1), 23-24.

[47] *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010).

Obtaining a writ from this Court is the only adequate remedy because it will immediately halt the district court's consideration of Southwest Gas's impermissible briefing, provide needed clarity for future appeals of PUCN decisions, and obviate the need for an appeal on this issue. If, however, this Court finds that an adequate remedy does exist in the ordinary course of law, it can and should still exercise its discretion to entertain this petition because it "presents a legal issue of statewide importance that needs clarification, and principles of judicial economy and public policy weigh in favor of considering the petition."[48] Also, "the circumstances reveal urgency and strong necessity."[49]

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[48] *Lorton v. Jones*, 130 Nev. 51, 54-56, 322 P.3d 1051, 1053-54 (2014) (finding that a petition presented an issue of statewide importance for which judicial economy and public policy warranted consideration of a writ because it would "help define the parameters of [the law regarding eligibility for public office, specifically how the law applies] in any city where the government is structured such that the mayor is a member of the city council") (citing *Walker*, 120 Nev. at 819, 101 P.3d at 790; *Salaiscooper v. Eighth Judicial Dist. Court*, 117 Nev. 892, 901-02, 34 P.3d 509, 515–16 (2001) (finding that interlocutory intervention was appropriate due "to the unique facts, peculiar procedural history, and far-reaching questions presented in th[e] case"); and *Child v. Lomax*, 124 Nev. 600, 605-06, 188 P.3d 1103, 1107 (2008) (finding that a writ petition challenging a legislator's candidacy should be considered, despite the availability of other legal remedies and statutory mechanisms allowing an elector to challenge a candidate's qualifications, because the application of term limits to members of the Nevada Legislature presents a question of statewide significance)).

[49] *Barngrover v. Fourth Judicial Dist. Court of State ex rel. County of Elko*, 115 Nev. 104, 111, 979 P.2d 216, 220 (1999).

1. Whether PUCN decisions receive expedited judicial review is an important issue of law that requires clarification, and public policy is served by this Court issuing the requested writ.

While this Court generally does not exercise its discretion to issue a writ of mandamus or prohibition where an adequate remedy exists in the ordinary course of law, "[it] may do so where, as here, the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law."[50] For example, in *Smith v. Eighth Judicial Dist. Court*, discussed above, this Court issued a writ of mandamus to address "an important issue of law [that] require[d] clarification," specifically, whether the Nevada Rules of Civil Procedure permit the filing of a cross-claim as a separate pleading.[51] There, as in the instant case, the issue dealt with a limitation imposed on a court's discretion to allow certain types of filings, and this Court correctly found that clarification was necessary to ensure consistent application of the law in future judicial proceedings. The issue presented by this petition is particularly deserving of this Court's attention because it affects every customer of utilities regulated by the PUCN and is thus a statewide issue.[52]

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[50] *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010) (entertaining a petition for a writ addressing district court filing requirements, specifically whether a declaration submitted by a medical expert under penalty of perjury satisfies the requirement to file an affidavit).

[51] 113 Nev. at 1345, 950 P.2d at 281.

[52] Nearly every Nevada resident receives services from one or more PUCN-regulated utilities. The PUCN regulates approximately 400 utilities that provide

Writ relief is appropriate here to safeguard utility ratepayers' money, not just in the underlying case involving Southwest Gas, but in all future appeals of PUCN decisions involving utility rates. The concern relevant to the instant case is the effect on ratepayers if the district court were to reverse the PUCN decision and, for example, require the PUCN to permit recovery of certain costs that were disallowed by the PUCN or to increase Southwest Gas's allowed return on equity. The PUCN would be required to modify rates to collect the funds associated with the disallowed costs and increased return on equity for the period of time over which the appeal was pending. The longer the appeal is pending, the larger the pot of money grows, thereby making it more likely that ratepayers will experience a spike in their utility bills as a result of an adverse court decision.

This negative effect of prolonged briefing applies to judicial review of any PUCN decision setting utility rates. If a reviewing court finds that rates adopted by the PUCN are too low, the utility is entitled to additional revenue to offset the under-collection that occurred during the pendency of the appeal. The resulting revised rates will ultimately be higher as more time passes between the PUCN's initial decision and the PUCN's subsequent approval of revised rates that reflect the court-ordered change. Thus, any delay compounds the rate instability caused

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electricity, natural gas, water, wastewater, telecommunication, and rail services throughout the State. *See* PUCN *2019 Biennial Report* at 8 (2 App. 391).

by a reversal of a challenged PUCN decision by increasing the magnitude of a subsequent rate-change.[53] With this concern in mind, the Legislature established the accelerated appeal process outlined in NRS 703.373.[54]

The potential harm to utility customers is important enough, and has such far-reaching, statewide significance, that the Legislature prioritized appeals of PUCN decisions over all other civil actions, specifically mandating that "[a]ll actions brought under [NRS 703.373] have precedence over any civil action of a different nature pending in the court."[55] The district court's decision to allow extra briefing in this case is inconsistent with the Legislature's clear desire to streamline the judicial review of PUCN decisions and, if not corrected by this Court, will undoubtedly invite requests for additional briefing from petitioners in all future appeals of PUCN decisions. To the extent that courts grant such requests, there is a significant risk that ratepayers will be harmed.

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[53] Stability and predictability are key attributes of a sound utility rate structure because they allow customers to plan, reduce transactional and administrative costs, and "secure a rational control of demand." James C. Bonbright et al., *Principles of Public Utility Rates* 388 (2d ed. 1988).

[54] In addition to concerns related to rate stability, delayed implementation of final rates also creates equity concerns by allowing the utility to recover costs from different ratepayers than those who were customers when the costs were incurred. *See* 2 App. 379-81 (Minutes of the Meeting of the Assembly Comm. on Government Affairs, Seventy-Sixth Session, Feb. 9, 2011, pp. 45-47).

[55] NRS 703.373(10).

2. The circumstances reveal urgency and strong necessity, and judicial economy and sound judicial administration militate in favor of issuing a writ.

In *Ashokan v. State, Dept. of Ins.*,[56] where the issue was whether a particular report was privileged and therefore prohibited from being included in a medical malpractice complaint, this Court found that urgency and strong necessity warranted entertaining a writ petition to interpret a statute and "define the precise parameters" of its applicability. Similarly, in *Barngrover v. Fourth Judicial Dist. Court of State ex rel. County of Elko*,[57] this Court found that urgency and strong necessity warranted issuing a writ of mandamus to compel the expungement of a grand jury's report because the district court exceeded its statutory authority in allowing the report to be filed. Each of these cases is analogous to the instant case, which likewise involves an adjudicator's interpretation of a statute in making an interlocutory ruling as to the permissibility of a filing.

In *State of Nevada v. Eighth Judicial Dist. Court of State of Nevada, ex rel. County of Clark*,[58] this Court found that the circumstances revealed urgency and strong necessity that warranted issuing writs of mandamus to address various district court judges' conclusions as to whether a conviction for driving under the

[56] 109 Nev. 662, 856 P.2d 244 (1993).

[57] 115 Nev. 104, 979 P.2d 216 (1999).

[58] 116 Nev. 127, 994 P.2d 692 (2000).

influence is redundant to convictions for other traffic code infractions. There, this Court cited the fact that different judges had reached different conclusions, essentially creating a split of authority amongst the lower courts.[59] The instant case presents similar circumstances, wherein the Eighth Judicial District Court allowed additional briefing that was deemed impermissible in recent appeals of PUCN decisions in the First, Second, and Third Judicial District Courts.[60] As this Court recognized in *State of Nevada*, "[t]he only way this split can be resolved is for this [C]ourt to exercise its constitutional prerogative to entertain [a] writ petition[]."[61] Issuing a writ in this case is necessary to efficiently resolve what will otherwise become a recurring issue in all future appeals of PUCN decisions.[62]

In addition to generally promoting judicial economy and sound judicial administration by providing clarification and avoiding inconsistent application of

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[59] *Id*., 116 Nev. at 135, 994 P.2d at 697.

[60] *See supra* note 37.

[61] 116 Nev. at 135, 994 P.2d at 697.

[62] The possibility of obtaining another bite of the apple will inevitably motivate petitioners to initiate time-consuming motion practice. In the instant case, which involves only three parties, the number of filed pleadings has ballooned from the contemplated three (one brief from each party) to nine. For appeals of PUCN decisions, which often attract numerous intervening parties due to the widespread impact of utility ratemaking, a tripling of pleadings could severely expand the amount of time necessary for a court to review and consider the arguments before it. *See* First Judicial District Court Case Nos. 15-OC-00052-1B (nine parties) and 16-OC-00072-1B (nine parties); and Second Judicial Dist. Court Case Nos. CV16-00351 (eleven parties) and CV18-02497 (nine parties).

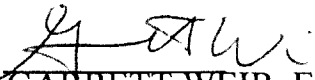
the law by courts reviewing PUCN decisions, the requested writ will foster judicial economy and sound judicial administration by ensuring that NRS 703.373 has its intended effect of requiring swift adjudication of challenged PUCN decisions. As discussed above, delays in adjudicating appeals of PUCN decisions can cause harm to utility ratepayers, so judicial economy and sound judicial administration militate in favor of expediting these types of judicial proceedings.

V. CONCLUSION

For the foregoing reasons, the PUCN respectfully requests that the Supreme Court of Nevada grant this petition and issue a writ of mandamus requiring Respondents to adhere to the process contained in NRS 703.373. Alternatively, the PUCN requests that this Court issue a writ of prohibition enjoining Respondents' deviation from the legislatively-mandated, expedited process for judicial review of PUCN decisions.

Dated this 9th day of December, 2019.

THE PUBLIC UTILITIES COMMISSION OF NEVADA

by: 

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VERIFICATION

State of Nevada)
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Under penalty of perjury, I declare that I am counsel for the petitioner in the foregoing petition and know the contents thereof; that the pleading is true of my own knowledge, except as to those matters stated on information and belief; and that as to such matters, I believe them to be true. I, rather than the petitioner, make this verification because the relevant facts are procedural and thus within my knowledge as the petitioner's attorney. This verification is made pursuant to NRS 15.010 and NRAP 21(a)(5).

Dated this 9th day of December, 2019

Garrett Weir (Nevada State Bar No. 12300)

Subscribed and sworn to before me
this 9th day of December, 2019.

CYNDI MARTIN
NOTARY PUBLIC
STATE OF NEVADA
No. 04-91617-2 My Appt. Exp. June 1, 2021

Notary Public

CERTIFICATE OF COMPLIANCE

I 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 using Microsoft Office Word in a proportionally-spaced typeface in 14-point, double-spaced Times New Roman font.

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, contains approximately 6,780 words, and does not exceed 30 pages.

I also certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. Finally, I certify that this brief complies with all applicable NRAP, in particular NRAP 28(e)(1), which requires every assertion 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.

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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 NRAP.

DATED this 9th day of December, 2019.

THE PUBLIC UTILITIES COMMISSION OF NEVADA

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Public Utilities Commission of Nevada and that on this date I electronically filed and served copies of the foregoing **Petition for Writ of Mandamus or, Alternatively, Prohibition** to the following:

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