

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

HELIX ELECTRIC OF NEVADA,  
LLC,

Appellant/Cross-Respondent,

vs.

APCO CONSTRUCTION, INC., a  
Nevada Corporation,

Respondent/Cross-Appellant.

Case No. 77320/80508

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Elizabeth A. Brown  
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**OPPOSITION TO MOTION FOR LEAVE TO FILE A REPLY IN**

**SUPPORT OF APPELLANT’S MOTION FOR EN BANC**

**RECONSIDERATION**

Respondent/Cross-Appellant APCO CONSTRUCTION, INC. (“APCO”), by and through its counsel, opposes Appellant/Cross-Respondent HELIX ELECTRIC OF NEVADA, LLC’S (“Helix”) Motion for Leave to File a Reply in Support of Appellant’s Motion for En Banc Reconsideration (the “Motion”) as follows:

The Nevada Rules of Appellate Procedure do not allow a party to file a reply in support of a petition for en banc reconsideration, unless expressly requested by this Court. *See* NRAP 40A(e). This is because such petitions are disfavored, and rarely granted. *See* NRAP 40A(a). This Court has not requested a reply, and nothing in the rules allow a party to request leave to file a reply.

In addition, the Nevada Rules of Appellate Procedure do not permit a party to circumvent the prohibitions of NRAP 40A(e). By engaging in motion practice, Helix has impermissibly delayed a decision on the petition, while the Court decides the motion. Undoubtedly, Helix will file a reply to this response further extending the time for an ultimate decision on the petition. Furthermore, it is an improper use of motion practice to file a motion seeking permission to file a reply brief, which incorporates verbatim the entire proposed reply brief. Moreover, although stating that its reply would not address certain arguments made by APCO, Helix, nevertheless, uses the motion to address those very arguments. Helix's efforts to circumvent NRAP 40A(e), if permitted, would make the limitation on reply briefs meaningless. If permitted, any dissatisfied appellant could file a motion, after seeing the other side's answer, to present arguments that should have been made in the original petition, but were left out.

Helix's request is a concession that it has not fully complied with NRAP 40A(c), because Helix concedes that its original petition apparently did not cover all of the arguments Helix would like to make now that it has seen APCO's response. NRAP 40A(c) requires the petitioning party to "concisely set forth the issue, . . . specify the nature of the issue, and . . . demonstrate the impact of the panel's decision beyond the litigants involved." Helix cannot seek leave to correct its omissions and failure to comply with this Court's rules.

Helix's request also misrepresents what APCO has argued in its response. APCO argued that the question of novation was unnecessary to reach, not the question of assignment. If this Court reads APCO's response as a whole, it will see that APCO's argument tracks this Court's logic in its opinion, i.e., (1) the preconditions are enforceable and not satisfied because the project was never completed through no fault of APCO and Helix continued to work under an assignment for Gemstone/Camco; but (2) to the extent Helix argues that APCO prevented completion of the preconditions or that performance was futile, APCO's payment obligations were validly assigned to Camco and the issue of novation did not need to be reached. *See Answer to Petition for En Banc Reconsideration*, pp. 1-8; *see also Helix Elec. of Nev., LLC v. APCO Constr., Inc.*, 138 Nev., Adv. Op. 13, 506 P.3d 1046, 1052 (Nev. Mar. 24, 2022).

Notably, Helix repeatedly argued in its original briefs that a novation, as opposed to an assignment, was required. *See Appellant/Cross-Respondent's Consolidated Opening Brief*, pp. 51-54; *Appellant/Cross-Respondent's Reply Brief and Answering Brief on Cross-Appeal*, pp. 22-23. This Court specifically stated in its opinion that it had reviewed the "parties' remaining arguments" and "considered them *unnecessary to address, given this disposition, or without merit.*" *Helix*, 506 P.3d at 1054 n.5 (emphasis added). This would include Helix's arguments on novation. As APCO's answering brief explains, the issue of novation was

unnecessary for this Court to address because obligations to pay money can be assigned without requiring a novation, and this Court's opinion is neither misleading nor contradictory to prior precedent. *See Answer to Petition for En Banc Reconsideration*, pp. 4-9. Helix essentially wants to treat this petition process as a motion for reconsideration, but the rules of appellate procedure do not allow parties to indefinitely file papers based upon post-argument regret.

Helix's request to file a reply is procedurally improper and based upon a misrepresentation of the arguments in APCO's answering brief. This Court is capable of discerning whether clarification of a party's position is required without Helix's assistance or the need for a reply brief. This Court should deny Helix's motion to discourage parties from using motion practice to circumvent the plain language of NRCP 40A(e), which prohibits reply briefs without leave of Court, and from delaying the decision process.

Dated this 5th day of August, 2022.

**FENNEMORE CRAIG, P.C.**

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## **CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 5<sup>th</sup> day of August, 2022 and was served on the following by the Supreme Court Electronic Filing System (eFlex):

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