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Elizabeth A. Brown
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DISTRICT COURT
CLARK COUNTY, NEVADA

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| SOUTHWEST GAS CORPORATION,<br><br>Petitioner,<br><br>*vs.*<br><br>PUBLIC UTILITIES COMMISSION OF NEVADA,<br><br>Respondent. | Case No.: A-19-791302-J<br><br>Dep't No.: 19<br><br>**NOTICE OF APPEAL** |

Please take notice that petitioner Southwest Gas Corporation hereby appeals to the Supreme Court of Nevada from:

1. All judgments and orders in this case;

2. "Order Denying Petition for Judicial Review," notice of entry of which was served electronically on March 6, 2020 (Exhibit A); and

3. All rulings and interlocutory orders made appealable by any of the foregoing.



Docket 80911 Document 2020-12640

Case Number: A-19-791302-J

Dated this 25th day of March, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

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## CERTIFICATE OF SERVICE

I certify that on March 25, 2020, I served the foregoing "Notice of Appeal" through the Court's electronic filing system upon all parties on the master e-file and serve list.

*/s/ Lisa M. Noltie*
An Employee of Lewis Roca Rothgerber Christie LLP

# EXHIBIT A

# EXHIBIT A

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CLERK OF THE COURT

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| SOUTHWEST GAS CORPORATION,<br><br>Petitioner,<br><br>vs.<br><br>PUBLIC UTILITIES COMMISSION OF NEVADA, *et al.*,<br><br>Respondents. | CASE NO. A-19-791302-J<br><br>DEPT. NO. 19<br><br>**NOTICE OF ENTRY OF ORDER DENYING PETITION FOR JUDICIAL REVIEW** |

Please take notice that an Order Denying Petition for Judicial Review was entered on March 5, 2020. A true and correct copy is attached.

Dated this 6th day of March, 2020.

By: */s/ Debrea M. Terwilliger*
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**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of the Public Utilities Commission of Nevada, and that, on this date, I have served the foregoing **NOTICE OF ENTRY OF ORDER DENYING PETITION FOR JUDICIAL REVIEW** through the Court's electronic filing system upon all parties listed below:

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DATED this 6th day of March, 2020.

An Employee of the Public Utilities Commission of Nevada

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| SOUTHWEST GAS CORPORATION,<br><br>Petitioner,<br><br>vs.<br><br>PUBLIC UTILITIES COMMISSION OF NEVADA, *et al.*,<br><br>Respondents. | CASE NO. A-19-791302-J<br><br>DEPT. NO. 19<br><br>**ORDER DENYING PETITION FOR JUDICIAL REVIEW** |

Before the Court is a Petition for Judicial Review (the "Petition") filed by Petitioner Southwest Gas Corporation ("Southwest Gas"). Petitioner challenges orders issued by the Public Utilities Commission of Nevada (the "PUCN") regarding Southwest Gas's application for authority to increase its retail natural gas utility service rates. *See* PUCN's Order on Petitions for Reconsideration and Clarification (Feb. 15, 2019); PUCN's Modified Order (Feb. 15, 2019) (hereinafter, both orders are referred to collectively as the "Order"). Specifically, Southwest Gas requests findings from the Court that (1) the PUCN erred by failing to apply a presumption of prudence to costs that Southwest Gas was seeking to recover through rates charged to its customers; and (2) Southwest Gas's due process rights were violated. Southwest Gas further requests that the Court reverse the PUCN's Order and remand the case to the PUCN with instructions to approve Southwest Gas's proposed return on investment as well as Southwest Gas's proposed recovery of costs associated with pensions and certain challenged work orders for computer software projects.

After full consideration of the Petition, the parties' memoranda of points and authorities, the parties' oral argument presented to the Court, and the certified record of the PUCN's Docket No. 18-05031, the Court denies the Petition and affirms the PUCN's Order.

**LEGAL STANDARD**

Nevada Revised Statutes ("NRS") 703.373(11) requires that the Court, in reviewing a PUCN decision, shall not substitute its judgment for that of the PUCN as to the weight of the evidence on questions of fact.[1] Courts can set aside the PUCN decision only if "the substantial rights of the petitioner have been prejudiced because the final decision of the [PUCN] is: (a) In violation of constitutional or statutory provisions; (b) In excess of the statutory authority of the [PUCN]; (c) Made upon unlawful procedure; (d) Affected by other error of law; (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) Arbitrary or capricious or characterized by abuse of discretion."[2] NRS 703.373(9) further clarifies that "[t]he burden of proof is on the petitioner to show that the final decision is invalid."

The PUCN is responsible for supervising and regulating the operation and maintenance of public utilities, including "provid[ing] for the safe, economic, efficient, prudent, and reliable operation and service of public utilities."[3] With regard to the PUCN's statutory authority and duty to regulate utility rates, the PUCN's power is "plenary," meaning that it is "broadly construed."[4] The PUCN's ratemaking decisions are "prima facie lawful."[5] Therefore, this Court must "not interfere with [PUCN] decisions other than to keep them within the framework of the law."[6] The PUCN has broad discretion in setting utility rates, and "[t]he only limit on the PUC[N]'s authority to regulate utility rates is the legislative directive that rates charged for services provided by a public utility must be 'just and

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[1] The Supreme Court of Nevada has similarly established that it "...will not reweigh evidence or witness credibility, nor will [it] substitute [its] judgment for the administrative judge's." *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. 328, 342, 302 P.3d 1108, 1118 (2013) (citing *Nellis Motors v. State Dep't of Motor Vehicles*, 124 Nev. 1263, 1269-70, 197 P.2d 1061, 1066 (2008)).

[2] NRS 703.373(11).

[3] *See* NRS 703.150 and 704.001.

[4] *Nev. Power Co. v. Eighth Judicial Dist. Court of Nev.*, 120 Nev. 948, 957, 102 P.3d 578, 584 (2004); *Consumers League v. Sw. Gas,* 94 Nev. 153, 157, 576 P.2d 737, 739 (1978); NRS 704.040.

[5] NRS 704.130.

[6] *Nev. Power Co. v. Public Service Comm'n of Nev.*, 105 Nev. 543, 545, 779 P.2d 531, 532 (1989).

reasonable' and that it is unlawful for a public utility to charge an unjust or unreasonable rate."[7]

Here, Southwest Gas seeks an expansion of the standard of review, arguing that the Court should not afford deference to the PUCN's ratemaking decisions and findings of fact because Southwest Gas has alleged violations of its constitutional rights. The Court, however, declines to expand the standard of review as to PUCN decisions clearly set forth in Nevada statutes and caselaw. As to any claims of violations of constitutional rights, this Court relies on the standard established in *Fed. Power Comm'n v. Hope Natural Gas Co.,* where the United States ("U.S.") Supreme Court found that when a utility alleges unconstitutional confiscation based on a rate-setting, the courts should examine only whether there is any reasonable basis upon which the rate-setting order can be upheld.[8] In *Duquesne Light Co. v. Barasch*, the U.S. Supreme Court reiterated its findings in *Hope Natural Gas,* stating: "[I]t is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry ... is at an end. The fact that the method employed to reach that result may contain infirmities is not then important."[9] This "end result" test has been adopted by the Nevada Supreme Court to determine whether PUCN decisions are just and reasonable.[10]

In setting rates, the PUCN may consider a "zone of reasonableness."[11] "Assuming that there is a zone of reasonableness within which the [PUCN] is free to fix a rate varying in amount and higher

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[7] *Nev. Power Co.*, 120 Nev. at 957, 102 P.3d at 584 (citing NRS 704.040).

[8] *See Fed. Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 602 64 S.Ct. 281, 287-288 (1944) (holding that a court is required to accept an agency's findings if they are supported by substantial evidence); *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 767, 88 S.Ct. 1344, 1360(1968) ("[T]his Court has often acknowledged that the Commission is not required by the Constitution or the Natural Gas Act to adopt as just and reasonable any particular rate level; rather, courts are without authority to set aside any rate selected by the Commission which is within a 'zone of reasonableness'" (quoting *FPC v. Nat. Gas Pipeline Co.,* 315 U.S. 575, 585, 62 S.Ct. 736, 743 (1942) and *Duquesne Light Co. v. Barasch,* 488 U.S. 299, 109 S.Ct. 609 (1989)).

[9] *Duquesne Light Co. v. Barasch,* 488 U.S. 299, 310, 109 S.Ct. 609, 617 (1989) (citing *Hope*, 320 U.S. at 602, 64 S.Ct. at 288).

[10] *Pub. Serv. Comm'n v. Ely Light & Power Co.*, 80 Nev. 312, 322, 393 P.2d 305, 310 (1964) ("'[I]t is not our province to quarrel with methods used by the commission or with methods approved by the district court ... if the end result of the orders made is to permit the company a just and reasonable return.'") (quoting *Hope*, 320 U.S. 591, 64 S.Ct. 281, and *Bell Tel. Co. of Nev. v. Public Serv. Comm'n*, 70 Nev. 25, 253 P.2d 602 (1953)).

[11] *Fed. Power Comm'n v. Natural Gas Pipeline Co.,* 315 U.S. 575, 585, 62 S.Ct. 736, 743 (1942).

than a confiscatory rate ... the [PUCN] is also free to decrease any rate which is not the 'lowest reasonable rate.'"[12]

With regard to Southwest Gas's request that the Court order the PUCN to award Southwest Gas its originally-requested return on equity and recovery of costs that were disallowed by the PUCN, the Court, as a matter of law, does not have authority to provide such relief. As noted by the Nevada Supreme Court:

> Courts have been loath to prescribe the formula or formulae that must be used by a regulatory commission in establishing just and reasonable rates. The methods used by a regulatory body in establishing just and reasonable rates of return are generally considered to be outside the scope of judicial inquiry.[13]

This hesitancy on the part of the courts to prescribe formulae to be used by the regulatory body in establishing a rate of return stems from the fact that ratemaking "is primarily a legislative function, and therefore, were the courts to prescribe such formulae, they would be exercising a legislative function not constitutionally entrusted to them."[14] As such, the Court cannot instruct the PUCN to set a particular rate of return or require the PUCN to simply upwardly adjust rates to account for certain costs. The Court is limited to reviewing whether the overall effect of the rates is just and reasonable; it may remand the case to the PUCN to correct unjust and unreasonable rates, but it cannot prescribe the manner in which the PUCN arrives at just and reasonable rates.

When the PUCN sets a rate, "[t]here may be cases where two conflicting views may each be sustained by substantial evidence."[15] Therefore, the PUCN Order does not need to disprove that Southwest Gas's requested return on equity may also be satisfactory in terms of the evidence taken and the standards set forth in the applicable case law. Indeed, "[s]ubstantial evidence is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'"[16] "Furthermore, when an agency's conclusions of law are closely related to its view of the

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[12] *Id.* (internal citations omitted).

[13] *Nevada Power Co. v. Pub. Serv. Comm'n*, 91 Nev. 816, 826, 544 P.2d 428, 435 (citations omitted).

[14] *Id.*, 91 Nev. at 827, 544 P.2d at 436.

[15] *Robertson Transp. Co. v. Pub. Serv. Comm'n,* 39 Wis.2d 653, 159 N.W.2d 636, 638 (Wis. 1968.)

[16] *Olsen v. Nat'l Transp. Safety Bd.*, 14 F.3d 471, 475 (9th Cir. 1994) (*quoting Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620, 86 S.Ct. 1018, 1026 (1965)).

facts, those conclusions are entitled to deference, and [the court] will not disturb them if they are supported by substantial evidence."[17]

## ANALYSIS

This Court affirms the PUCN's Order because the Order is not in violation of constitutional or statutory provisions, in excess of the statutory authority of the PUCN, made upon unlawful procedure, affected by other error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, arbitrary or capricious, or characterized by abuse of discretion. With regard to the specific issues raised by Southwest Gas, the PUCN Order 1) weighed the record evidence before it to establish a return on Southwest Gas's equity investments that results in just and reasonable rates and comports with the applicable standards for determining an appropriate return on equity; 2) determined an appropriate amount of pension expense for Southwest Gas to recover in rates by applying an often-used ratemaking methodology and weighing the evidence in the record; 3) disallowed certain costs for select capital projects because Southwest Gas failed to sustain its burden of proof for establishing that the proposed rate changes associated with those projects were just, reasonable, and not unduly discriminatory or preferential; and 4) did not apply a presumption of prudence because such a presumption does not exist in Nevada law and is not a constitutional standard that must be applied in Nevada. There is substantial evidence in the record to support that the rates established by the PUCN are just and reasonable.

### A. The PUCN Based Its Findings on the Substantial Evidence in the Record.

#### 1. The return on equity set by the PUCN is supported by substantial evidence and meets the applicable legal standards for fair returns.

Return on equity is the amount that public utilities are permitted to earn on the equity that they spend on investments in infrastructure to serve their ratepayers. The PUCN is legislatively mandated to ensure that established rates are just and reasonable. Specific to return on investments, NRS 704.001(4) provides that the PUCN must "balance the interests of customers and shareholders of public utilities by providing public utilities with the opportunity to earn a fair return on their investments while providing customers with just and reasonable rates[.]" Additionally, two seminal

[17] *Fathers & Sons & A Daughter Too v. Transp. Services Auth. of Nevada*, 124 Nev. 254, 259, 182 P.3d 100, 104 (2008).

U.S. Supreme Court cases, *Bluefield Waterworks & Improvement Co. v. West Va. Pub. Serv. Comm'n*[18] and *Federal Power Comm'n v. Hope Natural Gas Co.*,[19] inform the PUCN's decisions regarding return on equity. In *Bluefield*, the U.S. Supreme Court stated:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties ... The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.[20]

In *Hope*, the U.S. Supreme Court re-affirmed the *Bluefield* standard, adding that the return on equity should be commensurate with the returns of investments in other enterprises having corresponding risks and be sufficient enough to ensure confidence in the financial integrity of the utility such that the utility can maintain is credit and attract capital.[21] Additionally, the *Hope* opinion stated that it is not the method of setting return on equity that determines the reasonableness; rather, it is the result and the effect of the result on the public utility.[22] The *Hope* Court even declared that the presence of infirmities in the method employed to arrive at a just and reasonable rate is not important.[23] The Nevada Supreme Court has affirmed the findings of *Hope* and *Bluefield*: "The crux to every rate case involving the cost of common equity is just how one goes about conforming to the *Bluefield* and *Hope* cases,"[24] and the Court finds that the PUCN's decision conforms to the *Hope* and *Bluefield* cases.

In determining the return on equity, the PUCN relied on substantial evidence, including (1) the results of each expert's evaluation of various return on equity models; (2) the experts' judgment in

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[18] 262 U.S. 679. 43 S.Ct. 675 (1923).

[19] 320 U.S. 591, 64 S.Ct. 609 (1944).

[20] *Bluefield*, 262 U.S. at 692-93 43 S.Ct. at 679.

[21] *Hope*, 320 U.S. at 603, 64 S.Ct. at 288.

[22] *Id.*, 320 U.S. at 602, 64 S.Ct. at 288.

[23] *Id.*; *see also Duquesne Light Co. v. Barasch*, 488 U.S. at 310, 109 S.Ct. at 617 ("Today we reaffirm these teaching of *Hope Natural Gas*: '[i]t is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry ... is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.'" (internal citations omitted)).

[24] *Nevada Power Co. v. Pub. Serv. Comm'n*, 91 Nev. at 825, 544 P.2d at 434.

assessing macroeconomic conditions, capital markets, Southwest Gas's particular circumstances (e.g., capital structure, risk profile, and regulatory environment); and (3) each expert's critique of other experts' analyses. The PUCN found that a 9.25-percent return on equity, within the range of reasonableness of 9.10 to 9.70 percent, balances the interest of Southwest Gas's ratepayers and shareholders, is commensurate with returns on investments in other enterprises having corresponding risks, and is both sufficient to assure confidence in the financial integrity of the enterprise and for Southwest Gas to attract capital.

**2. The PUCN's determinations regarding pension expenses are supported by substantial evidence, and Southwest Gas had proper notice to prepare to defend its testimony related to pension expenses.**

The Court finds that Southwest Gas's due process rights were not violated by the PUCN's decisions regarding pension expense. The PUCN based its decisions on the record evidence before it, determining that normalizing pension expenses was necessary to address volatility. Moreover, the PUCN found that Southwest Gas failed to provide evidence in support of its proposed change in the discount rate, even after an opportunity was provided to Southwest Gas at hearing to present such evidence. Rather than adopting Southwest Gas's unsupported reduction to the existing discount rate, the PUCN relied on evidence of historical discount rates in finding that the substantial evidence on the record supported a rejection of Southwest Gas's proposal.

Southwest Gas's due process arguments – that its rights were violated because (1) it did not have the opportunity to submit testimony on the PUCN decision to normalize pension expense; and (2) it was required to justify its proposed discount rate without notice –fail. First, Southwest Gas was not entitled to receive advance notice regarding particular questions or issues that could arise during hearing, so long as the proceedings stayed within the scope of Southwest Gas's application. Here, Southwest Gas requested recovery of pension expenses in its application and acknowledged that the expenses were volatile; Southwest Gas's application even contained a proposal for addressing the volatility and supported its proposal with witness testimony. Thus, inquiry into the appropriate method for addressing pension expense volatility was squarely within the scope of the publicly-noticed proceedings to address Southwest Gas's application. There is no requirement for other parties or the PUCN to telegraph the questions that they might ask an applicant's expert witness regarding a proposal contained in the application that the witness's testimony supports.

Southwest Gas even received advance notice that normalization of pension expenses was at

issue. One of the parties to the case proposed normalization of pension expenses in pre-filed testimony nine days prior to Southwest Gas submitting pre-filed rebuttal testimony and approximately three weeks before the hearing. Southwest Gas was fully apprised of the other party's position and had more than adequate opportunity, both through pre-filed rebuttal testimony and at hearing, to address normalization. Thus, this Court finds that Southwest Gas's due process rights were not violated, and the PUCN's decision to normalize pension expenses to address volatility was based on substantial evidence in the record.

With regard to the discount rate, Southwest Gas submitted pre-filed direct testimony with its application specifically proposing a particular discount rate. NAC 703.2231 mandates that "[a]n applicant must be prepared to go forward at a hearing on the data which have been submitted ..." Witnesses must be prepared at hearing to respond to questions about their written testimony.[25] The fact that Southwest Gas's witness was not prepared at hearing to answer questions does not amount to a due process violation or a lack of notice. This Court finds that the PUCN approved a just and reasonable discount rate based on historical annual discount rates; Southwest Gas offered no evidence to support its proposal to adopt a rate that differed significantly from historical rates. Thus, the PUCN relied on substantial evidence to determine that there was no basis to change the discount rate as suggested by Southwest Gas.

Southwest Gas's argument that there was a violation of due process based on the PUCN not applying a presumption of prudence with regard to pension expense similarly fails. A presumption does not exist in Nevada law and is not a constitutional standard that must be applied in Nevada. Moreover, a presumption of prudence does not change the burden of proof, and it would not require the PUCN to presume that evidence exists to support Southwest Gas's proposals related to pension expenses.

[25] NRS 233B.123(4).

### 3. Southwest Gas failed to sustain its burden of proof in seeking to collect from ratepayers the costs associated with the challenged work orders, so the PUCN's disallowance of the costs associated with the work orders is just and reasonable.

The PUCN did not err in finding that Southwest Gas failed to sustain its burden of proof for establishing that the proposed rate changes associated with the challenged work orders were just, reasonable, and not unduly discriminatory or preferential. Therefore, the Court upholds the PUCN's decision to deny recovery of the unsupported costs based on the substantial evidence in the record.

In examining how the PUCN arrived at its conclusion that Southwest Gas did not provide substantial evidence, NAC 703.2231, the regulation that memorializes the burden of proof in rate cases, is instructive. Pursuant to this regulation, to sustain its burden of proof for establishing that its proposed rate changes were just and reasonable, Southwest Gas was required to "ensure that the material it relied upon is of such composition, scope and format that it would serve as its complete case if the matter is set for hearing." The record supports the PUCN's finding that Southwest Gas fell short of meeting its burden, as Southwest Gas did not provide necessary information demonstrating why it made the decision to incur the costs associated with the challenged work orders, including information addressing whether the choices made by the utility were the least-cost options or the best available alternatives, and whether the project expenditures were reasonable under the circumstances.

In total, Southwest Gas provided only limited information related to the challenged work orders, including: the names of and budgets for the projects; invoices or estimates for purchases made; the name and/or signature of the employee or consultant authorizing the expenditures; memos identifying individuals in charge of various projects; and organizational charts for the projects. The PUCN reasonably concluded that this information was insufficient to demonstrate prudent management or why inclusion of these costs in rates was reasonable. Southwest Gas cannot merely rely upon the fact of payment as a demonstration of prudence or reasonableness. The utility bears responsibility for adequately supporting the costs requested in its application for a change in general rates with evidentiary support that is "commonly relied upon by reasonable and prudent persons in the conduct of their affairs" that would demonstrate the reasonableness of such expenditures.[26]

[26] NRS 233B.123; *see also* NAC 703.2231.

Requiring Southwest Gas to demonstrate the prudence and, relatedly, the reasonableness of the costs included in the challenged work orders does not violate Southwest Gas's due process rights. Southwest Gas was provided an opportunity to rebut testimony addressing the prudence of the costs, both in its own pre-filed rebuttal testimony and at hearing. In fact, Southwest Gas spent nearly one full day cross-examining an opposing party's witness who addressed this issue.

### B. The PUCN Was Not Required to Apply a Presumption of Prudence to Southwest Gas's Incurred Costs.

There is no Nevada statute or regulation establishing the presumption of prudence described by Southwest Gas. Moreover, neither the U.S. Supreme Court nor the Nevada Supreme Court has found that a utility is entitled to a presumption of prudence in a general rate case. On one occasion, the Nevada Supreme Court determined that a presumption of prudence should apply in a deferred energy accounting proceeding, but the Nevada Legislature nullified this decision by adopting a statute that specifically found no presumption of prudence could be used in such cases.[27] While some jurisdictions have adopted a presumption of prudence, the case law addressing those jurisdictions is not controlling in Nevada.

Additionally, Nevada law reflects the non-existence of a presumption of prudence in utility rate cases. The existing regulatory framework presumes that utilities must affirmatively demonstrate that significant project costs were prudently incurred before the costs can be recovered through rates charged to customers.

"[W]here power is clearly conferred or fairly implied, and is consistent with the purposes for which the [PUCN] was established by law, the existence of the power should be resolved in favor of the commissioners so as to enable them to perform their proper functions of government."[28] The Legislature clearly conferred to the PUCN "the power to fix and order... rates as shall be just and reasonable,"[29] as well as the power and duty to ensure prudent and reliable operation and service by public utilities.[30] Accordingly, with regard to whether the PUCN has the power to evaluate prudence

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[27] *See* NRS 704.185.

[28] *Nevada Power Co.*, 120 Nev. at 956, 102 P.3d at 584 (quoting 73B C.J.S. *Public Utilities* § 166, at 413-14).

[29] NRS 704.120(1).

[30] *See* NRS 704.001.

in setting just and reasonable rates in a general rate case, the Court resolves the question in favor of the PUCN.

**1. The presumption of prudence is not rooted in the Constitution.**

The U.S. Supreme Court has not found that a presumption of prudence is rooted in the Constitution. In *Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*,[31] cited by Southwest Gas, the U.S. Supreme Court found only that the "applicable general rule" is that a regulatory commission is not "'empowered to substitute its judgment for that of the directors of the corporation.'"[32] The PUCN's decision in the instant case does not amount to the PUCN substituting its judgment for that of the utility's management. Significantly, the PUCN did not find that the costs were imprudently incurred; rather, it simply found that Southwest Gas failed to provide sufficient evidence to sustain its burden of proof. Here, the PUCN did not second-guess Southwest Gas's judgment; rather, it found that Southwest Gas ***failed to demonstrate that judgment was even exercised***.

In *W. Ohio Gas Co. v. Pub. Util. Comm'n of Ohio*,[33] also cited by Southwest Gas, the U.S. Supreme Court held only that the good faith of the managers of the business were to be presumed and, similar to the opinion in *Sw. Bell Tel. Co.*, that "[i]n the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay."[34] The U.S. Supreme Court did not find that a utility is entitled to a presumption of prudence as a constitutional protection – only that the managers of the business were presumed to have acted in good faith. Presuming the good faith of managers is not the same as presuming prudence; a utility manager can act with good faith in authorizing an expenditure but still make an imprudent decision.

Collectively, the U.S. Supreme Court cases cited by Southwest Gas provide that the PUCN should base its decisions on the evidence before it, including determining whether a showing of inefficiency or improvidence has overcome assumed good faith or reasonable judgment on the part of the utility managers. Essentially, the rulings stand for the proposition that a state commission must

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[31] 262 U.S. 276, 43 S.Ct. 544 (1923).

[32] *Sw. Bell Tel. Co.*, 262 U.S. at 289, 43 S.Ct. at 547 (quoting *States Pub. Utils. Comm'n ex rel. Springfield v. Springfield Gas & Electric Co.*, 291 Ill. 209, 234, 125 N.E. 891, 901 (1923)).

[33] 294 U.S. 63, 72, 55 S. Ct. 316, 321 (1935).

[34] *Id.*

base its findings on the evidentiary record.[35] They do not say that a state commission cannot disallow a cost for which the utility has not met its burden to demonstrate that it was prudently incurred and that its inclusion in rates would be just and reasonable.

**2. Nevada courts have not found that a presumption of prudence exists for public utilities in a general rate case.**

With regard to Nevada case law, Southwest Gas states that the presumption of prudence was applied by the Nevada Supreme Court in *Pub. Serv. Comm'n v. Ely Light & Power Co.*[36] In *Ely Light*, the Nevada Supreme Court found as follows:

> In the absence of an abuse of discretion on the part of the utility and in the absence of showing lack of good faith, inefficiency or improvidence, ***and if the amounts in question are reasonable and are actually paid*** as pensions or are allocated to a proper fund under a feasible plan, the commission should not substitute its judgment for that of management.[37]

Thus, *Ely Light* stands for many of the same propositions as *Sw. Bell Tel. Co.* and *W. Ohio Gas*. Specifically, a correct reading of *Ely Light* indicates that if the costs actually incurred by a utility are found to be reasonable via the evidence considered, then without contrary evidence of an abuse of discretion, a showing of a lack of good faith, inefficiency or improvidence, the PUCN should not substitute its judgment for that of management of the utility. In other words, if a cost is reasonable and actually incurred by a utility, a regulatory commission cannot arbitrarily disallow a cost simply because it disagrees with the decision to incur the cost – a regulatory body must base its decision on the evidentiary record.

The *Ely Light* Court did not find that a utility's incurrence of a cost, in and of itself and in the absence of other evidence, entitles the utility to a finding of prudence or a presumption of prudence. Rather, the cost must be found to be "reasonable." Nothing in *Ely Light* supports a determination that a utility is entitled to a presumption of prudence.

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[35] *Washington Gas Light Co v. Public Service Comm'n of District of Columbia*, 450 A.2d 1187, 1225 (D.C. Ct. App. 1982) (noting that the *W. Ohio Gas* case stands for the proposition that the "commission's disallowance of certain advertising expenses as business expenses chargeable to ratepayers was wrong where the commission's action had ***no basis*** in evidence, ***either direct or substantial***.") (emphasis in original).

[36] 80 Nev. 312, 393 P.2d 305 (1964).

[37] *Ely Light & Power Co.*, 80 Nev. at 324, 393 P.2d at 311 (emphasis added).

Southwest Gas next turns to *Nevada Power Co. v. Pub. Util. Comm'n of Nevada*[38] to argue that a presumption of prudence has been applied by the Nevada Supreme Court. However, the *Nevada Power* case does not apply in the context of this general rate case. The decision in *Nevada Power* applies only to deferred energy costs and rate adjustments proposed in a deferred energy accounting application. Thus, applying the findings from *Nevada Power* to a general rate case proceeding is misplaced. Moreover, the Legislature explicitly superseded the findings regarding deferred energy accounting applications in the *Nevada Power* case when it enacted Assembly Bill ("AB") 7 in 2007 to make clear that utilities are not entitled to a presumption of prudence.[39]

Though AB 7 is not directly applicable, it is instructive when you compare the facts and circumstances of a general rate case to a deferred energy accounting case. Deferred energy accounting applications involve changes in rates to allow recovery of natural gas costs (and purchased power costs for electric utilities), which are a pass-through cost to customers. Because the utility is not entitled to earn a profit on the purchase of natural gas, there is no incentive for the utility to imprudently inflate the costs associated with such purchases. In passing AB 7, the Legislature wanted to ensure that a utility is not entitled to a presumption of prudence even with respect to pass-through costs. If there were an inclination to adopt a presumption favoring utilities, it would make more sense from a public policy standpoint for the presumption to exist within the context of proceedings that exclusively involve pass-through costs because one might reasonably presume that a utility with no financial motive to increase the pass-through costs will attempt to keep those costs low to avoid the public outcry that could occur from increasing customers' rates. The utility's cost-benefit analysis changes, however, in a general rate case, where it seeks to recover costs on which it will earn a return. A utility's return on equity is applied to all approved capital costs in a general rate case, allowing the utility to earn more as it spends more.

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[38] 122 Nev. 821, 138, P.3d 486 (2006).

[39] "The provisions of this act are intended to supersede the holding of the Nevada Supreme Court in *Nevada Power Company v. Public Utilities Commission of Nevada*, 122 Nev. Adv. Op. 72 (2006) ...") (Sec. 1 of AB 7). Assemblywoman and then-Speaker, Barbara Buckley, stated, "There is no presumption favoring a public utility when it files a rate change. We do not burden Nevada consumers for mistakes." Minutes of the Meeting of the Assembly Committee on Commerce and Labor, March 7, 2007 at 8, A.B. 7, 2007 Leg., 74th Sess., at https://www.leg.state.nv.us/Session/74th2007/Minutes/Assembly/CMC/Final/454.pdf. 1 CR at 592-593, ¶ 48.

It would be nonsensical to conclude that, despite the Legislature expressing serious concerns regarding a presumption of prudence in cases involving pass-through costs and immediately passing a law to overturn the one court case recognizing any presumption of prudence in Nevada, the Legislature nevertheless intended to preserve a presumption of prudence in cases where the likelihood of imprudence and its effect on ratepayers is much greater.

**3. Past PUCN decisions do not create a presumption of prudence.**

Southwest Gas cites three decades-old instances where the PUCN applied a presumption of prudence, but administrative agencies in Nevada are not bound by *stare decisis*.[40] With regard to Southwest Gas's argument that it was deprived of due process because the PUCN did not apply a presumption in this case, the most relevant past PUCN decision occurred in Southwest Gas's last rate case in 2012. There, Southwest Gas raised the presumption of prudence, and the PUCN did not apply the proposed presumption or acknowledge that such a presumption existed. Rather, the PUCN found that there are several steps to determine whether a rate is just and reasonable, including the first step of examining whether costs were prudently incurred.[41] Thus, Southwest Gas was on notice that the first step in its most recent rate case was for the PUCN to determine whether costs were prudently incurred. The 2012 Southwest Gas rate case is consistent with the PUCN's approach in this case of determining whether costs are just and reasonable by first examining whether those costs are prudently incurred.

**4. A presumption of prudence is not consistent with existing Nevada law.**

The presumption described by Southwest Gas would render several key statutes and regulations meaningless and drastically change utility regulation in Nevada by removing an important consumer protection that requires an affirmative demonstration of prudence. If a presumption of prudence already applied to all utilities in Nevada, there would have been no need for the Legislature to establish

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[40] *State, Dep't of Taxation v. Chrysler Group, LLC*, 129 Nev.274, 279, 300 P.3d 713, 717 at n.3 (2013) (citing *Motor Cargo v. Public Service Comm'n*, 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992)); *see also Desert Irrigation, Ltd. V. State of Nevada*, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997) ("[N]o binding effect is given to prior administrative determinations.").

[41] *In re Southwest Gas Corp.*, 2012 WL 7170426, at ¶ 45 (Dec. 19, 2012).

a process wherein prudence is determined as part of resource planning. There would be no reason to conduct IRP proceedings to reach an outcome that is already presumed.[42]

Among the broad implications of Southwest Gas's proposal is the disproportionate way in which Southwest Gas, compared to most other utilities in Nevada, would benefit, to the detriment of its ratepayers. Natural gas utilities like Southwest Gas are not required to file a general rate case at specific intervals. Electric utilities and certain water utilities, on the other hand, must file rate cases every three years, with some limited exceptions. Natural gas utilities like Southwest Gas also do not make resource planning filings every three years, unlike electric and water utilities. So, under Southwest Gas's proposed approach, it would be able to file a general rate case when it chooses, having spent as much money as it needed to in the intervening years between rate cases and having not received any determination that its investments were prudent from the PUCN in a resource plan, and still be awarded with a presumption of prudence for its investments. Depending on the number of years between Southwest Gas's general rate cases, the total costs presumed to be prudent under its interpretation of the law could be significant. This is illogical in the broader context. Nevada mandates that electric and water utilities file regular resource plans, where prudence is predetermined for costly projects, as well as regular general rate cases. But Southwest Gas argues that state and federal law permits it to sit out for as many years as it chooses with no resource plan or general rate case and still enjoy the benefit of a presumption of prudence, no matter how much money is at stake for ratepayers. As a practical matter, the longer the time between a utility's rate cases, the more challenging it becomes for the regulator to review and assess the reasonableness of the costs that accrue during the interim.

[42] The Nevada Supreme Court states that it avoids statutory interpretation that renders language meaningless or superfluous; statutes must be read harmoniously with one another to avoid an unreasonable or absurd result. *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912 (2010) (citing *Karcher Firestopping v. Meadow Valley Constr.*, 125 Nev. 111, 204 P.3d 1262 (2009) and *AllState Insurance Co. v. Fackett*, 125 Nev. 132, 206 P.3d 572 (2009)).

### C. The PUCN's Order Is Not Confiscatory.

The U.S. Supreme Court in *Hope* found that those looking to overturn a rate order using constitutional claims have a "heavy burden of making a convincing showing that [the order] is invalid because it is unjust and unreasonable ***in its consequences***."[43] Southwest Gas's naked assertions of an unconstitutional taking fall far short of meeting this "heavy burden."[44] Southwest Gas did not even attempt to produce evidence as to how the rates resulting from the PUCN's Order "jeopardize[d] the financial integrity" of the company.[45] The *Duquesne* Court explained that an argument must be made that the rate-setting decision (1) leaves Southwest Gas with insufficient operating capital; (2) impedes its ability to raise future capital; or (3) is inadequate to compensate current equity holders for the risk associated with their investments.[46]

As previously discussed, it is the overall impact of the rate order that must be found to be "constitutionally objectionable."[47] Constitutional claims based upon a "piecemeal"[48] examination of methodologies are flawed because "[t]he Constitution protects the utility from the net effect of the rate order on its property."[49] Southwest Gas failed to provide any review of the overall impact of the PUCN's Order. There has been no argument presented that Southwest Gas is lacking sufficient capital to provide safe, adequate, and reliable service to its customers. Nor is there any mention that the overall effect of the Order will be that Southwest Gas cannot access capital in the market in the future

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[43] 320 U.S. at 602, 64 S.Ct. at 288 (emphasis added).

[44] *See Puerto Rico Tel. Co., Inc. v. Telecom. Regulatory Bd. of Puerto Rico*, 665 F.3d 309, 324 (1st Cir. 2011) (stating that a "naked assertion on appeal" of constitutional claims of confiscatory rates "falls far short of meeting its 'heavy burden'" of demonstrating that a rate threatens its financial integrity) (citing *Hope*, 320 U.S. at 602, 64 S.Ct. at 288).

[45] *Duquesne*, 488 U.S. at 312, 109 S.Ct. at 618.

[46] *Id.*

[47] *Id.*, 488 U.S. at 310, 312, 109 S.Ct. at 617-18 ("'If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry ... is at an end.'") (citing *Hope*, 320 U.S. at 602, 64 S.Ct. at 288)).

[48] *Id.*, 488 U.S. at 313, 109 S.Ct. at 618.

[49] *Id.*, 488 U.S. at 314, 109 S.Ct. at 619 ("The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect.").

or continue compensating its equity holders for the risks associated with their investment. The Court, therefore, cannot find that the PUCN's Order results in an unconstitutional confiscation or taking.

## CONCLUSION

The PUCN Order subject to this judicial review epitomizes the type of rate-setting and regulatory oversight contemplated and expressly authorized by the Legislature.[50] The PUCN acted to ensure efficient, prudent, and reliable operation and service by Southwest Gas,[51] and the PUCN's Order balances the interest of the ratepayers and shareholders of Southwest Gas, allowing Southwest Gas to earn a fair return on investments through just and reasonable rates.[52] Therefore, the Court upholds the PUCN's decision, finding that the PUCN relied upon substantial evidence to make the findings in its Order, and its Order is not (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the PUCN; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion.

## ORDER

IT IS ORDERED:

The PUCN's Order on Petitions for Reconsideration and Clarification, issued on February 15, 2019, and the PUCN's Modified Order, also issued on February 15, 2019, in PUCN Docket No. 18-05031, are affirmed.

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[50] *Nev. Power Co. v. Eighth Judicial Dist. Court of Nev.*, 120 Nev. at 959, 102 P.3d at 585-86 (2004) (finding that the power to prescribe rates is a legislative function).

[51] NRS 704.001(3).

[52] NRS 704.001(4).

Dated this 5th day of March, 2020.

DISTRICT COURT JUDGE

Respectfully submitted by:
THE PUBLIC UTILITIES COMMISSION OF NEVADA

By: _____
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Carson City, Nevada 89701

*Attorneys for the Public Utilities Commission of Nevada*

Approved as to form and content by:

THE STATE OF NEVADA, BUREAU OF CONSUMER PROTECTION

By: _____
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Steven D. Grierson
CLERK OF THE COURT

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*Attorneys for Petitioner Southwest Gas Corporation*

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| SOUTHWEST GAS CORPORATION,<br><br>Petitioner,<br><br>*vs.*<br><br>PUBLIC UTILITIES COMMISSION OF NEVADA,<br><br>Respondent. | Case No.: A-19-791302-J<br><br>Dep't No.: 19<br><br>**CASE APPEAL STATEMENT** |

1. Name of appellant filing this case appeal statement:

Petitioner Southwest Gas Corporation

2. Identify the judge issuing the decision, judgment, or order appealed from:

The Honorable William "Bill" Kephart

3. Identify each appellant and the name and address of counsel for each appellant:

*Attorneys for Appellant Southwest Gas Corporation*

DANIEL F. POLSENBERG
JOEL D. HENRIOD
JUSTIN J. HENDERSON
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3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

*Attorneys for Respondent Public Utilities Commission of Nevada*

GARRETT WEIR
DEBREA M. TERWILLIGER
1150 East William Street
Carson City, Nevada 89701
(775) 684-6132

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

N/A

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Retained counsel

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Retained counsel

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

N/A

9. Indicate the date the proceedings commenced in the district court, *e.g.*, date complaint, indictment, information, or petition was filed:

"Petition for Judicial Review," filed March 18, 2019

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This action stems from appellant's challenge of orders issued by the Public Utilities Commission of Nevada regarding its application for authority to increase its retail natural gas utility service rates. Southwest Gas appeals from the district court order denying its petition for judicial review.

11. Indicate whether the case has previously been the subject of an appeal or an original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding.

N/A

12. Indicate whether this appeal involves child custody or visitation: v

This case does not involve child custody or visitation.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

Under the circumstances, settlement is unlikely.

Dated this 25th day of March, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

DANIEL F. POLSENBERG (SBN 2376)
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3993 Howard Hughes Parkway, #600
Las Vegas, Nevada 89169

*Attorneys for Petitioner Southwest Gas Corporation*

## CERTIFICATE OF SERVICE

I certify that on March 25, 2020, I served the foregoing "Case Appeal Statement" through the Court's electronic filing system upon all parties on the master e-file and serve list.

*/s/ Lisa M. Noltie*
An Employee of Lewis Roca Rothgerber Christie LLP

EIGHTH JUDICIAL DISTRICT COURT

# CASE SUMMARY

## CASE NO. A-19-791302-J

| | | | |
|---|---|---|---|
| **Southwest Gas Corporation, Petitioner(s)** | § | Location: | **Department 19** |
| **vs.** | § | Judicial Officer: | **Kephart, William D.** |
| **Public Utilities Commission of Nevada, Respondent(s)** | § | Filed on: | **03/18/2019** |
| | § | Cross-Reference Case Number: | **A791302** |

### CASE INFORMATION

Case Type: **Other Judicial Review/Appeal**

Case Status: **03/18/2019 Open**

### DATE — CASE ASSIGNMENT

**Current Case Assignment**

| | |
|---|---|
| Case Number | A-19-791302-J |
| Court | Department 19 |
| Date Assigned | 03/18/2019 |
| Judicial Officer | Kephart, William D. |

### PARTY INFORMATION

| | | *Lead Attorneys* |
|---|---|---|
| **Petitioner** | **Southwest Gas Corporation** | **Polsenberg, Daniel F.**<br>*Retained*<br>702-949-8200(W) |
| **Respondent** | **Public Utilities Commission of Nevada** | **Weir, Garrett C.**<br>*Retained*<br>775-684-6185(W) |

### DATE — EVENTS & ORDERS OF THE COURT — INDEX

## EVENTS

03/18/2019 Petition for Judicial Review
Filed by: Petitioner Southwest Gas Corporation
*Petition for Judicial Review*

03/18/2019 Initial Appearance Fee Disclosure
Filed By: Petitioner Southwest Gas Corporation
*Initial Appearance Fee Disclosure*

03/18/2019 Disclosure Statement
Party: Petitioner Southwest Gas Corporation
*Petitioner's Disclosure Statement Pursuant to NRCP 7.1*

03/19/2019 Errata
*Erratum to "Petitioner's Disclosure Statement Pursuant to NRCP 7.1"*

03/19/2019 Errata
*Erratum*

03/19/2019 Summons Electronically Issued - Service Pending
Party: Petitioner Southwest Gas Corporation
*Summons*

| | |
|---|---|
| 03/27/2019 | Statement of Intent to Participate in Petition for Judicial<br>Filed By: Intervenor State of Nevada, Bureau of Consumer Protection<br>*Statement of Intent to Participate in Petition For Judicial Review* |
| 03/28/2019 | Summons Electronically Issued - Service Pending<br>Party: Petitioner Southwest Gas Corporation<br>*Summons* |
| 04/22/2019 | Document Filed<br>Filed by: Respondent Public Utilities Commission of Nevada<br>*Certification of Record - Index of Volumes* |
| 04/22/2019 | Document Filed<br>Filed by: Respondent Public Utilities Commission of Nevada<br>*Record of Docket Volume 1 of 24* |
| 04/22/2019 | Document Filed<br>Filed by: Respondent Public Utilities Commission of Nevada<br>*Record of Docket Volume 2 of 24* |
| 04/22/2019 | Document Filed<br>Filed by: Respondent Public Utilities Commission of Nevada<br>*Record of Docket Volume 4 of 24* |
| 04/22/2019 | Document Filed<br>*Record of Docket Volume 6 of 24* |
| 04/22/2019 | Document Filed<br>Filed by: Respondent Public Utilities Commission of Nevada<br>*Record of Docket Volume 5 of 24* |
| 04/22/2019 | Document Filed<br>Filed by: Respondent Public Utilities Commission of Nevada<br>*Record of Docket Volume 7 of 24* |
| 04/22/2019 | Document Filed<br>Filed by: Respondent Public Utilities Commission of Nevada<br>*Record of Docket Volume 8 of 24* |
| 04/22/2019 | Document Filed<br>Filed by: Respondent Public Utilities Commission of Nevada<br>*Record of Docket Volume 9 of 24* |
| 04/22/2019 | Document Filed<br>Filed by: Respondent Public Utilities Commission of Nevada<br>*Record of Docket Volume 10of 24* |
| 04/22/2019 | Document Filed<br>Filed by: Respondent Public Utilities Commission of Nevada<br>*Record of Docket Volume 12 of 24* |
| 04/22/2019 | Document Filed |

Filed by: Respondent Public Utilities Commission of Nevada
*Record of Docket Volume 11 of 24*

04/22/2019 Document Filed
Filed by: Respondent Public Utilities Commission of Nevada
*Record of Docket Volume 13 of 24*

04/22/2019 Document Filed
Filed by: Respondent Public Utilities Commission of Nevada
*Record of Docket Volume 14 of 24*

04/22/2019 Document Filed
Filed by: Respondent Public Utilities Commission of Nevada
*Record of Docket Volume 15 of 24*

04/22/2019 Document Filed
Filed by: Respondent Public Utilities Commission of Nevada
*Record of Docket Volume 16 of 24*

04/22/2019 Stipulation
Filed by: Respondent Public Utilities Commission of Nevada
*Stipulation to Seal Records*

04/22/2019 Exhibits
Filed By: Respondent Public Utilities Commission of Nevada
*Exhibit - Certification of Confidential Record of Docket NO. 18-05031*

04/22/2019 Document Filed
Filed by: Respondent Public Utilities Commission of Nevada
*Record of Docket Volume 17 of 24*

04/22/2019 Document Filed
Filed by: Respondent Public Utilities Commission of Nevada
*Record of Docket Volume 18 of 24*

04/22/2019 Document Filed
Filed by: Respondent Public Utilities Commission of Nevada
*Record of Docket Volume 20 of 24*

04/22/2019 Document Filed
Filed by: Respondent Public Utilities Commission of Nevada
*Record of Docket Volume 19 of 24*

04/22/2019 Document Filed
Filed by: Respondent Public Utilities Commission of Nevada
*Record of Docket Volume 21 of 24*

04/22/2019 Document Filed
Filed by: Respondent Public Utilities Commission of Nevada
*Record of Docket Volume 23 of 24*

04/22/2019 Document Filed
Filed by: Respondent Public Utilities Commission of Nevada
*Record of Docket Volume 22 of 24*

04/22/2019 Document Filed
Filed by: Respondent Public Utilities Commission of Nevada
*Record of Docket Volume 3 of 24*

05/08/2019 Stipulation
Filed by: Respondent Public Utilities Commission of Nevada
*Addendum to Stipulation to Seal Records*

05/22/2019 Memorandum of Points and Authorities
Filed By: Petitioner Southwest Gas Corporation
*Memorandum of Points and Authorities in Support of Petition for Judicial Review*

06/21/2019 Memorandum of Points and Authorities
Filed By: Intervenor State of Nevada, Bureau of Consumer Protection
*Bureau of Consumer Protection's Memorandum of Points and Authorities in Opposition to Petition for Judicial Review*

06/21/2019 Memorandum of Points and Authorities
Filed By: Respondent Public Utilities Commission of Nevada
*Respondent Public Utilities Commission of Nevada Memorandum of Points and Authorities*

08/06/2019 Motion for Leave to File
Party: Petitioner Southwest Gas Corporation
*Motion for Leave to File Reply in Support of Petition for Judical Review*

08/06/2019 Clerk's Notice of Hearing
*Notice of Hearing*

08/08/2019 Opposition to Motion
Filed By: Intervenor State of Nevada, Bureau of Consumer Protection
*Bureau of Consumer Protection's Opposition to Southwest Gas' Motion for Leave to File Reply in Support of Petition for Judicial Review*

08/21/2019 Opposition to Motion
Filed By: Respondent Public Utilities Commission of Nevada
*Public Utilities Commission of Nevada's Opposition to Southwest Gas's Motion for Leave to File Reply in Support of Petition for Judicial Review*

09/06/2019 Reply in Support
Filed By: Petitioner Southwest Gas Corporation
*Reply in Support of Motion for Leave to File and Reply in Support of Petition for Judicial Review*

10/16/2019 Reply Points and Authorities
Filed by: Petitioner Southwest Gas Corporation
*Reply in Support of Petition for Judicial Review*

11/01/2019 Reply Points and Authorities
Filed by: Respondent Public Utilities Commission of Nevada
*Sur-reply of the Public Utilities Commission of Nevada in Response to Southwest Gas Corporation Reply*

11/01/2019 Reply Points and Authorities

Filed by: Intervenor State of Nevada, Bureau of Consumer Protection
*Bureau of /consumer Protection's Sur-Reply to Southwest Gas Reply in Support of The Petition for Judicial Review*

11/11/2019 Order Granting Motion
*Order Granting Motion for Leave to File Reply in Support of Petition for Judicial Review*

11/14/2019 Recorders Transcript of Hearing
Party: Intervenor State of Nevada, Bureau of Consumer Protection
*Recorders Transcript of Hearing Re: 10/15/19 - Petitioner's Motion for Leave to File Reply in Support of Petition for Judicial Review*

11/14/2019 Notice of Entry of Order
*Notice of Entry of Order Granting Motion for Leave to File Reply in Support of Petition for Judicial Review*

12/09/2019 Notice
Filed By: Respondent Public Utilities Commission of Nevada
*Respondent's Notice of Filing of Petition for Writ of Mandamus or, Alternatively, Prohibition*

12/09/2019 Motion to Stay
Filed By: Respondent Public Utilities Commission of Nevada
*Respondent's Motion for Stay Alternatively, Continuance*

12/09/2019 Motion
Filed By: Respondent Public Utilities Commission of Nevada
*RESPONDENT'S EX PARTE APPLICATION FOR ORDER SHORTENING TIME REGARDING ITS MOTION FOR STAY, OR ALTERNATIVELY, CONTINUANCE*

12/10/2019 Motion
Filed By: Respondent Public Utilities Commission of Nevada
*RESPONDENT'S EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME REGARDING ITS MOTION FOR STAY OR, ALTERNATIVELY, CONTINUANCE*

12/11/2019 Motion to Stay
Filed By: Intervenor State of Nevada, Bureau of Consumer Protection
*State of Nevada, Bureau of Consumer Protection S Joinder to The Public Utility Commission of Nevada's Motion to Stay or, Alternatively, Continuance*

12/12/2019 Clerk's Notice of Nonconforming Document
*Clerk's Notice of Nonconforming Document*

12/12/2019 Clerk's Notice of Nonconforming Document
*Clerk's Notice of Nonconforming Document*

12/16/2019 Clerk's Notice of Nonconforming Document and Curative Action
*Clerk's Notice of Curative Action*

12/16/2019 Opposition to Motion
Filed By: Petitioner Southwest Gas Corporation
*Southwest Gas Corporation's Opposition to Motion for Stay*

12/23/2019 Recorders Transcript of Hearing
Party: Petitioner Southwest Gas Corporation

*Recorders Transcript of Hearing Re: 12/17/19 - RESPONDENT'S EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME REGARDING ITS MOTION FOR STAY, OR ALTERNATIVELY CONTINUANCE*

03/06/2020 Notice of Entry of Order
Filed By: Respondent Public Utilities Commission of Nevada
*Notice of entry of Order Denying Petition for Judicial Review*

03/25/2020 Notice of Appeal
Filed By: Petitioner Southwest Gas Corporation
*Notice of Appeal*

03/25/2020 Case Appeal Statement
Filed By: Petitioner Southwest Gas Corporation
*Case Appeal Statement*

## HEARINGS

09/12/2019 **Motion for Leave** (3:00 AM) (Judicial Officer: Bonaventure, Joseph T.)
**09/12/2019, 10/15/2019**
*Petitioner's Motion for Leave to File Reply in Support of Petition for Judical Review*
Matter Continued;
Granted;
Journal Entry Details:
*Following arguments by counsel, COURT ORDERED, Motion GRANTED Petitioner shall be permitted to file a reply. FURTHER ORDERED, Respondent shall be permitted to file a Sur-Reply which shall be limited to 19 pages and filed on or before 11/01/19 with tabbed courtesy copies being provided to the Court. FURTHER ORDERED, matter SET for argument on the Petition for Judicial Review. 12/17/2019 9:00 AM PETITION FOR JUDICIAL REVIEW;*
Matter Continued;
Granted;
Journal Entry Details:
*COURT ORDERED, matter CONTINUED pursuant to the agreement between the parties.;*

12/17/2019 **Motion For Stay** (9:00 AM) (Judicial Officer: Kephart, William D.)
*Respondent's Ex Parte Application for an Order Shortening Time Regarding its Motion for Stay, or, Alternatively Continuance*
Motion Denied;

12/17/2019 **Joinder** (9:00 AM) (Judicial Officer: Kephart, William D.)
*State of Nevada, Bureau of Consumer Protection's Joinder to The Public Utility Commission of Nevada s Motion to Stay or, Alternatively, Continuance*
Denied;

12/17/2019 **All Pending Motions** (9:00 AM) (Judicial Officer: Kephart, William D.)
Matter Heard;
Journal Entry Details:
*RESPONDENT'S EX PARTE APPLICATION FOR AN ORDER ON ORDER SHORTENING TIME REGARDING ITS MOTION FOR STAY, OR, ALTERNATIVELY CONTINUANCE...STATE OF NEVADA, BUREAU OF CONSUMER PROTECTION'S JOINDER TO THE PUBLIC UTILITY COMMISSION OF NEVADA'S MOTION TO STAY OR, ALTERNATIVELY, CONTINUANCE Court noted procedural history and advised only the motion to stay will be addressed today. Ms. Terwilliger argued in support of stay until clarity is received by the Nevada Supreme Court as to the appeal process. Further, Ms. Terwilliger argued Respondent did not cause delay, Petitioner not harmed here due to their actions and the shareholders will not be harmed as well. Mr. Stuhff joined with Commission's motion for stay and argued case has suffered by the delays brought on by Petitioner due to the Petitioner asking for more briefing then called for. Further, with amount of briefing, Commission has sought extraordinary relief, gone to the Nevada Supreme Court and case should be stayed pending decision by the Nevada Supreme Court. Colloquy. Additional argument by Ms. Terwilliger. COURT ORDERED, motion and joinder DENIED. Hearing set for January 9, 2020, STANDS.;*

| | | |
|---|---|---|
| 01/09/2020 | **Petition for Judicial Review** (1:00 PM) (Judicial Officer: Kephart, William D.)<br>Matter Heard;<br>Journal Entry Details:<br>*Following arguments by counsel, COURT ORDERED, Petition DENIED Court Finds, there is no statutory or legal authority that mandates or requires that this Court find that there is a presumption of prudence in this particular matter under the circumstances of a general rate case. Further, Southwest Gas was put on proper notice through their initial requirements under paragraph 42 and 45 to be prepared to answer requiring their duty to support their burden that their requests were reasonable. Finally, the Court Finds, there was substantial evidence in the record that the Public Utilities Commission's decision was appropriate and COURT ORDERED, Decision UPHELD and Petition DENIED. ;* | |

| DATE | FINANCIAL INFORMATION | |
|---|---|---|
| | **Petitioner** Southwest Gas Corporation | |
| | Total Charges | 339.50 |
| | Total Payments and Credits | 69.50 |
| | **Balance Due as of 3/27/2020** | **270.00** |

# DISTRICT COURT CIVIL COVER SHEET

County, Nevada

Case No. .....

*(Assigned by Clerk's Office)*

## I. Party Information *(provide both home and mailing addresses if different)*

| Plaintiff(s) (name/address/phone): | Defendant(s) (name/address/phone): |
|---|---|
| Southwest Gas Corporation | Public Utilities Commission of Nevada |
| | |
| | |
| | |
| Attorney (name/address/phone): | Attorney (name/address/phone): |
| Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith | |
| Lewis Roca Rothgerber Christie LLP | |
| 3993 Howard Hughes Parkway, Suite 600 | |
| Las Vegas, Nevada 89169, (702) 949-8200 | |

CASE NO: A-19-791302-J
Department 19

## II. Nature of Controversy *(please select the one most applicable filing type below)*

### Civil Case Filing Types

| Real Property | Torts | |
|---|---|---|
| **Landlord/Tenant** | **Negligence** | **Other Torts** |
| ☐ Unlawful Detainer | ☐ Auto | ☐ Product Liability |
| ☐ Other Landlord/Tenant | ☐ Premises Liability | ☐ Intentional Misconduct |
| **Title to Property** | ☐ Other Negligence | ☐ Employment Tort |
| ☐ Judicial Foreclosure | **Malpractice** | ☐ Insurance Tort |
| ☐ Other Title to Property | ☐ Medical/Dental | ☐ Other Tort |
| **Other Real Property** | ☐ Legal | |
| ☐ Condemnation/Eminent Domain | ☐ Accounting | |
| ☐ Other Real Property | ☐ Other Malpractice | |

| Probate | Construction Defect & Contract | Judicial Review/Appeal |
|---|---|---|
| **Probate** *(select case type and estate value)* | **Construction Defect** | **Judicial Review** |
| ☐ Summary Administration | ☐ Chapter 40 | ☐ Foreclosure Mediation Case |
| ☐ General Administration | ☐ Other Construction Defect | ☐ Petition to Seal Records |
| ☐ Special Administration | **Contract Case** | ☐ Mental Competency |
| ☐ Set Aside | ☐ Uniform Commercial Code | **Nevada State Agency Appeal** |
| ☐ Trust/Conservatorship | ☐ Building and Construction | ☐ Department of Motor Vehicle |
| ☐ Other Probate | ☐ Insurance Carrier | ☐ Worker's Compensation |
| **Estate Value** | ☐ Commercial Instrument | ■ Other Nevada State Agency |
| ☐ Over $200,000 | ☐ Collection of Accounts | **Appeal Other** |
| ☐ Between $100,000 and $200,000 | ☐ Employment Contract | ☐ Appeal from Lower Court |
| ☐ Under $100,000 or Unknown | ☐ Other Contract | ☐ Other Judicial Review/Appeal |
| ☐ Under $2,500 | | |

| Civil Writ | | Other Civil Filing |
|---|---|---|
| **Civil Writ** | | **Other Civil Filing** |
| ☐ Writ of Habeas Corpus | ☐ Writ of Prohibition | ☐ Compromise of Minor's Claim |
| ☐ Writ of Mandamus | ☐ Other Civil Writ | ☐ Foreign Judgment |
| ☐ Writ of Quo Warrant | | ☐ Other Civil Matters |

***Business Court filings should be filed using the Business Court civil coversheet.***

March 18, 2019
Date

/s/ Daniel F. Polsenberg
Signature of initiating party or representative

***See other side for family-related case filings.***

Electronically Filed
3/6/2020 10:03 AM
Steven D. Grierson
CLERK OF THE COURT

**NEOJ**

Garrett Weir, Esq., NV Bar No. 12300
Debrea M. Terwilliger, Esq., NV Bar No. 10452
1150 E. William Street
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Tel: (775) 684-6132
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*Attorneys for Respondent Public Utilities Commission of Nevada*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| SOUTHWEST GAS CORPORATION,<br><br>Petitioner,<br><br>vs.<br><br>PUBLIC UTILITIES COMMISSION OF NEVADA, *et al.*,<br><br>Respondents. | CASE NO. A-19-791302-J<br><br>DEPT. NO. 19<br><br>**NOTICE OF ENTRY OF ORDER DENYING PETITION FOR JUDICIAL REVIEW** |

Please take notice that an Order Denying Petition for Judicial Review was entered on March 5, 2020. A true and correct copy is attached.

Dated this 6th day of March, 2020.

By: */s/ Debrea M. Terwilliger*
GARRETT WEIR, ESQ.
Nevada Bar No. 12300
DEBREA M. TERWILLIGER, ESQ.
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*Attorneys for the Public Utilities Commission of Nevada*

**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of the Public Utilities Commission of Nevada, and that, on this date, I have served the foregoing **NOTICE OF ENTRY OF ORDER DENYING PETITION FOR JUDICIAL REVIEW** through the Court's electronic filing system upon all parties listed below:

Daniel F. Polsenberg, Esq.
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*Attorneys for the Attorney General's Bureau of Consumer Protection*

DATED this 6th day of March, 2020.

An Employee of the Public Utilities Commission of Nevada

**ODJR**

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*Attorneys for Respondent Public Utilities Commission of Nevada*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| SOUTHWEST GAS CORPORATION,<br><br>Petitioner,<br><br>vs.<br><br>PUBLIC UTILITIES COMMISSION OF NEVADA, *et al.*,<br><br>Respondents. | CASE NO. A-19-791302-J<br><br>DEPT. NO. 19<br><br>**ORDER DENYING PETITION FOR JUDICIAL REVIEW** |

Before the Court is a Petition for Judicial Review (the "Petition") filed by Petitioner Southwest Gas Corporation ("Southwest Gas"). Petitioner challenges orders issued by the Public Utilities Commission of Nevada (the "PUCN") regarding Southwest Gas's application for authority to increase its retail natural gas utility service rates. *See* PUCN's Order on Petitions for Reconsideration and Clarification (Feb. 15, 2019); PUCN's Modified Order (Feb. 15, 2019) (hereinafter, both orders are referred to collectively as the "Order"). Specifically, Southwest Gas requests findings from the Court that (1) the PUCN erred by failing to apply a presumption of prudence to costs that Southwest Gas was seeking to recover through rates charged to its customers; and (2) Southwest Gas's due process rights were violated. Southwest Gas further requests that the Court reverse the PUCN's Order and remand the case to the PUCN with instructions to approve Southwest Gas's proposed return on investment as well as Southwest Gas's proposed recovery of costs associated with pensions and certain challenged work orders for computer software projects.

After full consideration of the Petition, the parties' memoranda of points and authorities, the parties' oral argument presented to the Court, and the certified record of the PUCN's Docket No. 18-05031, the Court denies the Petition and affirms the PUCN's Order.

**LEGAL STANDARD**

Nevada Revised Statutes ("NRS") 703.373(11) requires that the Court, in reviewing a PUCN decision, shall not substitute its judgment for that of the PUCN as to the weight of the evidence on questions of fact.[1] Courts can set aside the PUCN decision only if "the substantial rights of the petitioner have been prejudiced because the final decision of the [PUCN] is: (a) In violation of constitutional or statutory provisions; (b) In excess of the statutory authority of the [PUCN]; (c) Made upon unlawful procedure; (d) Affected by other error of law; (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) Arbitrary or capricious or characterized by abuse of discretion."[2] NRS 703.373(9) further clarifies that "[t]he burden of proof is on the petitioner to show that the final decision is invalid."

The PUCN is responsible for supervising and regulating the operation and maintenance of public utilities, including "provid[ing] for the safe, economic, efficient, prudent, and reliable operation and service of public utilities."[3] With regard to the PUCN's statutory authority and duty to regulate utility rates, the PUCN's power is "plenary," meaning that it is "broadly construed."[4] The PUCN's ratemaking decisions are "prima facie lawful."[5] Therefore, this Court must "not interfere with [PUCN] decisions other than to keep them within the framework of the law."[6] The PUCN has broad discretion in setting utility rates, and "[t]he only limit on the PUC[N]'s authority to regulate utility rates is the legislative directive that rates charged for services provided by a public utility must be 'just and

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[1] The Supreme Court of Nevada has similarly established that it "...will not reweigh evidence or witness credibility, nor will [it] substitute [its] judgment for the administrative judge's." *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. 328, 342, 302 P.3d 1108, 1118 (2013) (citing *Nellis Motors v. State Dep't of Motor Vehicles*, 124 Nev. 1263, 1269-70, 197 P.2d 1061, 1066 (2008)).

[2] NRS 703.373(11).

[3] *See* NRS 703.150 and 704.001.

[4] *Nev. Power Co. v. Eighth Judicial Dist. Court of Nev.*, 120 Nev. 948, 957, 102 P.3d 578, 584 (2004); *Consumers League v. Sw. Gas,* 94 Nev. 153, 157, 576 P.2d 737, 739 (1978); NRS 704.040.

[5] NRS 704.130.

[6] *Nev. Power Co. v. Public Service Comm'n of Nev.*, 105 Nev. 543, 545, 779 P.2d 531, 532 (1989).

reasonable' and that it is unlawful for a public utility to charge an unjust or unreasonable rate."[7]

Here, Southwest Gas seeks an expansion of the standard of review, arguing that the Court should not afford deference to the PUCN's ratemaking decisions and findings of fact because Southwest Gas has alleged violations of its constitutional rights. The Court, however, declines to expand the standard of review as to PUCN decisions clearly set forth in Nevada statutes and caselaw. As to any claims of violations of constitutional rights, this Court relies on the standard established in *Fed. Power Comm'n v. Hope Natural Gas Co.,* where the United States ("U.S.") Supreme Court found that when a utility alleges unconstitutional confiscation based on a rate-setting, the courts should examine only whether there is any reasonable basis upon which the rate-setting order can be upheld.[8] In *Duquesne Light Co. v. Barasch*, the U.S. Supreme Court reiterated its findings in *Hope Natural Gas,* stating: "[I]t is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry ... is at an end. The fact that the method employed to reach that result may contain infirmities is not then important."[9] This "end result" test has been adopted by the Nevada Supreme Court to determine whether PUCN decisions are just and reasonable.[10]

In setting rates, the PUCN may consider a "zone of reasonableness."[11] "Assuming that there is a zone of reasonableness within which the [PUCN] is free to fix a rate varying in amount and higher

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[7] *Nev. Power Co.*, 120 Nev. at 957, 102 P.3d at 584 (citing NRS 704.040).

[8] *See Fed. Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 602 64 S.Ct. 281, 287-288 (1944) (holding that a court is required to accept an agency's findings if they are supported by substantial evidence); *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 767, 88 S.Ct. 1344, 1360(1968) ("[T]his Court has often acknowledged that the Commission is not required by the Constitution or the Natural Gas Act to adopt as just and reasonable any particular rate level; rather, courts are without authority to set aside any rate selected by the Commission which is within a 'zone of reasonableness'" (quoting *FPC v. Nat. Gas Pipeline Co.,* 315 U.S. 575, 585, 62 S.Ct. 736, 743 (1942) and *Duquesne Light Co. v. Barasch,* 488 U.S. 299, 109 S.Ct. 609 (1989)).

[9] *Duquesne Light Co. v. Barasch,* 488 U.S. 299, 310, 109 S.Ct. 609, 617 (1989) (citing *Hope*, 320 U.S. at 602, 64 S.Ct. at 288).

[10] *Pub. Serv. Comm'n v. Ely Light & Power Co.*, 80 Nev. 312, 322, 393 P.2d 305, 310 (1964) ("'[I]t is not our province to quarrel with methods used by the commission or with methods approved by the district court ... if the end result of the orders made is to permit the company a just and reasonable return.'") (quoting *Hope*, 320 U.S. 591, 64 S.Ct. 281, and *Bell Tel. Co. of Nev. v. Public Serv. Comm'n*, 70 Nev. 25, 253 P.2d 602 (1953)).

[11] *Fed. Power Comm'n v. Natural Gas Pipeline Co.,* 315 U.S. 575, 585, 62 S.Ct. 736, 743 (1942).

than a confiscatory rate ... the [PUCN] is also free to decrease any rate which is not the 'lowest reasonable rate.'"[12]

With regard to Southwest Gas's request that the Court order the PUCN to award Southwest Gas its originally-requested return on equity and recovery of costs that were disallowed by the PUCN, the Court, as a matter of law, does not have authority to provide such relief. As noted by the Nevada Supreme Court:

> Courts have been loath to prescribe the formula or formulae that must be used by a regulatory commission in establishing just and reasonable rates. The methods used by a regulatory body in establishing just and reasonable rates of return are generally considered to be outside the scope of judicial inquiry.[13]

This hesitancy on the part of the courts to prescribe formulae to be used by the regulatory body in establishing a rate of return stems from the fact that ratemaking "is primarily a legislative function, and therefore, were the courts to prescribe such formulae, they would be exercising a legislative function not constitutionally entrusted to them."[14] As such, the Court cannot instruct the PUCN to set a particular rate of return or require the PUCN to simply upwardly adjust rates to account for certain costs. The Court is limited to reviewing whether the overall effect of the rates is just and reasonable; it may remand the case to the PUCN to correct unjust and unreasonable rates, but it cannot prescribe the manner in which the PUCN arrives at just and reasonable rates.

When the PUCN sets a rate, "[t]here may be cases where two conflicting views may each be sustained by substantial evidence."[15] Therefore, the PUCN Order does not need to disprove that Southwest Gas's requested return on equity may also be satisfactory in terms of the evidence taken and the standards set forth in the applicable case law. Indeed, "[s]ubstantial evidence is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'"[16] "Furthermore, when an agency's conclusions of law are closely related to its view of the

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[12] *Id.* (internal citations omitted).

[13] *Nevada Power Co. v. Pub. Serv. Comm'n*, 91 Nev. 816, 826, 544 P.2d 428, 435 (citations omitted).

[14] *Id.*, 91 Nev. at 827, 544 P.2d at 436.

[15] *Robertson Transp. Co. v. Pub. Serv. Comm'n,* 39 Wis.2d 653, 159 N.W.2d 636, 638 (Wis. 1968.)

[16] *Olsen v. Nat'l Transp. Safety Bd.*, 14 F.3d 471, 475 (9th Cir. 1994) (*quoting Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620, 86 S.Ct. 1018, 1026 (1965)).

facts, those conclusions are entitled to deference, and [the court] will not disturb them if they are supported by substantial evidence."[17]

## ANALYSIS

This Court affirms the PUCN's Order because the Order is not in violation of constitutional or statutory provisions, in excess of the statutory authority of the PUCN, made upon unlawful procedure, affected by other error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, arbitrary or capricious, or characterized by abuse of discretion. With regard to the specific issues raised by Southwest Gas, the PUCN Order 1) weighed the record evidence before it to establish a return on Southwest Gas's equity investments that results in just and reasonable rates and comports with the applicable standards for determining an appropriate return on equity; 2) determined an appropriate amount of pension expense for Southwest Gas to recover in rates by applying an often-used ratemaking methodology and weighing the evidence in the record; 3) disallowed certain costs for select capital projects because Southwest Gas failed to sustain its burden of proof for establishing that the proposed rate changes associated with those projects were just, reasonable, and not unduly discriminatory or preferential; and 4) did not apply a presumption of prudence because such a presumption does not exist in Nevada law and is not a constitutional standard that must be applied in Nevada. There is substantial evidence in the record to support that the rates established by the PUCN are just and reasonable.

### A. The PUCN Based Its Findings on the Substantial Evidence in the Record.

#### 1. The return on equity set by the PUCN is supported by substantial evidence and meets the applicable legal standards for fair returns.

Return on equity is the amount that public utilities are permitted to earn on the equity that they spend on investments in infrastructure to serve their ratepayers. The PUCN is legislatively mandated to ensure that established rates are just and reasonable. Specific to return on investments, NRS 704.001(4) provides that the PUCN must "balance the interests of customers and shareholders of public utilities by providing public utilities with the opportunity to earn a fair return on their investments while providing customers with just and reasonable rates[.]" Additionally, two seminal

[17] *Fathers & Sons & A Daughter Too v. Transp. Services Auth. of Nevada*, 124 Nev. 254, 259, 182 P.3d 100, 104 (2008).

U.S. Supreme Court cases, *Bluefield Waterworks & Improvement Co. v. West Va. Pub. Serv. Comm'n*[18] and *Federal Power Comm'n v. Hope Natural Gas Co.*,[19] inform the PUCN's decisions regarding return on equity. In *Bluefield*, the U.S. Supreme Court stated:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties ... The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.[20]

In *Hope*, the U.S. Supreme Court re-affirmed the *Bluefield* standard, adding that the return on equity should be commensurate with the returns of investments in other enterprises having corresponding risks and be sufficient enough to ensure confidence in the financial integrity of the utility such that the utility can maintain is credit and attract capital.[21] Additionally, the *Hope* opinion stated that it is not the method of setting return on equity that determines the reasonableness; rather, it is the result and the effect of the result on the public utility.[22] The *Hope* Court even declared that the presence of infirmities in the method employed to arrive at a just and reasonable rate is not important.[23] The Nevada Supreme Court has affirmed the findings of *Hope* and *Bluefield*: "The crux to every rate case involving the cost of common equity is just how one goes about conforming to the *Bluefield* and *Hope* cases,"[24] and the Court finds that the PUCN's decision conforms to the *Hope* and *Bluefield* cases.

In determining the return on equity, the PUCN relied on substantial evidence, including (1) the results of each expert's evaluation of various return on equity models; (2) the experts' judgment in

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[18] 262 U.S. 679. 43 S.Ct. 675 (1923).

[19] 320 U.S. 591, 64 S.Ct. 609 (1944).

[20] *Bluefield*, 262 U.S. at 692-93 43 S.Ct. at 679.

[21] *Hope*, 320 U.S. at 603, 64 S.Ct. at 288.

[22] *Id.*, 320 U.S. at 602, 64 S.Ct. at 288.

[23] *Id.*; *see also Duquesne Light Co. v. Barasch*, 488 U.S. at 310, 109 S.Ct. at 617 ("Today we reaffirm these teaching of *Hope Natural Gas*: '[i]t is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry ... is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.'" (internal citations omitted)).

[24] *Nevada Power Co. v. Pub. Serv. Comm'n*, 91 Nev. at 825, 544 P.2d at 434.

assessing macroeconomic conditions, capital markets, Southwest Gas's particular circumstances (e.g., capital structure, risk profile, and regulatory environment); and (3) each expert's critique of other experts' analyses. The PUCN found that a 9.25-percent return on equity, within the range of reasonableness of 9.10 to 9.70 percent, balances the interest of Southwest Gas's ratepayers and shareholders, is commensurate with returns on investments in other enterprises having corresponding risks, and is both sufficient to assure confidence in the financial integrity of the enterprise and for Southwest Gas to attract capital.

**2. The PUCN's determinations regarding pension expenses are supported by substantial evidence, and Southwest Gas had proper notice to prepare to defend its testimony related to pension expenses.**

The Court finds that Southwest Gas's due process rights were not violated by the PUCN's decisions regarding pension expense. The PUCN based its decisions on the record evidence before it, determining that normalizing pension expenses was necessary to address volatility. Moreover, the PUCN found that Southwest Gas failed to provide evidence in support of its proposed change in the discount rate, even after an opportunity was provided to Southwest Gas at hearing to present such evidence. Rather than adopting Southwest Gas's unsupported reduction to the existing discount rate, the PUCN relied on evidence of historical discount rates in finding that the substantial evidence on the record supported a rejection of Southwest Gas's proposal.

Southwest Gas's due process arguments – that its rights were violated because (1) it did not have the opportunity to submit testimony on the PUCN decision to normalize pension expense; and (2) it was required to justify its proposed discount rate without notice –fail. First, Southwest Gas was not entitled to receive advance notice regarding particular questions or issues that could arise during hearing, so long as the proceedings stayed within the scope of Southwest Gas's application. Here, Southwest Gas requested recovery of pension expenses in its application and acknowledged that the expenses were volatile; Southwest Gas's application even contained a proposal for addressing the volatility and supported its proposal with witness testimony. Thus, inquiry into the appropriate method for addressing pension expense volatility was squarely within the scope of the publicly-noticed proceedings to address Southwest Gas's application. There is no requirement for other parties or the PUCN to telegraph the questions that they might ask an applicant's expert witness regarding a proposal contained in the application that the witness's testimony supports.

Southwest Gas even received advance notice that normalization of pension expenses was at

issue. One of the parties to the case proposed normalization of pension expenses in pre-filed testimony nine days prior to Southwest Gas submitting pre-filed rebuttal testimony and approximately three weeks before the hearing. Southwest Gas was fully apprised of the other party's position and had more than adequate opportunity, both through pre-filed rebuttal testimony and at hearing, to address normalization. Thus, this Court finds that Southwest Gas's due process rights were not violated, and the PUCN's decision to normalize pension expenses to address volatility was based on substantial evidence in the record.

With regard to the discount rate, Southwest Gas submitted pre-filed direct testimony with its application specifically proposing a particular discount rate. NAC 703.2231 mandates that "[a]n applicant must be prepared to go forward at a hearing on the data which have been submitted ..." Witnesses must be prepared at hearing to respond to questions about their written testimony.[25] The fact that Southwest Gas's witness was not prepared at hearing to answer questions does not amount to a due process violation or a lack of notice. This Court finds that the PUCN approved a just and reasonable discount rate based on historical annual discount rates; Southwest Gas offered no evidence to support its proposal to adopt a rate that differed significantly from historical rates. Thus, the PUCN relied on substantial evidence to determine that there was no basis to change the discount rate as suggested by Southwest Gas.

Southwest Gas's argument that there was a violation of due process based on the PUCN not applying a presumption of prudence with regard to pension expense similarly fails. A presumption does not exist in Nevada law and is not a constitutional standard that must be applied in Nevada. Moreover, a presumption of prudence does not change the burden of proof, and it would not require the PUCN to presume that evidence exists to support Southwest Gas's proposals related to pension expenses.

[25] NRS 233B.123(4).

### 3. Southwest Gas failed to sustain its burden of proof in seeking to collect from ratepayers the costs associated with the challenged work orders, so the PUCN's disallowance of the costs associated with the work orders is just and reasonable.

The PUCN did not err in finding that Southwest Gas failed to sustain its burden of proof for establishing that the proposed rate changes associated with the challenged work orders were just, reasonable, and not unduly discriminatory or preferential. Therefore, the Court upholds the PUCN's decision to deny recovery of the unsupported costs based on the substantial evidence in the record.

In examining how the PUCN arrived at its conclusion that Southwest Gas did not provide substantial evidence, NAC 703.2231, the regulation that memorializes the burden of proof in rate cases, is instructive. Pursuant to this regulation, to sustain its burden of proof for establishing that its proposed rate changes were just and reasonable, Southwest Gas was required to "ensure that the material it relied upon is of such composition, scope and format that it would serve as its complete case if the matter is set for hearing." The record supports the PUCN's finding that Southwest Gas fell short of meeting its burden, as Southwest Gas did not provide necessary information demonstrating why it made the decision to incur the costs associated with the challenged work orders, including information addressing whether the choices made by the utility were the least-cost options or the best available alternatives, and whether the project expenditures were reasonable under the circumstances.

In total, Southwest Gas provided only limited information related to the challenged work orders, including: the names of and budgets for the projects; invoices or estimates for purchases made; the name and/or signature of the employee or consultant authorizing the expenditures; memos identifying individuals in charge of various projects; and organizational charts for the projects. The PUCN reasonably concluded that this information was insufficient to demonstrate prudent management or why inclusion of these costs in rates was reasonable. Southwest Gas cannot merely rely upon the fact of payment as a demonstration of prudence or reasonableness. The utility bears responsibility for adequately supporting the costs requested in its application for a change in general rates with evidentiary support that is "commonly relied upon by reasonable and prudent persons in the conduct of their affairs" that would demonstrate the reasonableness of such expenditures.[26]

[26] NRS 233B.123; *see also* NAC 703.2231.

Requiring Southwest Gas to demonstrate the prudence and, relatedly, the reasonableness of the costs included in the challenged work orders does not violate Southwest Gas's due process rights. Southwest Gas was provided an opportunity to rebut testimony addressing the prudence of the costs, both in its own pre-filed rebuttal testimony and at hearing. In fact, Southwest Gas spent nearly one full day cross-examining an opposing party's witness who addressed this issue.

### B. The PUCN Was Not Required to Apply a Presumption of Prudence to Southwest Gas's Incurred Costs.

There is no Nevada statute or regulation establishing the presumption of prudence described by Southwest Gas. Moreover, neither the U.S. Supreme Court nor the Nevada Supreme Court has found that a utility is entitled to a presumption of prudence in a general rate case. On one occasion, the Nevada Supreme Court determined that a presumption of prudence should apply in a deferred energy accounting proceeding, but the Nevada Legislature nullified this decision by adopting a statute that specifically found no presumption of prudence could be used in such cases.[27] While some jurisdictions have adopted a presumption of prudence, the case law addressing those jurisdictions is not controlling in Nevada.

Additionally, Nevada law reflects the non-existence of a presumption of prudence in utility rate cases. The existing regulatory framework presumes that utilities must affirmatively demonstrate that significant project costs were prudently incurred before the costs can be recovered through rates charged to customers.

"[W]here power is clearly conferred or fairly implied, and is consistent with the purposes for which the [PUCN] was established by law, the existence of the power should be resolved in favor of the commissioners so as to enable them to perform their proper functions of government."[28] The Legislature clearly conferred to the PUCN "the power to fix and order... rates as shall be just and reasonable,"[29] as well as the power and duty to ensure prudent and reliable operation and service by public utilities.[30] Accordingly, with regard to whether the PUCN has the power to evaluate prudence

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[27] *See* NRS 704.185.

[28] *Nevada Power Co.*, 120 Nev. at 956, 102 P.3d at 584 (quoting 73B C.J.S. *Public Utilities* § 166, at 413-14).

[29] NRS 704.120(1).

[30] *See* NRS 704.001.

in setting just and reasonable rates in a general rate case, the Court resolves the question in favor of the PUCN.

**1. The presumption of prudence is not rooted in the Constitution.**

The U.S. Supreme Court has not found that a presumption of prudence is rooted in the Constitution. In *Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*,[31] cited by Southwest Gas, the U.S. Supreme Court found only that the "applicable general rule" is that a regulatory commission is not "'empowered to substitute its judgment for that of the directors of the corporation.'"[32] The PUCN's decision in the instant case does not amount to the PUCN substituting its judgment for that of the utility's management. Significantly, the PUCN did not find that the costs were imprudently incurred; rather, it simply found that Southwest Gas failed to provide sufficient evidence to sustain its burden of proof. Here, the PUCN did not second-guess Southwest Gas's judgment; rather, it found that Southwest Gas ***failed to demonstrate that judgment was even exercised***.

In *W. Ohio Gas Co. v. Pub. Util. Comm'n of Ohio*,[33] also cited by Southwest Gas, the U.S. Supreme Court held only that the good faith of the managers of the business were to be presumed and, similar to the opinion in *Sw. Bell Tel. Co.*, that "[i]n the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay."[34] The U.S. Supreme Court did not find that a utility is entitled to a presumption of prudence as a constitutional protection – only that the managers of the business were presumed to have acted in good faith. Presuming the good faith of managers is not the same as presuming prudence; a utility manager can act with good faith in authorizing an expenditure but still make an imprudent decision.

Collectively, the U.S. Supreme Court cases cited by Southwest Gas provide that the PUCN should base its decisions on the evidence before it, including determining whether a showing of inefficiency or improvidence has overcome assumed good faith or reasonable judgment on the part of the utility managers. Essentially, the rulings stand for the proposition that a state commission must

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[31] 262 U.S. 276, 43 S.Ct. 544 (1923).

[32] *Sw. Bell Tel. Co.*, 262 U.S. at 289, 43 S.Ct. at 547 (quoting *States Pub. Utils. Comm'n ex rel. Springfield v. Springfield Gas & Electric Co.*, 291 Ill. 209, 234, 125 N.E. 891, 901 (1923)).

[33] 294 U.S. 63, 72, 55 S. Ct. 316, 321 (1935).

[34] *Id.*

base its findings on the evidentiary record.[35] They do not say that a state commission cannot disallow a cost for which the utility has not met its burden to demonstrate that it was prudently incurred and that its inclusion in rates would be just and reasonable.

**2. Nevada courts have not found that a presumption of prudence exists for public utilities in a general rate case.**

With regard to Nevada case law, Southwest Gas states that the presumption of prudence was applied by the Nevada Supreme Court in *Pub. Serv. Comm'n v. Ely Light & Power Co.*[36] In *Ely Light*, the Nevada Supreme Court found as follows:

> In the absence of an abuse of discretion on the part of the utility and in the absence of showing lack of good faith, inefficiency or improvidence, ***and if the amounts in question are reasonable and are actually paid*** as pensions or are allocated to a proper fund under a feasible plan, the commission should not substitute its judgment for that of management.[37]

Thus, *Ely Light* stands for many of the same propositions as *Sw. Bell Tel. Co.* and *W. Ohio Gas*. Specifically, a correct reading of *Ely Light* indicates that if the costs actually incurred by a utility are found to be reasonable via the evidence considered, then without contrary evidence of an abuse of discretion, a showing of a lack of good faith, inefficiency or improvidence, the PUCN should not substitute its judgment for that of management of the utility. In other words, if a cost is reasonable and actually incurred by a utility, a regulatory commission cannot arbitrarily disallow a cost simply because it disagrees with the decision to incur the cost – a regulatory body must base its decision on the evidentiary record.

The *Ely Light* Court did not find that a utility's incurrence of a cost, in and of itself and in the absence of other evidence, entitles the utility to a finding of prudence or a presumption of prudence. Rather, the cost must be found to be "reasonable." Nothing in *Ely Light* supports a determination that a utility is entitled to a presumption of prudence.

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[35] *Washington Gas Light Co v. Public Service Comm'n of District of Columbia*, 450 A.2d 1187, 1225 (D.C. Ct. App. 1982) (noting that the *W. Ohio Gas* case stands for the proposition that the "commission's disallowance of certain advertising expenses as business expenses chargeable to ratepayers was wrong where the commission's action had ***no basis*** in evidence, ***either direct or substantial***.") (emphasis in original).

[36] 80 Nev. 312, 393 P.2d 305 (1964).

[37] *Ely Light & Power Co.*, 80 Nev. at 324, 393 P.2d at 311 (emphasis added).

Southwest Gas next turns to *Nevada Power Co. v. Pub. Util. Comm'n of Nevada*[38] to argue that a presumption of prudence has been applied by the Nevada Supreme Court. However, the *Nevada Power* case does not apply in the context of this general rate case. The decision in *Nevada Power* applies only to deferred energy costs and rate adjustments proposed in a deferred energy accounting application. Thus, applying the findings from *Nevada Power* to a general rate case proceeding is misplaced. Moreover, the Legislature explicitly superseded the findings regarding deferred energy accounting applications in the *Nevada Power* case when it enacted Assembly Bill ("AB") 7 in 2007 to make clear that utilities are not entitled to a presumption of prudence.[39]

Though AB 7 is not directly applicable, it is instructive when you compare the facts and circumstances of a general rate case to a deferred energy accounting case. Deferred energy accounting applications involve changes in rates to allow recovery of natural gas costs (and purchased power costs for electric utilities), which are a pass-through cost to customers. Because the utility is not entitled to earn a profit on the purchase of natural gas, there is no incentive for the utility to imprudently inflate the costs associated with such purchases. In passing AB 7, the Legislature wanted to ensure that a utility is not entitled to a presumption of prudence even with respect to pass-through costs. If there were an inclination to adopt a presumption favoring utilities, it would make more sense from a public policy standpoint for the presumption to exist within the context of proceedings that exclusively involve pass-through costs because one might reasonably presume that a utility with no financial motive to increase the pass-through costs will attempt to keep those costs low to avoid the public outcry that could occur from increasing customers' rates. The utility's cost-benefit analysis changes, however, in a general rate case, where it seeks to recover costs on which it will earn a return. A utility's return on equity is applied to all approved capital costs in a general rate case, allowing the utility to earn more as it spends more.

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[38] 122 Nev. 821, 138, P.3d 486 (2006).

[39] "The provisions of this act are intended to supersede the holding of the Nevada Supreme Court in *Nevada Power Company v. Public Utilities Commission of Nevada*, 122 Nev. Adv. Op. 72 (2006) ...") (Sec. 1 of AB 7). Assemblywoman and then-Speaker, Barbara Buckley, stated, "There is no presumption favoring a public utility when it files a rate change. We do not burden Nevada consumers for mistakes." Minutes of the Meeting of the Assembly Committee on Commerce and Labor, March 7, 2007 at 8, A.B. 7, 2007 Leg., 74th Sess., at https://www.leg.state.nv.us/Session/74th2007/Minutes/Assembly/CMC/Final/454.pdf. 1 CR at 592-593, ¶ 48.

It would be nonsensical to conclude that, despite the Legislature expressing serious concerns regarding a presumption of prudence in cases involving pass-through costs and immediately passing a law to overturn the one court case recognizing any presumption of prudence in Nevada, the Legislature nevertheless intended to preserve a presumption of prudence in cases where the likelihood of imprudence and its effect on ratepayers is much greater.

**3. Past PUCN decisions do not create a presumption of prudence.**

Southwest Gas cites three decades-old instances where the PUCN applied a presumption of prudence, but administrative agencies in Nevada are not bound by *stare decisis*.[40] With regard to Southwest Gas's argument that it was deprived of due process because the PUCN did not apply a presumption in this case, the most relevant past PUCN decision occurred in Southwest Gas's last rate case in 2012. There, Southwest Gas raised the presumption of prudence, and the PUCN did not apply the proposed presumption or acknowledge that such a presumption existed. Rather, the PUCN found that there are several steps to determine whether a rate is just and reasonable, including the first step of examining whether costs were prudently incurred.[41] Thus, Southwest Gas was on notice that the first step in its most recent rate case was for the PUCN to determine whether costs were prudently incurred. The 2012 Southwest Gas rate case is consistent with the PUCN's approach in this case of determining whether costs are just and reasonable by first examining whether those costs are prudently incurred.

**4. A presumption of prudence is not consistent with existing Nevada law.**

The presumption described by Southwest Gas would render several key statutes and regulations meaningless and drastically change utility regulation in Nevada by removing an important consumer protection that requires an affirmative demonstration of prudence. If a presumption of prudence already applied to all utilities in Nevada, there would have been no need for the Legislature to establish

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[40] *State, Dep't of Taxation v. Chrysler Group, LLC*, 129 Nev.274, 279, 300 P.3d 713, 717 at n.3 (2013) (citing *Motor Cargo v. Public Service Comm'n*, 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992)); *see also Desert Irrigation, Ltd. V. State of Nevada*, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997) ("[N]o binding effect is given to prior administrative determinations.").

[41] *In re Southwest Gas Corp.*, 2012 WL 7170426, at ¶ 45 (Dec. 19, 2012).

a process wherein prudence is determined as part of resource planning. There would be no reason to conduct IRP proceedings to reach an outcome that is already presumed.[42]

Among the broad implications of Southwest Gas's proposal is the disproportionate way in which Southwest Gas, compared to most other utilities in Nevada, would benefit, to the detriment of its ratepayers. Natural gas utilities like Southwest Gas are not required to file a general rate case at specific intervals. Electric utilities and certain water utilities, on the other hand, must file rate cases every three years, with some limited exceptions. Natural gas utilities like Southwest Gas also do not make resource planning filings every three years, unlike electric and water utilities. So, under Southwest Gas's proposed approach, it would be able to file a general rate case when it chooses, having spent as much money as it needed to in the intervening years between rate cases and having not received any determination that its investments were prudent from the PUCN in a resource plan, and still be awarded with a presumption of prudence for its investments. Depending on the number of years between Southwest Gas's general rate cases, the total costs presumed to be prudent under its interpretation of the law could be significant. This is illogical in the broader context. Nevada mandates that electric and water utilities file regular resource plans, where prudence is predetermined for costly projects, as well as regular general rate cases. But Southwest Gas argues that state and federal law permits it to sit out for as many years as it chooses with no resource plan or general rate case and still enjoy the benefit of a presumption of prudence, no matter how much money is at stake for ratepayers. As a practical matter, the longer the time between a utility's rate cases, the more challenging it becomes for the regulator to review and assess the reasonableness of the costs that accrue during the interim.

[42] The Nevada Supreme Court states that it avoids statutory interpretation that renders language meaningless or superfluous; statutes must be read harmoniously with one another to avoid an unreasonable or absurd result. *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912 (2010) (citing *Karcher Firestopping v. Meadow Valley Constr.*, 125 Nev. 111, 204 P.3d 1262 (2009) and *AllState Insurance Co. v. Fackett*, 125 Nev. 132, 206 P.3d 572 (2009)).

### C. The PUCN's Order Is Not Confiscatory.

The U.S. Supreme Court in *Hope* found that those looking to overturn a rate order using constitutional claims have a "heavy burden of making a convincing showing that [the order] is invalid because it is unjust and unreasonable ***in its consequences***."[43] Southwest Gas's naked assertions of an unconstitutional taking fall far short of meeting this "heavy burden."[44] Southwest Gas did not even attempt to produce evidence as to how the rates resulting from the PUCN's Order "jeopardize[d] the financial integrity" of the company.[45] The *Duquesne* Court explained that an argument must be made that the rate-setting decision (1) leaves Southwest Gas with insufficient operating capital; (2) impedes its ability to raise future capital; or (3) is inadequate to compensate current equity holders for the risk associated with their investments.[46]

As previously discussed, it is the overall impact of the rate order that must be found to be "constitutionally objectionable."[47] Constitutional claims based upon a "piecemeal"[48] examination of methodologies are flawed because "[t]he Constitution protects the utility from the net effect of the rate order on its property."[49] Southwest Gas failed to provide any review of the overall impact of the PUCN's Order. There has been no argument presented that Southwest Gas is lacking sufficient capital to provide safe, adequate, and reliable service to its customers. Nor is there any mention that the overall effect of the Order will be that Southwest Gas cannot access capital in the market in the future

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[43] 320 U.S. at 602, 64 S.Ct. at 288 (emphasis added).

[44] *See Puerto Rico Tel. Co., Inc. v. Telecom. Regulatory Bd. of Puerto Rico*, 665 F.3d 309, 324 (1st Cir. 2011) (stating that a "naked assertion on appeal" of constitutional claims of confiscatory rates "falls far short of meeting its 'heavy burden'" of demonstrating that a rate threatens its financial integrity) (citing *Hope*, 320 U.S. at 602, 64 S.Ct. at 288).

[45] *Duquesne*, 488 U.S. at 312, 109 S.Ct. at 618.

[46] *Id.*

[47] *Id.*, 488 U.S. at 310, 312, 109 S.Ct. at 617-18 ("'If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry ... is at an end.'") (citing *Hope*, 320 U.S. at 602, 64 S.Ct. at 288)).

[48] *Id.*, 488 U.S. at 313, 109 S.Ct. at 618.

[49] *Id.*, 488 U.S. at 314, 109 S.Ct. at 619 ("The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect.").

or continue compensating its equity holders for the risks associated with their investment. The Court, therefore, cannot find that the PUCN's Order results in an unconstitutional confiscation or taking.

## CONCLUSION

The PUCN Order subject to this judicial review epitomizes the type of rate-setting and regulatory oversight contemplated and expressly authorized by the Legislature.[50] The PUCN acted to ensure efficient, prudent, and reliable operation and service by Southwest Gas,[51] and the PUCN's Order balances the interest of the ratepayers and shareholders of Southwest Gas, allowing Southwest Gas to earn a fair return on investments through just and reasonable rates.[52] Therefore, the Court upholds the PUCN's decision, finding that the PUCN relied upon substantial evidence to make the findings in its Order, and its Order is not (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the PUCN; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion.

## ORDER

IT IS ORDERED:

The PUCN's Order on Petitions for Reconsideration and Clarification, issued on February 15, 2019, and the PUCN's Modified Order, also issued on February 15, 2019, in PUCN Docket No. 18-05031, are affirmed.

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[50] *Nev. Power Co. v. Eighth Judicial Dist. Court of Nev.*, 120 Nev. at 959, 102 P.3d at 585-86 (2004) (finding that the power to prescribe rates is a legislative function).

[51] NRS 704.001(3).

[52] NRS 704.001(4).

Dated this 5th day of March, 2020.

DISTRICT COURT JUDGE

Respectfully submitted by:
THE PUBLIC UTILITIES COMMISSION OF NEVADA

By: _____
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DEBREA M. TERWILLIGER (SBN 10452)
1150 E. William Street
Carson City, Nevada 89701

*Attorneys for the Public Utilities Commission of Nevada*

Approved as to form and content by:

THE STATE OF NEVADA, BUREAU OF CONSUMER PROTECTION

By: _____
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*Attorneys for Petitioner Southwest Gas Corporation*

# DISTRICT COURT
# CLARK COUNTY, NEVADA

**Other Judicial Review/Appeal** **COURT MINUTES** **September 12, 2019**

A-19-791302-J Southwest Gas Corporation, Petitioner(s)
vs.
Public Utilities Commission of Nevada, Respondent(s)

**September 12, 2019 3:00 AM Motion for Leave**

**HEARD BY:** Kephart, William D. **COURTROOM:** No Location

**COURT CLERK:** Tia Everett

**RECORDER:**

**REPORTER:**

**PARTIES PRESENT:**

## JOURNAL ENTRIES

- COURT ORDERED, matter CONTINUED pursuant to the agreement between the parties.

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

**Other Judicial Review/Appeal** **COURT MINUTES** **October 15, 2019**

A-19-791302-J Southwest Gas Corporation, Petitioner(s)
vs.
Public Utilities Commission of Nevada, Respondent(s)

**October 15, 2019** **9:00 AM** **Motion for Leave**

**HEARD BY:** Bonaventure, Joseph T. **COURTROOM:** RJC Courtroom 16B

**COURT CLERK:** Tia Everett

**RECORDER:** Christine Erickson

**REPORTER:**

**PARTIES PRESENT:**

| | |
|---|---|
| Polsenberg, Daniel F. | Attorney |
| Richburg, Whitney F. | Attorney |
| Terwilliger, Debrea M. | Attorney |

**JOURNAL ENTRIES**

- Following arguments by counsel, COURT ORDERED, Motion GRANTED Petitioner shall be permitted to file a reply. FURTHER ORDERED, Respondent shall be permitted to file a Sur-Reply which shall be limited to 19 pages and filed on or before 11/01/19 with tabbed courtesy copies being provided to the Court. FURTHER ORDERED, matter SET for argument on the Petition for Judicial Review.

12/17/2019 9:00 AM PETITION FOR JUDICIAL REVIEW

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

**Other Judicial Review/Appeal** **COURT MINUTES** **December 17, 2019**

A-19-791302-J Southwest Gas Corporation, Petitioner(s)
vs.
Public Utilities Commission of Nevada, Respondent(s)

**December 17, 2019 9:00 AM All Pending Motions**

**HEARD BY:** Kephart, William D. **COURTROOM:** RJC Courtroom 16B

**COURT CLERK:** April Watkins

**RECORDER:** Christine Erickson

**REPORTER:**

**PARTIES PRESENT:**

| | |
|---|---|
| Polsenberg, Daniel F. | Attorney |
| Smith, Abraham G. | Attorney |
| Stuhff, Paul E. | Attorney |
| Terwilliger, Debrea M. | Attorney |

**JOURNAL ENTRIES**

- RESPONDENT'S EX PARTE APPLICATION FOR AN ORDER ON ORDER SHORTENING TIME REGARDING ITS MOTION FOR STAY, OR, ALTERNATIVELY CONTINUANCE...STATE OF NEVADA, BUREAU OF CONSUMER PROTECTION'S JOINDER TO THE PUBLIC UTILITY COMMISSION OF NEVADA'S MOTION TO STAY OR, ALTERNATIVELY, CONTINUANCE

Court noted procedural history and advised only the motion to stay will be addressed today. Ms. Terwilliger argued in support of stay until clarity is received by the Nevada Supreme Court as to the appeal process. Further, Ms. Terwilliger argued Respondent did not cause delay, Petitioner not harmed here due to their actions and the shareholders will not be harmed as well. Mr. Stuhff joined with Commission's motion for stay and argued case has suffered by the delays brought on by Petitioner due to the Petitioner asking for more briefing then called for. Further, with amount of briefing, Commission has sought extraordinary relief, gone to the Nevada Supreme Court and case should be stayed pending decision by the Nevada Supreme Court. Colloquy. Additional argument by Ms. Terwilliger. COURT ORDERED, motion and joinder DENIED. Hearing set for January 9, 2020, STANDS.

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

**Other Judicial Review/Appeal** **COURT MINUTES** **January 09, 2020**

A-19-791302-J Southwest Gas Corporation, Petitioner(s)
vs.
Public Utilities Commission of Nevada, Respondent(s)

**January 09, 2020** **1:00 PM** **Petition for Judicial Review**

**HEARD BY:** Kephart, William D. **COURTROOM:** RJC Courtroom 16B

**COURT CLERK:** Tia Everett

**RECORDER:** Christine Erickson

**REPORTER:**

**PARTIES PRESENT:**

| | |
|---|---|
| Polsenberg, Daniel F. | Attorney |
| Richburg, Whitney F. | Attorney |
| Smith, Abraham G. | Attorney |
| Terwilliger, Debrea M. | Attorney |

**JOURNAL ENTRIES**

- Following arguments by counsel, COURT ORDERED, Petition DENIED

Court Finds, there is no statutory or legal authority that mandates or requires that this Court find that there is a presumption of prudence in this particular matter under the circumstances of a general rate case. Further, Southwest Gas was put on proper notice through their initial requirements under paragraph 42 and 45 to be prepared to answer requiring their duty to support their burden that their requests were reasonable. Finally, the Court Finds, there was substantial evidence in the record that the Public Utilities Commission's decision was appropriate and COURT ORDERED, Decision UPHELD and Petition DENIED.

**EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE**

# NOTICE OF DEFICIENCY

**ON APPEAL TO NEVADA SUPREME COURT**

**DANIEL F. POLSENBERG**
**3993 HOWARD HUGHES PKWY., SUITE 600**
**LAS VEGAS, NV 89169-5996**

**DATE: March 27, 2020**
**CASE: A-19-791302-J**

**RE CASE**: SOUTHWEST GAS CORPORATION vs. PUBLIC UTILITIES COMMISSION OF NEVADA

NOTICE OF APPEAL FILED: March 25, 2020

**YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.**

PLEASE NOTE: DOCUMENTS **NOT** TRANSMITTED HAVE BEEN MARKED:

☒ $250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
- If the $250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.

☐ $24 – District Court Filing Fee (Make Check Payable to the District Court)**

☒ $500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
- NRAP 7: Bond For Costs On Appeal in Civil Cases

☐ Case Appeal Statement
- NRAP 3 (a)(1), Form 2

☒ Filed Stamped Order

☐ Notice of Entry of Order

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NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. The district court clerk shall apprise appellant of the deficiencies in writing, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (g) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

*Please refer to Rule 3 for an explanation of any possible deficiencies*.

***Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.*

# Certification of Copy

**State of Nevada**
**County of Clark** } **SS:**

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; NOTICE OF ENTRY OF ORDER DENYING PETITION FOR JUDICIAL REVIEW; DISTRICT COURT MINUTES; NOTICE OF DEFICIENCY

SOUTHWEST GAS CORPORATION,

Petitioner(s),

vs.

PUBLIC UTILITIES COMMISSION OF NEVADA,

Respondent(s),

Case No: A-19-791302-J

Dept No: XIX

now on file and of record in this office.

**IN WITNESS THEREOF,** I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 27 day of March 2020.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk