Case No. 80911

In the Supreme Court of Nevada

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SOUTHWEST GAS CORPORATION,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF NEVADA; and STATE OF NEVADA BUREAU OF CONSUMER PROTECTION,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable WILLIAM KEPHART, District Judge
District Court Case No. A-19-791302-J

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CERTIFICATE OF SERVICE

I certify that on January 4, 2021, I submitted the foregoing "Joint Appendix" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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be compensated for all prudent investments at their actual cost when made . . . irrespective of whether individual investments are deemed necessary or beneficial in hindsight" and "the utility is entitled to the presumption that the investments were prudent, unless the contrary is shown"); *Gulf States Utils. Co. v. La. Pub. Serv. Comm'n*, 578 So.2d 71, 85 (La. 1991) ("[A] utility's investments are presumed to be prudent and allowable."); *Havre de Grace & Perryville Bridge Co. v. Towers*, 103 A. 319, 321 (Md. Ct. App. 1918); *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 405 A.2d 153, 177 (Me. 1979) (citing *W. Ohio Gas*, 294 U.S. at 72); *K N Energy, Inc. v. Cities of Alliance & Oshkosh*, 670 N.W.2d 319, 324 (Neb. 2003) (quoting Brandeis concurrence in *Southwestern Bell Telephone*); *Long Island Lighting Co. v. Pub. Serv. Comm'n*, 523 N.Y.S.2d 615, 620 (N.Y. App. Div. 1987) ("Staff is obliged to demonstrate a tenable basis for raising the specter of imprudence before the utility can be called upon to defend its conduct . . . ."); *Turpen v. Okla. Corp. Comm'n*, 769 P.2d 1309, 1330 (Okla. 1988) ("Since good faith is presumed on the part of public utility managers, their judgment about prudent outlays, including outlays for capital, should not be overruled unless inefficiency or improvidence on their part is shown."); *Pa. Pub. Util. Comm'n v. Phila. Elec. Co.*, 460 A.2d 734, 737 (Pa. 1983) (utility commission "is powerless to interfere with the general management decisions of public utility companies"); *Hamm v. S.C. Pub. Serv. Comm'n*, 422 S.E.2d 110, 112 (S.C. 1992) ("Although the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility's expenses are presumed to be reasonable and incurred in good faith." (citing *Sw. Bell Co.* and *W. Ohio Gas Co.*)); *Logan City v. Pub. Utils. Comm'n of Utah*, 296 P. 1006, 1007-08 (Utah 1931) (utility's business decision "should not be interfered with by the commission unless it is made to appear that the policy and consequent expenditure is actuated by bad faith, or involves dishonesty, wastefulness, or gross inefficiency"); *City of Norfolk v. Chesapeake & Potomac Tel. Co. of Va.*, 64 S.E.2d

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772, 784 (Va. 1951) (quoting language from *Ala. Pub. Serv. Comm'n*, 42 So.2d at 674, quoted above); *State ex rel. Pac. Tel. & Tel. Co. v. Dep't of Pub. Serv.*, 142 P.2d 498, 527 (Wash. 1943) ("In the absence of any showing that such officers have abused their discretion or acted arbitrarily, illegally, or beyond their lawful authority, courts will seldom interfere in the financial arrangements or methods of management of a business."); *Waukesha Gas & Elec. Co. v. R.R. Comm'n of Wis.*, 194 N.W. 846, 855 (Wis. 1923) ("In the absence of satisfactory proof to the contrary, it must be presumed that the investment was prudently made."); 73B C.J.S. *Public Utilities* § 134, Westlaw (database updated Mar. 2019) ("A utility is entitled to a presumption in a ratemaking proceeding that its expenditures were reasonable and incurred in good faith . . . ."); 2 Leonard Saul Goodman, THE PROCESS OF RATEMAKING 860 (1998), *available at* 2005 WL 998309 (hereinafter, "Goodman") ("A legal presumption that utility management has acted prudently surrounds their investment decisions. In the absence of specific evidence of imprudence, the investment . . . must be included in rate base.").

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2. The presumption is a common law rule with roots in the Constitution

The Commission suggested that there is only a presumption if it is created by statute. But the presumption is based in the common law and the United States Constitution, not a statute. *See Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 409 S.W.3d 371, 376 (Mo. 2013) ("The presumption of prudence is not a creature of statute or regulation.").

The Nevada Supreme Court cases do not rely on statutes as a basis for the presumption. *Ely Light* relied on caselaw, including *Southwest Bell Telephone* and *West Ohio Gas*. *Nevada Power* relied in the Commission's own decision in *Re Nevada Power Co.*, which, in turn, relied on the Federal Energy Regulation Commission opinion in *Re Midwestern Gas Transmission Co.*, 65 Pub.

Util. Rep. 4th (PUR) 508, 510 (F.E.R.C. Mar. 7, 1985).[2] And *Midwestern Gas Transmission* relied on the U.S. Supreme Court's opinion in *West Ohio Gas Co. See Midwestern Gas Transmission*, 65 P.U.R.4th 508 (1985). None of these cases cite a statute as the basis for the presumption.

In fact, *Ely Light* holds that there is a presumption of prudence, *despite a Nevada statute placing the burden of proof on the party attacking an order from the Commission* (then NRS 704.550, now NRS 703.373(9)) and the common law presumption that the Commission's orders are presumed valid. *Ely Light*, 80 Nev. at 324, 393 P.2d at 311; *see also Nev. Power Co.*, 122 Nev. at 834-36, 138 P.3d at 495-96 (applying presumption of prudence and reversing Commission order, despite general rule of deference to the Commission); *Nat'l Fuel Gas Distr. Corp. v. Pub. Serv. Comm'n*, 947 N.E.2d 115, 120-21 (N.Y. 2011) (reversing commission's order because it failed to rebut presumption of prudence, despite "deferential standard of review" of commission's orders). The Nevada Supreme Court held, a century ago, that "[t]he rates fixed by the commission are not conclusive." *Steamboat Canal*, 43 Nev. 298, 185 P. at 807. In other words, the Commission's discretion has boundaries.

The presumption of prudence overrides the general rule in favor of upholding the Commission's orders because the presumption has a constitutional dimension. Courts only have jurisdiction to review decisions of state regulatory commissions under the Fifth and Fourteenth Amendments – to determine "whether the action of the state officials in the totality of its consequence is consistent with the enjoyment by the regulated utility of a revenue something higher than confiscation." *W. Ohio Gas*, 294 U.S. at 70; *Pub. Serv. Comm'n v. Cont'l Tel. Co. of Cal.*, 94 Nev. 345, 348, 580 P.2d 467, 468 (1978) ("The district court and supreme court should not interfere with the commission's rulings or

[2] *Midwestern Gas Transmission* is hornbook law. Goodman at 861 & n.2.

review its determinations, further than to keep it within the law and protect constitutional rights of the public service agencies over which control is exercised.”). Without a constitutional backing, the courts would have no basis for applying the presumption when reviewing decisions by utility regulators. *See W. Ohio Gas*, 294 U.S. at 70 (“This court does not sit as a board of revision with power to review the action of administrative agencies upon grounds unrelated to the maintenance of constitutional immunities.”). But they do. *See id.* at 73 (managers’ good faith is presumed and “a court will not substitute its judgment” for management’s “[i]n the absence of a showing of inefficiency or improvidence”); *Ely Light*, 80 Nev. at 324, 393 P.2d at 311.

And where, as here, the utility alleges that the regulator has violated the utility’s constitutional rights, the Commission’s findings are not entitled to deference (although they may be considered). *Ohio Valley Water Co. v. Borough of Ben Avon*, 253 U.S. 287, 289 (1920); *Steamboat Canal*, 43 Nev. 298, 185 P. at 807 (“The courts are open for a review of the proceedings of the commission and the right given by the parties to adduce evidence in addition to that introduced on the hearing before the commission.”). “Legislative declaration of finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained.” *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52-53 (1936); *see also City of Dallas v. Stewart*, 361 S.W.3d 562, 576 n.22 (Tex. 2012) (in case involving confiscation challenge to public utility rate order, “plenary court review of constitutionally relevant facts” is required by *Ben Avon*).

The presumption is a constitutionally based protection because it ensures that the utility’s right to carry on its business and deal with its property is not

taken away through the "guise" of ratemaking.[3] *See United Fuel Gas Co.*, 278 U.S. at 320; *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) ("The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."); *id.* at 306, 308, 310 (examining jurisdiction and noting that the "partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment," and that the question of whether a rate is "so low as to be confiscatory" had "constitutional overtones"); *Pac. Gas & Elec. Co. v. City & Cnty. of San Francisco*, 265 U.S. 403, 415 (1924) (in rate making cases, courts are concerned with "confiscation," and constitutional guaranty "inhibit[s]s the taking of private property for public use without compensation under any guise"); *Pac. Tel. & Tel. Co. v. Whitcomb*, 12 F.2d 279, 288 (W.D. Wash. 1926) ("The right of a public utility corporation honestly and in good faith to carry on its business and direct its affairs must not be wrested from it under the guise of rate making."); *Monroe Gaslight & Fuel Co. v. Mich. Pub. Utils. Comm'n*, 11 F.2d 319, 325 (E.D. Mich. 1926) (noting that "[a]s to all disbursements actually made within the limits of good faith, the managers' discretion must stand, unless it is abused" and that "the constitutional guaranty is not to be avoided merely because the management is less than perfect");[4] *New. Eng. Tel. & Tel. Co. v. Dep't of Pub. Utils.*, 97 N.E.2d

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[3] The constitutional guaranty is sometimes expressed in terms of due process or equal protection, and sometimes in terms of the takings clause. *See Duquesne*, 488 U.S. at 307-12 (referring to due process and the takings clause); *St. Joseph Stock Yards*, 298 U.S. at 51 ("But the Constitution fixed limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation."); *Covington & L. Turnpike Rd. Co. v. Sandford*, 164 U.S. 578, 592-94 (1896) (power to regulate is subject to the takings clause and equal protection clause).

[4] The Nevada Supreme Court cited *Monroe Gaslight & Fuel* in *Ely Light & Power*, 80 Nev. at 324-25, 393 P.2d at 311-12.

509, 514 (Mass. 1951) ("[W]e agree of course that a public regulatory board cannot assume the management of the company and cannot under the guise of rate making interfere in matters of business detail with the judgment of its officers reached in good faith and within the limits of a reasonable discretion."); *State Pub. Utils. Comm'n v. Springfield Gas & Elec. Co.*, 125 N.E. 891 (Ill. 1919) (utility "rests secure under the constitutional protection, which extends, not merely to the title, but to the right to receive just compensation for the service given to the public"); 73B C.J.S., *Public Utilities* § 14, Westlaw (database updated Mar. 2019) ("Any regulation, therefore, which operates as a confiscation of private property or constitutes an arbitrary or unreasonable infringement of personal or property rights is void because it is repugnant to the constitutional guaranties of due process and equal protection of the laws.").

The presumption of prudence is the primary bulwark against the Commission substituting its judgment for the utility's. It mandates allowance of costs in the absence of evidence demonstrating that the cost was imprudently incurred. Without the presumption, the Commission would be allowed to substitute its judgment for the utility's by the simply expedient of concluding that the utility has not met its burden of proof. *See* Frank P. Darr, *A State Regulatory Strategy for the Transitional Phase of Gas Regulation*, 12 Yale J. on Reg. 69, 89 (1995) ("Inherent in the determination that a capital item or expense is too high is a rejection of the management decision to incur that cost."). And that's exactly what the Commission did in this case, despite the absence of evidence showing imprudence.

C. AB 7 Only Eliminated the Presumption in Deferred Energy Accounting Cases

The Commission concluded that the presumption of prudence does not apply because the Nevada Legislature eliminated the presumption when it en-

acted Assembly Bill 7 in 2007. *See* A.B. 7, 74th Leg. (Nev. 2007). The Commission erred as a matter of law because AB 7's amendments only apply to "deferred energy accounting," not to general rate cases like this one.

1. The difference between deferred energy accounting proceedings and general rate cases

Some background on the difference between deferred energy accounting proceedings and general rate cases will be useful before discussing why AB 7 only applies to deferred energy accounting proceedings.

General Rate Cases

"Few types of legal proceedings are more complex, intricate and expensive than the full-blown utility rate case, with its myriad problems in valuation, economics, accounting, law and engineering." Joe H. Foy, *Cost Adjustment in Utility Rate Schedules*, 13 Vand. L. Rev. 663, 663 (1960). A general rate application "traditionally covers all facets of a utility's operations, finances, rate design, and rate of return." 73B C.J.S. *Public Utilities* § 21 n.5, Westlaw (database updated Mar. 2019).

A general rate case is governed by NRS 704.110. A general rate application must include "a statement showing the recorded results of revenues, expenses, investments and costs of capital for its most recent 12 months for which data were available when the application was prepared." NRS 704.110(3). The utility may (but is not required to) submit a statement "showing the effects, on an annualized basis, of all expected changes in circumstances." NRS 704.110(4). The Commission is required to consider evidence in support of the increased rates "based upon actual recorded results of operations for the same 12 months, adjusted for increased revenues, any increased investment in facilities, increased expenses for depreciation, certain other operating expenses as approved by the Commission and changes in the costs of securities." NRS 704.110(3).

Commission regulations require a utility to include voluminous information in its application. NAC 703.2211, NAC 703.2215. The application must include dozens of statements and schedules containing information about nearly every aspect of the utility's business. NAC 703.2271-703.2452. General rate cases can last as long as 210 days in Nevada. NRS 704.110(2).

Deferred Energy Accounting Proceedings – aka "Purchased Gas Adjustments"

Deferred energy accounting deals with a specific problem – fluctuations in natural gas prices that cause financial difficulty for utilities faced with the delay inherent in regulatory approval of rate changes.

"Natural gas prices have historically been volatile." Jonas J. Monast, *Electricity Competition and the Public Good: Rethinking Markets and Monopolies*, 90 U. Colo. L. Rev. 667, 684 n.73 (2019); *see also In re Borden Chems. & Plastics Operating Ltd. P'ship*, 336 B.R. 214, 222 (Bankr. D. Del. 2006) ("Prices in the natural gas market are volatile because demand shifts quickly in response to weather changes and natural gas often cannot be moved to areas where there are unexpected increases in demand."); *Hunt Oil Company v. Batchelor*, 644 So.2d 191, 204 (La. 1994) ("The market for natural gas is extremely volatile . . . ."). At times, a regulated utility will have to purchase the commodity it is selling "on the wholesale market at prices higher than [it] could charge [its] customers in the retail market." *Nev. Power Co.*, 122 Nev. at 824, 138 P.3d at 488. "Because the cost of gas changes frequently and gas utilities continuously purchase gas, the cost of gas to the customer usually changes in the time between rate cases." *Purchased Gas Adjustments*, American Gas Association, https://www.aga.org/research/policy/purchased-gas-adjustments/. The utility consequently could suffer losses that a non-regulated business would not suffer. *Nev. Power Co.*, 122 Nev. at 824, 138 P.3d at 488; *People' Counsel of D.C. v. Pub. Serv. Comm'n of D.C.*, 472 A.2d 860, 863-64 (D.C. Ct. App. 1984)

("When inflation and cost fluctuation enter the economic picture . . . such formal rate hearings become inadequate as a means of ensuring a fair rate of return because of the delay inherent in them.").

"To enable utilities to recoup some of the losses incurred as a result of the regulations, the Nevada Legislature passed legislation permitting deferred energy accounting." *Nev. Power Co.*, 122 Nev. at 842, 138 P.3d at 488-89. Deferred energy accounting is governed by NRS 704.185, which "permit[s] public utilities to use a deferred energy accounting procedure to account for and recover increased costs incurred in the purchase of fuel or of power." *Sierra Pac. Power Co. v. Pub. Serv. Comm'n of Nev.*, 97 Nev. 479, 481, 634 P.2d 1200, 1201 (1981); *see also Nev. Power*, 122 Nev. at 824 & n.1, 138 P.3d at 489 & n.1 (noting that NRS 704.185 "provides for deferred energy accounting"). "[D]eferred energy accounting documents the losses (or gains) resulting from any difference between wholesale purchase prices and the regulated retail consumer rates by authorizing a public utility to seek reimbursements from its customers through a rate increase (or to reimburse its customers through a rate decrease) at a later date." *Nev. Power*, 122 Nev. at 825, 138 P.3d at 489.

Every state has a mechanism like deferred energy accounting for dealing with fluctuations in fuel costs. Liam Holland, Note, *Footing the Bill for Natural Gas Leaks: Why States Should Limit Cost Recovery of Lost and Unaccounted for Gas*, 58 B.C. L. Rev. 317, 326 (2017). They go by different names, such as "fuel adjustment clauses," "purchased gas adjustments," or "gas cost adjustments." *See id.*; 73B C.J.S. *Public Utilities* § 87, Westlaw (database updated Mar. 2019) ("'Fuel adjustment clauses' are widely accepted rate making tools utilized to allow a utility to recoup fluctuating fuel costs on an ongoing basis."). "Commissions employ such clauses when they encounter an item of expense, such as fuel costs, that tends to be more volatile in comparison to the utility's other costs." *Daily Advertiser v. Trans-La*, 612 So.2d 7, 22 (La. 1993). They have been in use

since the 1920s, but became very popular after fuel costs soared due to the Arab oil embargo in 1973. 12 Marc E. Lewis, Eastern Mineral Law Foundation, Proceedings of the 12th Annual Institute § 8.06 (1991). "[T]he lag between the fuel price increase and the time required to complete a rate case caused serious financial difficulties for utilities." *Id.*

Fuel adjustment clauses have "reduce[d] the volume of rate cases and . . . conserve[d] the time of regulatory bodies." Joe H. Foy, *Cost Adjustment in Utility Rate Schedules*, 13 Vand. L. Rev. 663, 668 (1960). "[A]s a general principle, the fuel adjustment clause points the way toward the solution of one of the more acute problems in the utility rate-making field, namely, that of integrating public utility rates, which are generally of a rigid nature, into a flexible national economy." *Re Cent. Me. Power Co.*, 22 P.U.R.3d 466 (Me. Pub. Util. Comm'n Jan. 31, 1958).

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General Rate Cases Are Distinct from Deferred Energy Accounting Proceedings

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Consistent with the above, general rate cases and deferred energy accounting proceedings are very different in Nevada.

General Rate Cases Are Governed by Different Statutes and Regulations than Deferred Energy Accounting Proceedings

A general rate application is filed under NRS 704.110(1)-(7). *Sierra Pac. Power*, 97 Nev. at 481, 634 P.2d at 1202 (noting that a "general rate increase application" is filed "pursuant to NRS 704.100 and 704.110"); NAC 703.272(2) ("If the application for approval of new or revised depreciation rates is filed as part of a general rate application pursuant to NRS 704.110 . . . ."); NAC 703.2206 (noting that a general rate application is filed "pursuant to paragraph (c) or (d) of subsection 3 of NRS 704.110).

Deferred energy accounting, in contrast, is governed by NRS 704.185.

The statutes implicitly recognize the difference between the two types of proceedings because they allow a utility to file applications "to recover the increased cost of purchased fuel, purchased power, or natural gas purchased for resale," "while a general rate application is pending" before the Commission. NRS 704.110(6). The regulations expressly recognize the difference. *See* NAC 703.2201-703.2481 (general rate cases); NAC 704.023-704.195 (deferred energy proceedings); *see also Re Nev. Power Co.*, 74 P.U.R.4th 703 (noting that general rate cases are governed by different regulations than deferred energy proceedings). In fact, ***deferred energy accounting cannot be included in a general rate case***. *See* NAC 703.2261 ("Any information submitted that relates to deferred energy accounting must be prepared and filed in accordance with NAC 704.023 to 704.195, inclusive.").

Deferred Energy Accounting Proceedings Allow a Utility to Avoid a General Rate Cases

The entire purpose of using deferred energy accounting proceedings is *to avoid* filing a costly and time-consuming general rate case. *Sierra Pac. Power Co. v. Pub. Serv. Comm'n of Nev.*, 97 Nev. 479, 481, 634 P.2d 1200, 1201 (1981) ("By electing to follow [deferred energy] accounting methods established by [the Commission], a utility is enabled to recover these increased costs *without having to go through the ordinary and relatively cumbersome rate increase process*." (emphasis added)). If the cost of fuel could only be recovered in a general rate case, the utility would go months paying more than it could recover from its customers. *See id*: *Daily Advertiser*, 612 So.2d at 22, 24 & n.24 (discussing "regulatory lag"). And "'[l]ittle purpose is served by requiring the commission to hold a general rate proceeding, recalculating all expenses, revenues, rate base, and rate of return, when the only substantial issues are extraordinary changes in fuel costs . . . ." *J.R. Simplot Co. v. Intermountain Gas Co.*, 630 P.2d 133, 134 (Idaho 1981) (quoting *Cal. Mfrs. Ass'n v. P.U.C.*, 595 P.2d 98, 101 (Cal. 1979)).

A gas cost adjustment proceeding "is not intended to serve as a substitute for a general rate proceeding, but is rather intended to be a summary proceedings to determine gas cost adjustments." *Teledyne Portland Forge v. Ohio Valley Gas Corp.*, 666 N.E.2d 1278, 1280 (Ind. Ct. App. 1996); *see also Consol. Gas Supply Corp. v. F.E.R.C.*, 745 F.2d 281, 285 n.9 (4th Cir. 1984) (charges for cost of gas under a purchased gas adjustment clause are "recovered separately from general rate charges").

Like the Nevada Supreme Court, courts in other jurisdictions have recognized the difference between a general rate case and a proceeding to recover the increased costs of purchasing energy. *See, e.g.*, *In re Tenn. Gas Pipeline Co.*, 21 FERC ¶ 61,004, 61,010 (Oct. 1, 1982) (noting that purchased gas adjustment "proceedings serves limited purposes and has an inherently limited scope" compared to general rate case in which "all elements of pipeline costs are scrutinized and system-wide issues involving inter-customer equity, such as cost allocation and rate design are fully explored"); *S. Edison Co. v. Pub. Utils. Comm'n*, 576 P.2d 945, 953 (Cal. 1978) ("[E]mphasiz[ing] the difference between a true ratemaking proceeding, in which many variables are taken into account and broad policies are formulated, and the narrowly restricted and semi-automatic functioning of an adjustment cause."); *In re Interstate Power Co.*, 500 N.W.2d 501, 505 (Minn. Ct. App. 1993) ("Because rate proceedings are generally slow and cumbersome, automatic fuel adjustment clauses allow for fluctuations in fuel costs that could either drive a utility out of business or result in windfall profits."); Richard J. Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 Harv. L. Rev. 345, 350 (1983) ("[g]as acquisition costs are singled out for separate regulatory treatment" via purchase gas adjustments).

2. *On its face, AB 7 only applies to deferred energy accounting proceedings*

When the Legislature enacted Assembly Bill 7 in 2007, it only eliminated the presumption of prudence in proceedings involving deferred energy accounting. The amendment does not apply to general rate cases.

AB 7 was targeted solely at recovery of costs for purchasing fuel and natural gas. It was entitled "AN ACT relating to public utilities; providing that certain electric and natural gas utilities applying to the [Commission] to clear deferred accounts or to recover costs for purchased fuel and power have the burden of proving reasonableness and prudence in such applications; prohibiting the Commission from allowing natural gas utilities to recover costs for purchases made imprudently; and providing other matters properly relating thereto." 2007 Nev. Stat., ch. 163.

The bill added two sentences to NRS 704.185, which is entitled "[u]se of deferred accounting by certain natural gas utilities; procedure; limitations."[5] The additions state:

> When a public utility which purchases natural gas for resale *files an application to clear its deferred accounts*, the proceeding regarding the application must include a review of the transactions and recorded costs of natural gas included in the application. There is no presumption of reasonableness or prudence for any transactions or recorded costs of natural gas included in the application, and the public utility has the burden of proving reasonableness and prudence in the proceeding.

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[5] The only other change to the statutes wrought by AB 7 was the addition of the following language to NRS 704.110(10): "There is no presumption that any practice or transaction was undertaken, managed or performed prudently by an electric utility applying to the Commission to clear its deferred accounts or to recover costs for purchased fuel and purchased power, and the electric utility has the burden of proving that the practices and transactions of the electric utility were reasonable and prudent." 2007 Nev. Stat., ch. 163, § 2. That provision only applies to electric utilities, and only to an electric utility's deferred energy accounts.

2007 Nev. Stat., ch. 163, § 3 (emphasis added). On its face, the statute only applies to deferred energy accounting.[6] That is conclusive as to the meaning of the statute. *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138-39, 206 P.3d 572, 576 (2009) (plain language of statute controls). Until Southwest Gas filed its general rate application, the Commission appears to have recognized the limited scope of AB 7 because it applied the rebuttable presumption in a general rate case proceeding two years after the statute was enacted. *In re Nev. Power Co.*,

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[6] The statute was subsequently amended in 2011 to change terminology. See A.B. 94, 76th Leg. (Nev. 2011). The statute now provides that "[w]hen a public utility which purchases natural gas for resale files an annual rate adjustment application or an annual deferred energy accounting adjustment application," there is no presumption of reasonableness or prudence. NRS 704.185(3). An "annual deferred energy accounting adjustment application" is only filed by electric utilities. NRS 704.110(6) (noting that an annual deferred energy accounting adjustment application is filed "pursuant to NRS 704.187); NRS 704.187(5) ("'Annual deferred energy accounting adjustment application' means an application filed by an electric utility pursuant to this section and subsection 11 of NRS 704.110.") An "annual rate adjustment application" relates to deferred energy accounting. It is an "application filed pursuant to subsection 9 of NRS 704.110 by a gas utility making quarterly adjustments to its base tariff energy rate." NAC 704.031. NRS 704.110(9) applies when "the Commission approves a request to make any rate adjustments on a quarterly basis pursuant to subsection 8," of NRS 704.110. NRS 704.110(8), in turn, requires a "public utility which purchases natural gas for resale" to "request approval from the Commission to adjust its rates on a quarterly basis between annual rate adjustment applications *based on changes in the public utility's recorded costs of natural gas purchased for resale*." (Emphasis added.) The annual rate adjustment application allows the Commission to evaluate the utility's quarterly adjustments to the rate based on changes to the cost of fuel. NRS 704.110(9)(c); NAC 704.116(3). An "annual rate adjustment application" is different from a "general rate application." NRS 704.062(1), (4); NRS 228.360(1)(a)(2) (treating "a general rate application" and an "annual deferred energy accounting adjustment application" as different things); NRS 703.085(1)(a) (distinguishing between a "general rate application" and "an annual deferred energy accounting adjustment application of an electric utility or a public utility which purchases natural gas for resale"). Again, this is a general rate case, not one involving natural gas purchased for resale.

2009 WL 1893687, at *75 (Nev. Pub. Utils. Comm'n June 24, 2009).

The amendment does not apply to proceedings other than deferred energy accounting proceedings. *Sandpointe Apartments v. Eighth Judicial Dist. Court*, 129 Nev. 813, 827, 313 P.3d 849, 858 (2013) ("Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." (internal quotation marks omitted)); *Hall v. United States*, 566 U.S. 506, 524 (2012) (even if compelling policy reasons supported a particular result, court could not rewrite plain language of a statute, "particularly in this complex terrain of interconnected provisions and exceptions enacted over nearly three decades").

3. The legislative findings only refer to proceedings involving deferred energy accounting

The session law enacted legislative findings that are not included in the Nevada Statutes, but are controlling. *Custom Molders, Inc. v. Am. Yard Prods., Inc.*, 463 S.E.2d 199, 202 (N.C. 1995) ("[T]he statement of a legislative enactment contained in the Session Laws is controlling over the statement codified in the General Statutes."). They confirm that the bill only applied to deferred energy accounting. The Legislature found and declared that "[i]n ***proceedings involving deferred energy accounting*** where a public utility seeks to recover from its ratepayer costs recorded in its deferred accounts *pursuant to NRS 704.185* or 704.187,[7] it is just and reasonable to require a public utility to prove that the *costs recorded in its deferred accounts* were incurred prudently. 2007 Nev. Stat., ch. 163, § 1.1 (emphasis added); *see also id.* § 1.4 (act applies "to all applications of a public utility seeking to clear its deferred accounts"); *id.* § 1.6 ("Under the provisions of this act, in ***proceedings involving deferred energy***

[7] NRS 704.187 only applies to electric utilities.

accounting," no presumption of prudence applies "if any party challenges the prudence of particular costs" (emphasis added)).

The Legislature only "intended to supersede the holding of the Nevada Supreme Court in *Nevada Power . . . to the extent that the Court determined* that the rebuttable presumption of prudence is the controlling procedure ***in proceedings involving deferred energy accounting.***" *Id.* § 1.3 (emphasis added). The Legislature noted that in *Nevada Power*, the Nevada Supreme Court "held that, *in the absence of a statute to the contrary*, the controlling procedure in ***proceedings involving deferred energy accounting*** is the rebuttable presumption of prudence." *Id.* § 1.2 (emphasis added).[8]

"[W]hen legislative findings are expressly included within a statute, those findings should be accorded great weight in interpreting a statute . . . ." *Clean Water Coalition v. The M Resort, LLC*, 127 Nev. 301,313 255 P.3d 247, 255 (2011); *see also* 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.4 (7th ed.), Westlaw (database updated Nov. 2018) ("[C]ourts can more accurately interpret statutes if they use the familiar 'whole act' method of construction and give the preamble the same consideration as a law's enacting portion."). And "[t]he expressly stated purpose of the statute is a factor to be considered." *Hotel Emps. & Rest. Emps. Int'l Union v. State ex rel. Nev. Gaming Control Bd.*, 103 Nev. 588, 591, 747 P.2d 878, 880 (1987); *see also Sheriff, Washoe Cnty. v. Smith*, 91 Nev. 729, 733-34, 542 P.2d 440, 443 (1975) (rejecting interpretation of statute that was "inconsistent with the purpose of the statute as expressed by the Legislature in the preamble").

The statute repeatedly uses the phrase "proceedings involving deferred

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[8] The statute doesn't even entirely dispose of the presumption. "[I]f no party challenges the prudence of particular costs and the public utility has established a prima facie case regarding those costs, the Commission has the authority to approve those costs for recovery by the public utility in its rates." 2007 Nev. Stat., ch. 163, § 1.6.

energy accounting." It was targeted solely at that distinct type of proceeding. It does not apply in general rate cases.

4. The Legislature's omission of general rate cases was deliberate

"Nevada follows the maxim 'expressio unius est exclusion alterius,' the expression of one thing is the exclusion of another." *State v. Javier C.*, 128 Nev. 536, 289 P.3d 1194 (2012). Under that canon of statutory interpretation, "omissions of subject matters from statutory provisions are presumed to have been intentional." *Dep't of Taxation v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005); 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:23 (7th ed.), Westlaw (database updated Nov. 2018) ("In practice, however expressed, all versions of the *expression unius* rule reflect the same common-sense premise that when people say one thing, the do not mean something else."). "Therefore, where the Legislature has, for example, explicitly applied a rule to one type of proceeding, this court will presume it deliberately excluded the rule's application to other types of proceedings." *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009); *see also State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436 (2016) (legislature's "use of 'explicit language' in one provision 'cautions against inferring' the same limitation in another provision" (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013))).

Here, the legislature "could have clearly provided that [the elimination of the presumption of prudence applies to *all* applications for a rate change], but it did not do so." *Id.*; *see also Flores v. Las Vegas-Clark Cnty. Library Dist.*, 432 P.3d 173 (Nev. 2018) (where legislature announced its purpose of occupying the field of firearm regulation and then defined the field as "consisting of only counties, cities, and towns," other kinds of governmental entities were not preempted from regulating firearms); *Raleigh v. G.R. Co. v. Reid*, 80 U.S. 269,

270 (1871) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."). It limited the scope of the amendment to "proceedings involving deferred energy accounting" that are governed by NRS 704.185. The AB 7 amendments therefore do not apply in a general rate case governed by NRS 704.110. *See In re Estate of Prestie*, 122 Nev. 807, 814, 138 P.3d 520, 524 (2006) ("By mentioning select chapters, we can imply that the Legislature's exclusion of other chapters was intentional."); *See Sonia F.*, 125 Nev. at 499-500, 215 P.3d at 708 (statute making evidence of previous sexual conduct inadmissible in criminal prosecution did not apply in civil cases because "the Legislature specifically phrased [the statute] to apply to criminal prosecutions to the exclusion of civil proceedings"); *Gruben v. Leebrick & Fisher*, 84 P.2d 1078, 1080 (Cal. App. Dep't Super. Ct. 1938) (applying *expressio unius* and refusing to apply statutory presumption after bench trial when, on its face, statute only applied after trial by jury, and statutory presumption was in derogation of the common law) *cf. Goldman v. Bryan*, 106 Nev. 30, 37, 787 P.2d 372, 377 (1990) (noting the "well recognized rule that an express constitutional provision requiring a certain thing to be done in a certain way is exclusive to like extent as if it had included a negative provision to the effect that it may not be done in any other way'" (quoting *Robinson v. First Judicial Dist. Court*, 73 Nev. 169, 175, 313 P.2d 436, 440 (1957))).

5. The amendment should be interpreted to avoid repeal of long-standing common law

"Relevant antecedent common law comprises part of a statute's legal history." 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 50:1 (7th ed.), Westlaw (database updated Nov. 2018). And "Legislatures are presumed to know the common law before a statute was enacted." *Id.*

"Statutes in derogation of the common law are to be strictly construed." *W. Indies, Inc. v. First Nat'l Bank of Nev.*, 67 Nev 13, 33, 21 P.2d 144, 154

(1950). Thus, "[i]n the enactment of a statute, 'the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed unless an intention to do so plainly appears by express declaration of necessary implication.'" *Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 537, 245 P.3d 1149, 1155-56 (2010) (quoting 73 Am. Jur. 2d § 97 (2001)). The rule is a variant of *expressio unius*. (2A SUTHERLAND STATUTORY CONSTRUCTION § 47.24 (7th ed.), Westlaw (database updated Nov. 2018) ("Courts long have disfavored statutes in derogation of the common law . . . and extensively employ *expression unius* as one mechanism to avoid repeal of the common law, or refute the maxim to make a statute cumulative with the common law." (footnotes omitted)).

When the Legislature enacted AB 7, it did so against the backdrop of nearly a century of common law holding that there is a presumption of prudence by a utility's management. There is no indication that the Legislature intended to abandon the presumption in general rate cases. "Absent an indication that a legislature intends a statute to supplant common law, courts should not give it that effect." 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 50:1 (7th ed.), Westlaw (database updated Nov. 2018) *see also id.* ("A court construing legislation may refer not only to the common law of its own jurisdiction, but also to the common law in other jurisdictions, to uncover the defects, trends, and policies relating to a statute's subject matter.").

6. The Court should interpret AB 7 to avoid a constitutional question

Although there is no ambiguity in the statute, if the Court somehow perceives ambiguity, "the mere fact that one among alternative constructions of a statute would involve serious constitutional difficulties is reason to reject that interpretation in favor of another." *Sheriff Washoe Cnty. v. Smith*, 91 Nev. 729, 733, 542 P.2d 440, 443 (1975). Again, the United States Supreme Court cases

(and others) recognize that the presumption of prudence is necessary to avoid confiscation of the regulated entity's property. The Court should interpret the statute to avoid this serious constitutional issue.

7. Applying AB 7 in general rate cases would violate four other canons of statutory interpretation

If all of this wasn't enough, at least four other well-established canons of statutory interpretation lead to the conclusion that AB 7 only applies to deferred energy accounting proceedings:

- "An amendment to one section of a statute does not also amend an entirely different section of the same statute, or any part of a different statute, in the absence of any statutory justification." 3A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 67.2 (8th ed.), Westlaw (database updated Nov. 2018). In Nevada, this rule of statutory construction is backed by the Nevada Constitution, which provides that "[e]ach law enacted by the Legislature shall embrace but one subject, . . . which subject shall be briefly expressed in the title." Nev. Const. art. 4, § 17. "Having seen fit to restrict the title of the act to amending but one section of the former act, the legislature cannot go on in the body of the act to amend other sections." *Ex Parte Hewlett*, 22 Nev. 333, 40 P.96, 97 (1895). AB 7 therefore cannot be extended to general rate cases, which are governed by entirely different statutes.
- "If the words of a statute are clear, we should not add to or alter them to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports. *Cirac v. Lander Cty.*, 95 Nev. 723, 729, 602 P.2d 1012, 1016 (1979); 3A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 67.2 (8th ed.), Westlaw (database updated Nov.

2018) ("Where statutory wording is clear, courts do not add to or alter it to accomplish a purpose that does not appear on the face of the statute."). The Commission violated this canon by effectively adding the words "general rate case" to NRS 704.185.

- "Different words used in the same, or a similar, statute are assigned different meanings whenever possible." 3A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 67.2 (8th ed.), Westlaw (database updated Nov. 2018).
- ""Where a legislature includes particular language in one section of a statute but omits it from another section of the same or a related act, it generally acts intentionally and purposely in the disparate inclusion or exclusion." *Id.*; *see also Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 646 (2017) (quoting Sutherland for the same proposition) *Williams v. State Dep't of corrections*, 402 P.3d 1260, 1264 (Nev. 2017) (stating same rule and citing *Loughrin v. United States*, 573 U.S. 351, 358 (2014)).

All of these canons lead to the conclusion that AB 7 only applies to deferred energy accounting proceedings. The phrase "deferred energy accounting" has a specific and technical meaning, created by the Nevada Legislature (it is not used by any other state), and codified multiple times. "When a legislature uses terms that have accumulated settled meaning under equity or the common law, it usually intends to incorporate the established meaning of those terms, unless a statute otherwise dictates." 3A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 67.2 (8th ed.), Westlaw (database updated Nov. 2018). That's what it did here.

8. The legislative history confirms that AB 7 only applies to deferred energy accounting

The statute is not ambiguous, so the Court need not resort to legislative history. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). But the legislative history of AB 7 confirms that it applies only to deferred energy accounting. Assemblywoman Buckley sponsored the bill. Consistent with the legislative findings, she focused solely on deferred energy accounting at a hearing before the Nevada Assembly Committee on Commerce and Labor.

She said that the bill was driven by the Legislature's re-institution of deferred energy accounting. *Nevada Assembly Committee Minutes, Comm. on Commerce and Labor*, 2007 Leg., 74th Sess. 7-8 (Statement of Assemblywoman Buckley, Member, Assembly Comm. on Commerce and Labor) (Mar. 7, 2007), *available at* https://www.leg.state.nv.us/Session/74th2007/Minutes/Assembly/CMC/Final/454.pdf. She explained that the bill was intended to overrule the Nevada Supreme Court's decision in *Nevada Power*, which dealt only with a "deferred energy application." *Id.* The statute was intended to be "precise" and the drafters of the amendment "struggled over every word." *Id.* at 8. The inclusion of legislative findings was deliberate and they "basically walk through everything [Assemblywoman Buckley] said in [her] testimony." *Id.* Those findings only address deferred energy accounting proceedings, which is confirmed by the text of the amendment (and its placement in NRS 704.185). Although one passage of Assemblywoman Buckley's comments refers generally to a "rate change," the context of her comments make clear that she was only talking about costs relating to a deferred energy accounting rate change, not a general rate case. Her more general comments should be read in light of her other comments, and the findings and text of the statute the Legislature actually passed.

The Legislature only included deferred energy accounting proceedings within the scope of the amendment. The presumption of prudence still applies

in general rate cases. *Hall*, 566 U.S. at 524.

9. The presumption of prudence avoids practical problems

Ratemaking cases are not manageable if there is no presumption of prudence. *See In re Pac. Gas & Elec. Co.*, 165 FERC ¶ 63,001 (Oct. 1, 2018) ("[I]n order to ensure that rate cases are manageable, a presumption of prudence applies until the challenging party creates a serious doubt as to the prudence of an expenditure."). If there is no presumption, a utility will be forced to prepare witnesses and other evidence, even for issues that are uncontested. Rate making cases are already cumbersome. They are expensive. And a utility is allowed to recover the expenses related to the rate proceeding from ratepayers. *W. Ohio Gas Co.*, 294 U.S. at 72-73. If a utility is required to present a full-blown case, even with respect to unchallenged expenses, the cost of the proceeding will be passed onto consumers.

The Commission has recognized these practical problems and previously rejected an argument by Staff that a utility should have a "higher standard of proof in its initial filing." *In re Nev. Power Co.*, 74 P.U.R.4th 703 (Nev. Pub. Serv. Comm'n May 30, 2986). The Commission described that request as "unworkable in practice." *Id.* It said that the "commission prefers that applicants file documents in the manner historically used and dictated by commission regulation." *Id.* The Commission should have adhered to its past practices because that's what it was required to do. *Cf.* Paul D. Clement, *The Intra-Executive Separation of Powers Keynote Address, 2009 Randolph W. Thrower Symposium*, 59 Emory L. J. 311, 317 (2009) ("To simply change a legal position without any alteration in the underlying policy comes at a great cost to the credibility of the Solicitor General and the Office of the Solicitor General before the Court.").

II.

THE COMMISSION VIOLATED SOUTHWEST GAS'S DUE PROCESS RIGHTS AND THE ADMINISTRATIVE PROCEDURES ACT

A. Southwest Gas's Due Process Rights Were Violated Because It Did Not Have Prior Notice of What It Was Required to Prove at the Hearing

Due process requires a fair hearing. *W. Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio*, 294 U.S. 63, 70 (1935). "A hearing is not meaningful without an awareness of the matters to be considered." *Nev. Power Co. v. Pub. Serv. Comm'n*, 91 Nev. 816, 824, 544 P.2d 428, 434 (1975). A fair hearing requires the Commission to give warning to a utility that "fault [is] imputed and that it must give evidence of care." *W. Ohio Gas*, 294 U.S. at 68. A utility must be given a meaningful opportunity to "supplement or explain" the evidence presented at a hearing. *Id.* at 70. It violates due process when a regulatory commission does not provide advance notice of what it will consider at the hearing and receives "new evidence" that the utility is unable to respond to. *Id.* at 71.

And "a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989). Under *Duquesne*, "misuse or inconsistent use of a crucial rate making method, such as the prudent investment rule, *even without a showing of confiscatoriness by the utility*, may amount to a denial of due process." *S. Cent. Bell. Tel. Co. v. La. Pub. Serv. Comm'n*, 594 So.2d 357, 365 (La. 1992) (emphasis added).

Southwest Gas was entitled to rely on the presumption when submitting its application and preparing for the hearing. Southwest Gas's right to due process was violated because notice was inadequate and the Commission abandoned the presumption and applied a standard that required Southwest Gas to

present evidence to establish the prudence of its expenditures. *State v. Second Judicial Dist. Court*, 116 Nev. 953, 11 P.3d 1209 (2000) (notice of aggravating evidence provided on day before hearing was inadequate to meet due process requirements (citing *Emmons v. State*, 107 Nev. 53, 807 P.2d 718 (1991))). It had no way of anticipating that the Commission would expand the proceedings by asking questions that went beyond the objections raised by the parties – because the Commission is not authorized to do so. The Commission is only allowed to ask questions "to clarify testimony provided by witnesses." NAC 703.695. The Commission changed the rule by asking questions that went beyond objections filed by Staff and the Bureau. And the problem is only getting worse. Southwest Gas's witness testified that the scope of this general rate case was far broader than any other case she had worked on in the last 20 years. (5 ROA at 3852, 3878-84.)

Southwest Gas "understandably did not prepare evidence relating to" issues that were not properly noticed, so the hearing was not meaningful. *Pub. Serv. Comm'n of Nev. v. Sw. Gas Corp.*, 99 Nev. 268, 271, 662 P.2d 624, 626 (1983). The hearing, as well as the erroneous conclusions in the Orders, were a direct result of the Commission abandoning the presumption of prudence. The presumption of prudence has always been the rule in Nevada (and elsewhere). The Commission's rejection of the presumption "was undeniably a radical departure from its past practice." *Mountain States Tel. & Tel. Co. v. F.C.C.*, 939 F.2d 1021, 1035 (D.C. Cir. 1991). Eliminating the presumption was a substantive change that fundamentally altered the proceedings before the Commission in violation of due process. *Id.*

B. The Commission Violated the APA by Eliminating the Presumption Without Going Through a Formal Rule-Making

Elimination of the presumption was such a dramatic change to the law that the Commission should have gone through a formal rule-making under the

Administrative Procedures Act. Because the presumption is based in the Constitution, the rule *cannot* be changed. But a formal rule-making would have at least allowed potentially affected utilities to raise that objection.

"The statutory presumption of validity of the agency's order assumes that the order was promulgated in accordance with law and in abidance with 'the requirements of due notice and hearing.'" *Pub. Serv. Comm'n of Nev. v. Sw. Gas Corp.*, 99 Nev. 268, 274, 662 P.2d 624, 628 (1983). The Nevada Supreme Court has invalidated Commission orders "adopted without compliance with the procedural safeguards of the Administrative Procedure Act." *Id.*

"A regulation is a rule, standard, directive or any statement of general applicability which effectuates or interprets policy of the agency concerned." *Pub. Serv. Comm'n of Nev. v. Sw. Gas Corp.*, 99 Nev. 268, 273, 662 P.2d 624, 627 (1983). A regulation is void unless the agency complies with Nevada's Administrative Procedure Act, including proper notice. *Id.* Here, the rejection of the presumption of prudence "has a 'general applicability' which affects other gas utilities and their customers." *Id.* In fact, it affects *all* utilities in Nevada. The Commission's order concludes that past Commission orders applying the presumption were wrong, thus demonstrating that the Commission will not apply the presumption in any future general rate case. (1 ROA at 597-99.) The abandonment of the presumption is a regulation and it is void because the Commission did not follow the procedures in the APA. *Id.*; *see also S. Nev. Operating Eng'rs Contract Compliance Trust v. Johnson*, 121 Nev. 523, 531 n.13, 119 P.3d 720, 726 n.13 (2005) ("[D]ecisions involving rate-making are . . . subject to the requirements of the APA."); *State Farm Mut. Auto. Ins. Co. v. Comm'r of Ins.*, 114 Nev. 535, 958 P.2d 733 (1988) ("[T]his court has not hesitated to invalidate agency actions in which the agency was formulating a rule of policy or general application and not merely making an interpretive ruling according to the facts before it.").

III.

IF THE COMMISSION HAD APPLIED THE PRESUMPTION AND AFFORDED DUE PROCESS TO SOUTHWEST GAS, IT WOULD HAVE APPROVED THE WORK ORDERS, THE PENSION EXPENSES, AND SELECTED AN APPROPRIATE RETURN ON INVESTMENT

If the Commission had properly applied the presumption of prudence, it would have been required to approve the work orders and pension expenses. There was no evidence demonstrating that those expenses were imprudent. Requiring Southwest Gas to defend itself in the absence of a showing of an abuse of discretion, lack of good faith, inefficiency or improvidence "was contrary to the rebuttable prudence presumption framework that the [Commission] proceedings should have followed." *Nev. Power*, 122 Nev. at 829 n.15; 138 P.3d at 492 n.15. And the Commission's selection of an arbitrary return on investment that was lower than anyone proposed and in direct contravention to its own rationale violated due process, was confiscatory, and was not supported by substantial evidence.

A. Disapproval of the Work Orders Was the Most Glaring Error

Nobody asked the Commission to disapprove 100% of the work orders for the software projects. Adopting the 50% reduction urged by Staff would have been confiscatory. *See Ely Light*, 80 Nev. at 323-24, 393 P.2d at 311 ("[T]o delete 50% of such cost from the rate base computations was arbitrary, confiscatory and erroneous, requiring reversal.") The denial of *all* of the work order expenses was undoubtedly confiscatory. The Commission violated the presumption of prudence when it disapproved unchallenged expenses and substituted its judgment for Southwest Gas's. It ignored evidence proffered by both Southwest Gas and the other parties that substantiated the expenses. And it failed to recognize that "the market tends to force the price of the item to competitive levels," which is typically sufficient to ensure that a utility does not pay too much. Frank P. Darr, *A State Regulatory Strategy for the Transitional Phase of Gas*

Regulation, 12 Yale. J. on Reg. 69, 89 (1995).

The Commission's finding that there was a lack of oversight is not supported by substantial evidence. The Commission must "engage in an analysis that considers each practice or transaction separately when deciding whether an allowance or disallowance is warranted for that particular practice or transaction." *Nev. Power Co.*, 122 Nev. at 837, 138 P.3d at 497. A "finding of 'colossal management mistakes' cannot operate as a ground for denying the entire" application. *Id.* But that's exactly what the Commission did.

And no party introduced evidence to demonstrate that the work orders were imprudent. Even Staff's witness admitted that he was only challenging one-half of one percent of the software expenses, yet he still fought for disallowance of 50% of those expenses. At most, Staff's witness questioned a miniscule amount of the expenses, much of which were voluntarily withdrawn by Southwest Gas. "While the [Commission] was highly critical of some of [Southwest Gas's] . . . practices, the [Commission] stopped short of labeling those practices imprudent." *Id.* at 838, 138 P.3d at 497. In fact, it allowed Southwest Gas to seek recovery for the work orders in a subsequent general rate case. Criticizing Southwest Gas's evidence and speculating about whether the projects could have cost less is not enough to overcome the presumption. *See id.* at 840, 138 P.3d at 499 (where staff "failed to present evidence" to support argument that utility should have made different decisions because it had other options, Commission's finding was "speculative and unsupported by evidence in the record").

B. The Pension Expenses Were Unchallenged and Should Have Been Approved

Nobody challenged the accuracy of the pension expenses. In the absence of evidence showing imprudence, the presumption applies and the expenses should have been approved. *Ely Light*, 80 Nev. at 323, 393 P.2d at 311 ("In the absence of an abuse of discretion on the part of the utility and in the absence of

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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." (emphasis added)). Because there was "no competent evidence before the Commission to support [a] finding that the cost of the pension plan was unreasonable," the Commission's decision to award less than the full amounts expended was "arbitrary, confiscatory and erroneous, requiring reversal." *Id.* at 324, 393 P.2d at 311.

And Southwest Gas's due process rights were violated because it was deprived of the opportunity to submit testimony or other evidence relating to the Commission's decision to normalize and reduce the pension expenses. The Commission also violated Southwest Gas's due process rights by requiring it to justify a 3.75% discount rate without prior notice.

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C. The Approved Return on Investment Was Lower than Anyone Requested and Lower Than the Rates Earned by Other Similarly Situated Utilities

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"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 . . . ." *Bluefield Waterworks & Improvement Co. v. Public Service Commission*, 262 U.S. 679, 693 (1923). "Regulation which adversely affects the financial integrity of the utility affects not only the present quality of service rendered but also discourages future capital investment and expenditure. Unreasonable, arbitrary, or capricious regulation which fails to provide a sufficient return to induce the utility to perform completely and effectively its function for the public is to be condemned.'" *State v. Zephyr Cove Water Co.*, 94 Nev. 634, 639, 584 P.2d 698, 701 (1978) (internal quotation marks omitted); *see also State Pub. Utils. Comm'n v. Springfield Gas*

& Elec. Co., 125 N.E. 891, 902 (Ill. 1919) ("It is equally important to the public and the utility that the rates established be just and reasonable."). The return on investment "'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.'" *Id.* (quoting *Bluefield*, 262 U.S. at 693 (1923)).

Thus, if "an arbitrary reduction of the rate base or an arbitrary increase of the apparent net earnings results in a false conclusion as to the rate of return and if this is so substantial that a correction of the figures in accord with the undisputed evidence shows that a fair and reasonable return is not being made, it is [the courts'] duty to correct this situation and to prevent what the courts unanimously agree to be confiscation of the company's property." *Bell Tel. Co. v. Pub. Serv. Comm'n*, 70 Nev. 25, 34, 253 P.2d 602, 606 (1953).

The Commission confiscated Southwest Gas's property by selecting a return on investment that was lower than anyone requested, and erroneously concluding that the evidence supported its finding. There is no evidence to support the Commission's arbitrary selection of 9.25 percent as a return on investment commensurate with Southwest Gas's peers. The Commission ignored the undisputed proxy group rate of return of 10.23 percent, and an industry average rate of return of 9.68 percent, both of which are substantially higher than 9.25 percent. It also disregarded evidence that Southwest Gas's higher risk rating justified the rate of 10.30 that Southwest Gas requested. The Commission's finding that a return on investment "of 9.25 percent is commensurate with returns on investments in other enterprises having corresponding risks" is not supported by any evidence in the record. (1 ROA at 372 ¶ 195.) The 9.25 percent rate of return was in no way "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." *Bluefield*, 262 U.S. at 692.

CONCLUSION

Southwest Gas requests that the Court confirm that (1) the presumption of prudence applies in general rate cases, and (2) Southwest Gas's due process rights were violated by significant deviations from prior procedure without notice. Further, the Commission's order should be reversed and the case remanded to the Commission with instructions to approve the work orders, the pension costs, and the return on investment as requested by Southwest Gas. *See Ely Light*, 80 Nev. at 329-30, 393 P.2d at 329 (affirming district court order that invalidated Commission's reduction of 50% of pension costs and invalidated Commission's reduction of working capital costs "as being without support in the evidence"); *cf. Pink v. Busch*, 100 Nev. 684, 691, 691 P.2d 456, 461 (1984) ("This court has held that upon reversal, where the material facts have been fully developed at trial and are undisputed such that the issues remaining are legal rather than factual, we will render final judgment or will remand the case to the lower court with directions to enter judgment in accordance with the opinion or with specific directions.").

Dated this 22nd day of May, 2019.

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DISTRICT COURT

CLARK COUNTY, NEVADA

Southwest Gas Corporation, Petitioner, vs. Public Utilities Commission of Nevada Respondent.	Case No.: A-19-791302-J Dept. No.: 19

BUREAU OF CONSUMER PROTECTION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR JUDICIAL REVIEW

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MEMORANDUM OF POINTS AND AUTHORITIES

I. JURISDICTIONAL STATEMENT

Jurisdiction in the Eighth Judicial District Court is proper pursuant to NRS 703.373. The Public Utilities Commission of Nevada's Modified Order ("Order") was issued on February 15, 2019. Petitioner filed its Petition for Judicial Review on March 18, 2019, and its Memorandum of Points and Authorities on May 22, 2019. The instant Opposition is timely filed pursuant to NRS 703.373(7).

II. ISSUES PRESENTED FOR REVIEW

The issues presented include:

A. Whether Southwest Gas Corporation ("SWG" or "Petitioner") can force the Public Utilities Commission of Nevada ("Commission") to adopt a foreign legal standard of a "presumption of prudence" in general rate cases when such a standard has been expressly rejected in Nevada.

B. Whether the Commission's Order violated SWG's constitutional and/or due process rights.

C. Whether the Commission's Order to disapprove the work orders, deny pension expenses, and approve the 9.25 percent return on equity was 1) made upon unlawful procedure; 2) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or 3) arbitrary, capricious, or characterized by abuse of discretion.

III. STATEMENT OF THE CASE

This case is an appeal from the Commission's Order rendered February 15, 2019, on SWG's general rate application. The primary question is whether the Commission must adopt a presumption of prudence standard in general rate cases in Nevada. Petitioner attempts to use Nevada and United States Supreme Court case law to claim that a presumption of prudence does apply. However, as this Opposition will show, Nevada law expressly rejects the presumption of

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prudence in general rate cases, and regulation clearly states that the burden of proof falls on the public utility.

Second, Petitioner asserts constitutional claims by alleging its due process rights were violated by the Commission in the underlying proceeding. Such a claim is based on the false premise that a presumption of prudence applies and serves as nothing more than a distraction and page filler.

Third, SWG is disappointed that the Commission has not allowed each and every claimed cost as an element of the Commission's allowed revenue requirement, which is well within the discretion of the Commission. The Commission is charged with a mission to balance the interests of the ratepayers and the utility, and in this case, the Commission did just that. Specifically, the Commission disallowed work order costs, pension expenses, and concluded that a different return on investment than what was suggested by SWG was appropriate. Such actions were within the Commission's plenary power and supported by substantial evidence.

The Commission's Order was based on the applicable law, procedure, and not arbitrary or capricious. The Order was not clearly erroneous and should not be disturbed on appeal based on the applicable standard of review.

IV. STATEMENT OF FACTS

On May 29, 2018, SWG filed a general rate case application, in which the BCP intervened. The Commission held hearings on October 22, 2018, through 25, 2018, and October 29, 2018, through 30, 2018. (1 ROA 574) On December 24, 2018, the Commission issued an order granting in part and denying in part SWG's Application. (1 ROA 575) On January 9, 2019, SWG filed a Petition for Reconsideration. *Id.* On February 15, 2019, the Commission considered SWG's request for reconsideration and issued an Order on Petitions for Reconsideration and Clarification and a Modified Order. (1 ROA 295, 572) The Commission correctly concluded that there is no presumption of prudence under Nevada law

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and reaffirmed that it was proper for SWG to prove the prudence of each expenditure for which it sought recovery. (*Id.* at 309-312).

V. SUMMARY OF THE ARGUMENTS

Petitioner's entire claim relies on the erroneous contention that SWG enjoys a presumption of prudence in rate increase cases. Based upon this false premise, Petitioner asserts several creative and, quite frankly, outlandish claims, including: Petitioner's due process rights were violated because Petitioner was not given notice of the burden of proof before the hearing; failing to apply the presumption of prudence amounts to a constitutional violation because the decision was "confiscatory," and the Commission committed a "legal error" by not applying a presumption of prudence, which Petitioner claims is the law in Nevada.

These arguments can be dismissed in their entirety because the clear and binding law in the State of Nevada, as set forth in Nevada Administrative Code ("NAC") 703.2231, a regulation that has been the rule since 1982, is that a public utility bears the burden of showing that the changes are just and reasonable in rate cases. Additionally, the Nevada Legislature, in adopting Assembly Bill 7 ("AB 7") in 2007, intended to make clear that there is no rebuttable presumption of prudence in rate cases, as provided by the legislative history of AB 7. Further, the express duty and purpose of the Commission is to investigate, analyze, and rule on the changes presented in rate cases with the goal of protecting Nevada ratepayers. To claim that SWG does not have to show the Commission that its changes are just and reasonable before the Commission approves of them would be to render the entire statutory scheme governing the Commission (NRS 703 and NAC 703) obsolete. As a result, Petitioner's various arguments that rely on the incorrect assertion concerning the burden of proof are without merit.

Additionally, Petitioner cites to several cases, including two Nevada Supreme Court cases and countless out-of-state cases, to piece together a claim

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that Nevada does apply the presumption. The Bureau of Consumer Protection ("BCP" or "Respondent") addresses these cases and provides to this Court how Petitioner's interpretation of the cases, and arguments resulting from the erroneous interpretations, are wholly misleading and incorrect. Respondent then provides references to the record to show that the Commission's rulings were based on substantial evidence and well within the scope of the Commission's broad discretion to rule in such a manner.

Lastly, and importantly, the entirety of Petitioner's argument must be assessed in light of the standard of review. The Commission's decision must not be disturbed unless the decision was made upon unlawful procedure, arbitrary and capricious, error of law, clearly erroneous, or an abuse of discretion. This is a high bar and certainly cannot be met by asserting arguments based on an erroneous depiction of law. Because the law and substantial evidence is in favor of the Commission's decision, Petitioner's argument must be rejected and the Commission's Order should be affirmed.

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VI. STANDARD OF REVIEW

The applicable standard of review of the Commission's decision is codified in NRS 703.373, which states, in relevant part, that the decision may be affirmed, or set aside, in whole or in part, if the substantial rights of the petitioner have been prejudiced because the decision by the Commission is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the Commission; (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. NRS 703.373(11).

The Nevada Supreme Court has stated, "The district court and supreme court should not interfere with the [C]ommission's rulings or review its determinations, further than to keep it within the law and protect constitutional

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rights of the public service agencies over which control is exercised." *Pub. Serv. Comm'n v. Cont'l Tel. Co. of California*, 94 Nev. 345, 348, 580 P.2d 467, 468 (1978) (citation omitted). The review of the decision is limited to a "determination that the [C]ommission's decision is based on substantial evidence." *Id.* at 348, 580 P.2d at 469 (citation omitted). A decision that is "based upon substantial evidence and within the framework of the law" will be upheld. *Office of Nevada Attorney Gen.'s Bureau of Consumer Prot. v. Pub. Utilities Comm'n of Nevada*, 126 Nev. 691, 367 P.3d 746 (2010) (citation omitted).

As to the weight of the evidence, the court should not substitute its judgment for that of the Commission. NRS 703.373(11). Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *Nevada Power Co. v. Pub. Utilities Comm'n of Nevada*, 122 Nev. 821, 834, 138 P.3d 486, 495 (2006) (citation omitted). However, questions of law, such as those involving statutory interpretation, are reviewed de novo. *Nevada Power Co. v. Pub. Utilities Comm'n of Nevada*, 122 Nev. 821, 834, 138 P.3d 486, 495 (2006) (citation omitted).

While the court may decide questions of law "without deference to an agency determination, an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference." *Installation & Dismantle, Inc. v. State Indus. Ins. Sys.*, 110 Nev. 930, 932, 879 P.2d 58, 59 (1994) (addressing an administrative matter under NRS 233B) (citation omitted). Additionally, the court "defer[s] to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." *Taylor v. Dep't of Health & Human Servs.*, 129 Nev. at 930, 314 P.3d at 951 (addressing an administrative matter involving NRS 284.390) (citation and internal quotation marks omitted).

The petitioner bears the burden of proof to show that the final decision is invalid pursuant to NRS 703.373(11). NRS 703.373(9). The decision of the

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Commission is deemed reasonable and lawful until the court sets it aside or reverses it. *Id.*

VII. ARGUMENTS

Petitioner's arguments are without merit and the Commission's Order should be affirmed because a) contrary to Petitioner's claims, public utilities bear the burden of proof in general rate cases; b) Petitioner cites to nonbinding and inapplicable law, and erroneously interprets various cases, in an attempt to confuse and distract this Court regarding the clear and binding law in this case; and c) the standard of review in appeals from the Commission's Order dictates that the Commission's Order should be affirmed.

A. Nevada Law Expressly Provides that there is No Presumption of Prudence in General Rate Cases.

The crux of Petitioner's argument is that the Commission erred by failing to apply a presumption of prudence in the underlying case. *See generally* Petition for Judicial Review ("Petition"). However, this argument must be denied in its entirety because it relies on an incorrect review and analysis of applicable law on this issue. The following corrects Petitioner's misunderstanding of the law by 1) providing the accurate and applicable law regarding whether there is a presumption of prudence in general rate cases; 2) clarifying the applicability of AB 7 and correcting Petitioner's misunderstanding of this law; and 3) providing the statutory role of the Commission to show why the subject Order was not only based on substantial evidence but the result was in fact fulfilling the function of the Commission.

1. <u>NAC 703.2231 provides that a utility company has the burden of proof of establishing the reasonableness of changes in general rate cases.</u>

NAC 703 governs the practice of public utilities before the Commission. *See* NAC 703.105. NAC 703.2231 instructs a public utility applicant on the scope of presentation and preparation for hearings in general rate cases, and provides:

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> An applicant must be prepared to go forward at a hearing on the data which have been submitted and **to sustain the burden of proof of establishing that its proposed changes are just and reasonable and not unduly discriminatory or preferential**. To avoid delay by the Commission in its consideration of the proposed changes, the applicant must 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.

See NAC 703.2231. Emphasis added.

Thus, pursuant to regulation, the utility company bears the burden of proof to show that the rate change requested in a general rate case is just and reasonable. The Commission is not required to apply a presumption of prudence in general rate cases, and in fact, applying a presumption would be to shift the burden of proof away from the utility company, which is not supported by case law and contradictory to the procedure provided for by regulation. *See Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 834, 897 P.2d 1093, 1095 (1995) ("A presumption not only fixes the burden of going forward with evidence, but it also shifts the burden of proof") (citations omitted).

NAC 703.2231 is not a new standard. This regulation was enacted in 1982, and this burden of proof standard has been nearly identical since that time. *See* Pub. Service Comm'n, Gen. Order 3 Rule 16 § 6, eff. 10-14-82. "The intent of NAC 703.2231 is to place the burden on the applicant to provide sufficient detail so that parties who wish to may be able to verify the accuracy of the filing without undue effort." *In Re Application of Southwest Gas Corp.*, No. 93-3003, (Nev. P.S.C. Oct. 28, 1993). Numerous Nevada public utility cases have applied this burden of proof for almost four decades. *See, Application of Sw. Gas Corp. for Auth. to Increase Its Rates & Charges for Nat. Gas Serv. for All Classes of Customers in S. & N. Nevada.*, 09-04003, 2009 WL 5176581 (Nev. P.U.C. Dec. 21, 2009); *In Re Sw. Gas Corp.*, 236 P.U.R.4th 294 (Nev. P.U.C. Aug. 26, 2004) ("[T]he burden of proof and persuasion on recovery of costs lies with

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Southwest."); *Re Sw. Gas Corp.*, 50 P.U.R.4th 1 (Nev. P.S.C. Nov. 24, 1982). As far back as 1986, in *In Re Nevada Power Co., Util. Shareholders Ass'n of Nevada*, the Commission cited to this regulation as the burden of proof standard in the matter. 74 P.U.R.4th 703 (Nev. P.S.C. May 30, 1986). Again, in *Application of Sierra Pac. Power Co. for Auth. to Recover Deferred Legal & Settlement Costs Incurred to Resolve Claims Arising from the W. Energy Crisis,* the Commission found that the public utility had not met its burden of proof pursuant to NAC 703.2231. 261 P.U.R.4th 443 (Nev. P.U.C. Nov. 30, 2007). In 2012, the Commission provides clear guidelines regarding the burden of proof and Commission's role in general rate cases:

> When a public utility files a general rate application, the Commission is statutorily obliged to investigate the propriety of the utility's proposed rates and ensure that its rates are just and reasonable. (NRS 704.040, 704.110, 704.120.) In carrying out its statutory duty, the Commission 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." Pursuant to NAC 703.2231, an applicant must ensure that its application contains all of the material necessary to sustain its burden of proof "that its proposed changes are just and reasonable and not unduly discriminatory or preferential" and that its application will serve as its complete case at hearing.

See In Re Sw. Gas Corp., No. 12-02019, 2012 WL 7170426 (Dec. 19, 2012) (internal citations and parentheticals omitted).

NAC 703.2231 is the controlling law on the burden of proof in general rate cases and must be applied in general rate cases such as the one in this matter. Petitioner conspicuously leaves out this regulation in its entire forty-eight page Petition, likely as a result of not discovering this rule and not because it was trying to mislead this Court. Regardless, there is no applicable law that states that utility companies are entitled to a presumption of prudence in general rate cases and, as a result, there was no presumption of prudence requirement in the

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underlying matter. SWG has no excuse to claim any type of misunderstanding of the proper burden of proof.

2. AB 7 does not provide that there is a presumption of prudence in general rate cases.

Instead of providing the law that governs the burden of proof for public utilities in rate cases, Petitioner goes into great detail explaining to this Court why AB 7 does not apply in general rate cases. In a narrow sense, BCP agrees with Petitioner on this because the primary regulation on the subject of presumption in general rate cases is NAC 703.2231, as discussed above. That said, AB 7 provides strong support for the contention that the burden of proof falls on a public utility, especially when coupled with the instructions in NAC 703.2231. The only reasonable interpretation of AB 7, when read in conjunction with NAC 703.2331, is to hold that there is no presumption of prudence in all rate cases, including general rate cases. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60, 125 S. Ct. 460, 466-467 (2004) ("Statutory construction is holistic endeavor, and provision that may seem ambiguous in isolation is often clarified by remainder of statutory scheme.").

AB 7, enrolled as NRS 704.185, expressly states that "there is no presumption of reasonableness or prudence for any transactions or recorded costs of natural gas include . . . and the public utility has the burden of proving reasonableness and prudence in the proceeding" in annual rate adjustment applications ("ARAA") and deferred energy accounting adjustment applications ("DEAA"). *See* NRS 704.185. In other words, AB 7 applies in ARAAs and DEAAs, and is silent on general rate cases.

Petitioner claims that "the Legislature's omission of general rate cases was deliberate" based on statutory construction rules. *See* Petition at 34:3-4. Essentially, Petitioner claims that AB 7's silence on general rate cases somehow

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results in general rate cases having a presumption of prudence. This leap in logic is disingenuous at best.

First, Petitioner's argument fails to take into account the glaring reason that AB 7 applies to ARAAs and DEAAs – the bill was passed in 2007 specifically to reverse the 2006 Nevada Supreme Court decision in *Nevada Power Co. v. Pub. Utilities Comm'n of Nevada*, 122 Nev. 821, 138 P.3d 486 (2006). In *Nevada Power*, the Nevada Supreme Court held that the rebuttable prudence presumption is the controlling procedure in deferred energy accounting proceedings, and did not apply this presumption to general rate cases. *Id.* at 834. The following year, the Nevada Legislature passed AB 7 with the legislative intent to supersede the holding of *Nevada Power*, to the extent that the Court determined the rebuttable presumption of prudence is the controlling procedure in proceedings involving deferred energy accounting. A.B. 7, 2007 Leg., 74th Sess. (Nev. 2007) at 2. Thus, AB 7 was enacted to address and reverse the *Nevada Power* decision, and by doing so, specifically provided that the presumption does not apply to DEAAs, the type of case at issue in *Nevada Power*. Thus, the statute's silence on general rate cases was not deliberate so that a presumption could apply in general rate cases. Rather, it was simply because general rate cases were not at issue in *Nevada Power*.

Second, the statutory construction maxim cited to in the Petition – the expression of one thing is the exclusion of another – would only apply if there was not express law on the issue. Here, NAC 703.2231 expressly addresses the burden of proof in general rate cases. Thus, AB 7's silence on general rate cases means nothing other than the fact that it was not addressed, perhaps because NAC 703.2231 already addresses it. *See generally Koons*. It should be noted that Petitioner cites to no evidence to support an argument that the 2007 Legislature intended that the presumption applied in general rate cases or otherwise purposely left out general rate cases.

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Lastly, the only reasonable implication of AB 7 in relation to general rate cases would be that there is *no presumption of prudence in all rate increase cases.* That is, it is absurd to assume that the Legislature intended to expressly state that most rate adjustment cases should not apply a presumption of prudence, but if a natural gas public utility voluntarily requests a rate increase in a general rate case, they should get the added benefit of not having to show the Commission why their charges and costs are reasonable. This would be assuming that the Legislature wished for the Commission to apply different standards to a rate increase analysis depending on whether it was voluntarily brought by the utility company or not. The same burden of proof should be applied to all rate cases, which is why NRS 704.185 is often interpreted to stand for the fact that no presumption of prudence applies in Nevada.

Moreover, if for some reason different burden of proofs were applied in different rate cases, logic tells us that it would be the other way around and public gas utilities would get a benefit of a presumption in involuntary cases that take place when the cost of gas increases. Otherwise, natural gas utility companies would have their costs presumed reasonable whenever they voluntarily ask the Commission for an increase in rates – the precise circumstance when they should have to prove to the Commission that the costs were reasonably and actually incurred. Such an absurd interpretation must be disregarded. Further, Assemblywoman Barbara Buckley specifically provided that the intent of AB 7 was to apply to rate cases in general:

> Assembly Bill 7 is intended to correct the court's interpretation of our legislative intent. When we reinstated deferred cost accounting, we told the utilities that they could not use this to ask for rate increases unless it was to recover costs resulting from reasonable and prudent business practices. That is what we meant. **There is no presumption favoring a public utility when it files a rate change.** We do not burden Nevada consumers for mistakes. They must demonstrate that

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> any cost they seek to recover was reasonably and prudently incurred. That is what this bill does.

See Minutes of the March 7, 2007, Meeting of the Assembly Committee on Commerce and Labor, Seventy-Fourth Session of the Nevada Legislature, at page 8. Emphasis added.

AB 7's silence on the presumption of prudence applying in general rate cases has no bearing on whether the presumption applies in general rate cases; AB 7's Legislative history and intent favors the interpretation that the intent is for the presumption of prudence to be excluded from all rate cases; and NAC 703.2231 expressly governs the lack of presumption in general rate cases. Therefore, Petitioner's argument must be denied.

3. <u>Giving a presumption of prudence to public utilities in general rate cases contradicts the Commission's role and purpose as prescribed by statute.</u>

The Commission's role in a general rate case proceeding is to determine whether rates charged by public utilities are just and reasonable. *See* NRS 703.150; 704.001, 704.110, 704.120. In fact, the Nevada Supreme Court has described the Commission's power as "plenary" and recognizes that the Commission has broad discretion in setting utility rates and practices. *Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada,* 120 Nev. 948, 957, 102 P.3d 578, 584 (2004). The Commission was created by statute to serve the function of checking public utilities in the context of rate cases in order to protect ratepayers.

In the underlying case, SWG voluntarily submitted an application, at the time and place of its own choosing, to increase natural gas utility service rates, put on evidence and testimony to support its request, and was denied some of its requests in whole or in part. This result was not ideal for SWG and, as a result, SWG filed the instant Petition in which it essentially takes the "throw it against the wall to see if it sticks" approach to try to get the unfavorable rulings reversed.

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Unfortunately for SWG, the Commissioner's Order was well within the Commission's plenary power, and the Commission certainly did not rule in an arbitrary, capricious, or otherwise erroneous manner.

It is the duty of the Commission to investigate, analyze, and rule on the changes presented in general rate cases with the goal of ascertaining whether such increases are just and reasonable. The Commissioner did just that in this case and a presumption would not have affected the outcome. That is, the Commission's Order does not turn on whether SWG was to prove that the charges were reasonable or whether the Commission proved that the charges were unreasonable. Some of the costs were not reasonable, a discovery which was properly made during the hearing process. It is as if Petitioner believes that if the presumption were to be applied, a public utility would be able to simply list its expenses and have the expenses deemed prudent, just, and reasonable. To do this would be to deem the statutory scheme that creates and governs the Commission obsolete, not to mention it would be a disservice to the ratepayers. The Commission carried out its statutory duties in this case. To disturb the Commission's findings of fact would be to disregard the entire function of the Commission and would contradict NRS 703 and NAC 703.

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B. Petitioner Relies on Nonbinding, Inapplicable and Inaccurate Interpretations of Law to Support the Claim that Nevada Applies a Presumption of Prudence.

While NAC 703.2231 and NRS 704.185 is more than enough to show that no presumption of prudence exists in Nevada, the following refutes Petitioner's various claims that case law supports a presumption of prudence in Nevada. Specifically, the following shows that Petitioner 1) wholly misinterprets and erroneously applies case law; 2) relies on nonbinding law; and 3) argues constitutional issues that are utterly inapplicable and only serve as a distraction from the issues in this matter.

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1. Petitioner misinterprets and erroneously applies Ely Light and Nevada Power.

To support Petitioner's incorrect contention that the Commission must apply a presumption of prudence, Petitioner strategically plucks quotes from cases and takes them out of context to piece together a claim that case law supports its contention.[1] Primarily, petitioner relies on *Pub. Serv. Comm'n v. Ely Light & Power Co.*, 80 Nev. 312, 324, 393 P.2d 305, 311 (1964) to claim that Nevada applies a presumption of prudence in general rate cases. *See* Petition at 13:24-16:13. However, a cursory review of *Ely Light* shows that this case does not in fact provide such a holding. The Court in *Ely Light* provides:

> "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."

Id. Emphasis added.

Notably, Petitioner includes this quote but conspicuously leaves out the word "reasonable." *See* Petition at 14:16-20. Perhaps that is because determining that rate changes are reasonable is precisely what NAC 703.2231 provides. To include that word would be to draw attention to the fact that all applicable case law states that the public utility must first show that the changes

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[1] Petitioner cites to *United Fuel Gas Co. v. R.R. Comm'n of Kentucky*, 278 U.S. 300, 306, 49 S. Ct. 150, 151, 73 L. Ed. 390 (1929), implying that this United States Supreme Court case holds that a presumption of prudence is the law of the land. A review of this citation provides that this case does not contain such a holding. In fact, *United Fuel Gas* refers to gas utilities bearing the burden of proof. *Id.* at 313.

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presented are reasonable, and once this is done, the Commission will approve of the costs and other public utility managements' judgments.

Petitioner, however, takes the language out of context, erroneously claiming that *Ely Light* stands for a burden shift, when *Ely Light* does nothing of the sort. First, the *Ely Light* Court *never* provides a ruling or standard involving a presumption or burden shift. Rather, the *Ely Light* Court simply states in dicta that it found many references to a "presumption of the proper exercise of judgment by the utility" in out-of-state cases and then cites to those cases. *Id.* at 325. The *Ely Light* Court does not adopt a presumption of prudence standard. In contrast, the Court makes a mention of presumption and then moves on.

Second, and importantly, Petitioner's erroneous interpretation of *Ely Light* seems to confuse *Ely Light*'s casual mention of presumption with a burden shift. The Nevada Supreme Court has held that applying a presumption is functionally synonymous with shifting the burden of proof to another party. *See Yeager,* 111 Nev. at 834, 897 P.2d at 1095; *see also Nevada Power Co. v. Pub. Utilities Comm'n of Nevada,* 122 Nev. 821, 834, 138 P.3d 486, 495 (2006).[23] The language in *Ely Light*, even if one were to construe it as an adopted standard, in no way provides that the burden of proof shifts. That is, the *Ely Light* Court states that if the Commission determines that the utility has met all of its qualifiers (listed above), including that the amounts in question are reasonable, then the Commission is to apply the standard of review mentioned by the *Ely Light* Court

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[2] "Thus, the intervener bears the initial burden of overcoming the prudence presumption by presenting evidence that creates a serious doubt as to the prudence of the utility's expenditure. Only then will the prudence presumption be rebutted and the burden of production shifted back to the utility." *Nevada Power*, 122 Nev. at 835, 138 P.3d at 496.

[3] Note, the application of a presumption prescribed in *Nevada Power* was reversed by the Nevada Legislature in AB 7 and is not current law.

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– that the utility will be presumed to have properly exercised judgment. It is as if the word "presumption" that holds certain legal weight was used in an innocuous way without its legal meaning in this case. As a result, Petitioner is confused about what the *Ely Light* stands for. Fortunately, a quick reading of the language will provide that the *Ely Light* Court did not adopt a presumption of prudence, or in other words, shift the burden away from the public utility. To argue otherwise, as Petitioner has done, would be to shift the burden in the opposite direction of not only *Ely Light*, but also of NAC 703.2231.[4]

Moreover, assuming *arguendo* that *Ely Light* did somehow state that a presumption of prudence did apply in rate cases, this does not mean that the Commission must accept the charges and costs presented in a rate case at face value. To hold otherwise would be to render the function and role of the Commission obsolete (as discussed above).

Next, Petitioner erroneously interprets and applies *Nevada Power* to claim that "the presumption has consistently been applied by the Nevada Supreme Court." *See* Petition at 15:1-2. Petitioner fails to mention the fact that, as discussed above, *Nevada Power* was reversed by the Legislature in 2007 through AB 7. In other words, the Nevada Supreme Court directly addressed the issue of whether the burden should shift from utilities and sided with Petitioner's argument, but the Legislature disagreed and changed that law back to what it is today – the burden of proof falls on the utility. Moreover, as discussed above, *Nevada Power* only addresses a presumption in the context of DEAAs. Accordingly, the effort and time Petitioner spent discussing the *Nevada Power* holding is futile – it is not the law on this issue and should not be treated as such.

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[4] Nevada cases citing *Ely Light* do not cite to it to hold that a presumption of prudence applies in general rate cases. *See*, for example, *Silver Lake Water Distribution Co. v. Pub. Serv. Comm'n of Nevada*, 107 Nev. 951, 955, 823 P.2d 266, 269 (1991); *see also Sw. Gas Corp. v. Pub. Serv. Comm'n of Nevada*, 98 Nev. 404, 407, 651 P.2d 95, 97 (1982).

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The two Nevada cases Petitioner relies on to claim that Nevada applies a presumption of prudence in general rate case either do not in fact apply such a presumption or have been reversed and do not provide the controlling law on that issue. The controlling law on this issue comes from NAC 703.2231 and NRS 704.185 (AB 7), which state that there is no presumption of prudence and the public utility bears the burden to show that the changes presented are just and reasonable.

2. Petitioner's citations to other state's law must be disregarded.

The Petitioner dedicates several pages of the Petition to string-citing nonbinding, out-of-state cases to say that a presumption of prudence "has been law for nearly a century." *See* Petition at 16:14-19:16. These cases are from other jurisdictions and are not the applicable law in the state of Nevada. Nevada, through legislation, may and has determined for itself whether or not to apply a presumption of prudence. Petitioner's references to the nonbinding law are futile unless the Petitioner is asking this Court to go against the clear law of the State of Nevada on this issue.

To the extent that Petitioner claims that the United States Supreme Court applies a presumption of prudence, the following provides a brief review of case progeny on this issue to show that there the United States Supreme Court does not provide such a holding:

First, the 1920's U.S. Supreme Court cases cited by Petitioner have been superseded. *Ohio Valley Water Company v. Borough of Ben Avon*, 253 U.S. 287, 40 S.Ct. 527 (1920) was replaced by later case law which clarifies that the Commission's decision should simply be in a "zone of reasonableness." The *Ohio Valley* case was decided during the *Lochner Era*, a time when the U.S. Supreme Court played a judicially activist role in striking down substantive economic legislation that would be upheld today with the application of the rational basis standard. *See generally Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 551

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(1905), *overruled in part by Day-Brite Lighting Inc. v. State of Mo.*, 72 S. Ct. 405 (1952), *overruled in part by Ferguson v. Skrupa*, 83 S. Ct. 1028 (1963), *abrogated by W. Coast Hotel Co. v. Parrish*, 57 S. Ct. 578 (1937). In addition to being superseded, *Ohio Valley* does not mandate that a state public utility commission decision is automatically reviewable for constitutionality merely because a regulated utility alleges that its constitutional rights have been violated. Similarly, *Mo. Ex rel. Sw. Bell Telephone Co.*, 262 U.S. 276, 43 S.Ct. 544 (1923) and *W. Ohio Gas Company v. Public Utility Commission of Ohio*, 294 U.S. 63, 55 S.Ct. 316 (1935) are from the same era and are not the current law on this issue.

The following U.S. Supreme Court cases have, in effect, replaced the *Ohio Valley* doctrine, holding that when a utility alleges confiscation because of a ratesetting, the courts should examine only whether there is any rational basis upon which the ratesetting order can be upheld: *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281 (1944); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 88 S.Ct. 1344 (1968); and *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 109 S.Ct. 609 (1989).

The Supreme Court has consistently reaffirmed the rational basis doctrine in rate cases. The *Permian Basin Cases* established the "zone of reasonableness" test in the review of actions by a federal energy regulator:

> A presumption of validity therefore attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake 'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.' We are not obliged to examine each detail of the Commission's decision; if the 'total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.' Moreover, this 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.'

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In re Permian Basin, 390 U.S. at 767, 88 S.Ct. at 1360 (citations omitted.)

Not only is Petitioner incorrect in stating that United States Supreme Court cases apply a presumption of prudence, but in fact, the actual standard applied by United States Supreme Court when reviewing ratesettings is that the Commission's decision will be upheld as long as there is a rational basis for its ruling. Petitioner's effort to cite to nonbinding case law is ultimately without merit, as these cases contradict the law in Nevada. Additionally, Petitioner's references to United States Supreme Court cases do not actually hold that a presumption of prudence must be applied in rate cases. As such, Petitioner's arguments should be summarily denied.

3. Petitioner's due process argument is without merit.

Petitioner claims that SWG "was entitled to rely on the presumption when submitting its application and preparing for the hearing. Southwest Gas's right to due process was violated because notice was inadequate and the Commission abandoned the presumption . . . ." *See* Petition at 41:25-28.

First, this argument must be rejected because it is based on a false premise. The law in Nevada clearly provides that the public utility bears the burden of proof to put on evidence to establish that the proposed changes are just and reasonable. *See* NAC 703.2231. SWG was also fully aware that the Commission has broad authority to conduct its hearings to ascertain whether proposed changes are just and reasonable. *See Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada ex rel. County of Clark*, 120 Nev. 948, 957, 102 P.3d 578, 584 (2004). Thus, SWG was without a doubt on notice of its burden to provide evidence to support all of its proposed changes, and to claim a violation of due process because the Commission was not persuaded by the evidence and testimony is baseless.

Second, Petitioner's due process argument is riddled with case law, none of which actually holds that the Commission's actions in the hearing were in any

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way improper. Again, Petitioner attempts to distract this Court away from the binding law in this matter by sprinkling various excerpts, taken out of context, that do not apply to the issue at hand. For example, Petitioner provides the following quote from *Duquesne*: "[A] State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions." *See* Petition at 41:16-19 quoting *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307, 109 S.Ct. 609, 615 (1989). However, *Duquesne* does not actually hold that due process is violated if a Commission applies a presumption of prudence or not, and in fact, this quote cited from this pertains to the investment rule and is entirely unrelated to the matter herein. Nevertheless, it is quoted along with other cases rather than addressing binding law on this issue. This Court should not fall for such a distraction and should summarily deny the due process argument.

Finally, to further show the absurdity of Petitioner's lack of due process argument, the record reflects that SWG did in fact provide evidence and testimony to support its requested increase, and to show that its costs were just and reasonable. Petitioner's due process argument is a reach. The argument essentially states that – had SWG known that it had the burden, it would have provided *more* evidence, which would have led to a different outcome. SWG had ample opportunity to understand the statutory burden of proof, to provide pre-filed testimony, and prepare witnesses to speak to the reasonableness of costs in direct and rebuttal testimony. Accordingly, the Commission provided SWG due process and a ruling that does not favor SWG does not mean otherwise.

C. SWG Has Failed to Show that the Commission's Decision Should be Set Aside, in Whole or in Part, Pursuant to NRS 703.373(11).

SWG presents no evidence that its substantial rights have been prejudiced because the Commission's decision was not a) made upon unlawful procedure;

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b) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or c) arbitrary or capricious or characterized by abuse of discretion. Therefore, the Commission's decision should be affirmed in full.

1. The Commission's decision was not made upon unlawful procedure rendering it void.

SWG argues that the Commission's abandonment of the presumption of prudence is void as a "regulation," thereby invalidating the decision, as the Commission did not "follow the procedures in the APA" in creating this "new" regulation. *See* Petition at 43: 19-28. The Nevada Administrative Procedure Act ("APA"), codified in NRS 233B et seq., establishes the process by which an agency adopts regulations that become part of the NAC applicable to the functions of that agency. Petitioner suggests that the absence of the presumption of prudence applied by the Commission was such a deviation from the law that not only did it warrant the Commission creating a new regulation, but the Commission's instant decision should be deemed void because it was based upon unlawful procedure. However, Petitioner's argument is belied by the record. The absence of a presumption of prudence was, in no way, a "new" or "unwritten regulation" that was applied to SWG, thereby somehow taking SWG by surprise. In fact, SWG filed it general rate application willingly and on its own accord after having ample time to familiarize itself with the Commission's requirements and legal standards, including the NRS and NAC 703.2231, which has been the standard since 1982. As such, any suggestion that the Commission's decision should be rendered invalid because it did not follow the APA or that its decision was made upon unlawful procedure fails as the Commission properly applied the appropriate legal standards to SWG's general rate case as articulated in the NRS and NAC. Therefore, the Commission's decision should be affirmed in full.

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2. <u>There is substantial evidence to support the Commission's decisions regarding work orders, pension expenses, and return on investment.</u>

Petitioner argues that the Commission's disapproval of the work orders, denial of the pension expenses, and approval of a lower return on investment was erroneous, not based on substantial evidence, and was arbitrary or capricious because the Commission failed to apply the presumption of prudence. This argument is belied by the record, which demonstrates that the Commission's decision in each of these areas was based on substantial evidence, and was not arbitrary or capricious.

Petitioner argues that the Commission's decision to disapprove 100% of the work orders for the software projects was confiscatory. Southwest Gas cites to the Nevada Supreme Court's decision in *Ely Light*, 80 Nev. at 323, 393 P.2d at 311, for support, which states that "delet[ing] 50% of such cost from the rate base computations was arbitrary, confiscatory and erroneous, requiring reversal." However, the citation to this case and quote is misleading. The mere denial of work orders is not, in itself, arbitrary, erroneous, and confiscatory. What made the Court's conclusion appropriate in *Ely Light* was that the Court, "[a]fter a careful and painstaking review of the record" found "no competent evidence before the Commission to support its finding." *Id.* Such is not the case here. Not only does SWG mistakenly apply the presumption of prudence to its analysis in how the Commission should have evaluated the work orders (thereby ignoring relevant NRS and NAC provisions)[5], but its argument that the Commission's decision was not supported by substantial evidence is refuted by the record. Unlike *Ely Light*, the Commission's instant decision is based on substantial and competent evidence regarding Southwest Gas Corporation's

[5] In fact, the Commission clarifies that its decision to "disallow 100 percent of the costs associated with the Challenged Work Orders is separate from the Commission's findings that SWG does not enjoy a rebuttable presumption of prudence regarding its expenditures in GRC proceedings." (1 ROA 493.)

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"initial failure to support [the work orders]" and Southwest Gas Corporation's "systematic lack of accountability, oversight, and prudent management" which is "substantiated by the underlying evidentiary record."(1 ROA 493.)

The record is replete with facts supporting the Commission's conclusion and ultimate disapproval of the work orders. While Petitioner attempts to confuse the issues by introducing arguments and cases whose facts are not analogous with those at hand, such as the facts articulated in *Nevada Power Co.*, 122 Nev. at 838, 138 P.3d at 497, the Commission's decision – and duty – was to decide based on the particular facts before it. Whether or not the Commission allowed SWG to seek recovery for work orders on a subsequent general rate case has no bearing on the disallowance of recovery here. As such, Petitioner has not met its burden showing that the Commission's decision should be overturned, in part or in whole. A review of the records demonstrates the Commission's decision regarding work orders was based upon substantial evidence and was within the framework of the law.

Petitioner again incorrectly relies on *Ely Light* to support its argument that the pension expenses should have been approved. Petitioner, in its misguided analysis, incorrectly states that a presumption of prudency applies, thereby giving the approval of pension expenses an advantage it would not – and does not – actually have. As stated *infra*, SWG willingly and voluntarily filed its general rate application at a time and place of its own choosing, and was required to be prepared to go forward at a hearing and bear the burden of proof. NAC 703.2231. SWG failed to demonstrate its pension expenses should have been approved.

Additionally, SWG's due process rights were not violated as it had ample opportunity – let alone a duty – to be prepared to go forward on the data submitted. Instead, SWG chose to, presumably strategically, to not produce a witness that could provide evidence concerning the selection process for the rate

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reduction. Indeed, the Commission specifically found that SWG failed to produce a witness during the hearing that could speak to "the selection process for the rate reduction." (1 ROA 434.) As a result, the Commission found that "SWG failed to provide evidence justifying an increase of approximately $4.0 million in pension costs to its Nevada gas operations." *Id.* The Commission's decision regarding pension expenses was based on substantial evidence, and was not arbitrary, capricious, nor did it constitute an error of law.

The Commission decided that SWG's "return on equity shall be set at 9.25 percent for both its Southern Nevada Division and Northern Nevada Division." (1 ROA 565.) Contrary to Petitioner's argument, this ruling is supported by substantial evidence as demonstrated by the record. Following its review of the evidence, the Commission determined the "ROE of 9.25 percent balances the interest of ratepayers and shareholders, and results in just and reasonable rates." (1 ROA 372.) While SWG may not appreciate the decision the Commission arrived at, it has not presented any evidence demonstrating that the Commission's decision was made in violation of NRS 703.373(11). As such, the decision regarding the return on investment should be affirmed as it was based upon substantial evidence, was within the framework of the law.

3. Petitioner has failed to show the Commission's decision violated NRS 703.373(11).

SWG has failed to demonstrate that any of the violations articulated in NRS 703.373(11) occurred. In particular, SWG has failed to demonstrate its constitutional or statutory rights were violated in any way. Any lack of notice it claims is a result of SWG failure to prepare a proper application rather than an error by the Commission. Moreover, Southwest Gas Corporation's arguments that the Commission's decision was based on an error of law or was arbitrary or capricious is unsupported and belied by the record. The Commission's decision was made upon lawful procedure and based on substantial evidence. Therefore,

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the Commission's decision should be upheld as SWG has failed to meet its burden pursuant to NRS 703.373(9).

VIII. CONCLUSION

Pursuant to NAC 703.2231 and NRS 704.185, SWG had the burden of proof to show that its rate changes were just and reasonable. Nevada does not apply a presumption of prudence to general rate cases, and to claim otherwise is to ignore binding law. Petitioner's arguments all rest on the false premise that Nevada does apply the presumption of prudence and, because Nevada does not, Petitioner's arguments can be summarily denied. Ultimately, the Commission executed its plenary power an applied law in the underlying hearing pursuant to the procedure and guidelines set forth in NRS 703 and NAC 703. The record in the underlying case supports the Commission's finding, and therefore, the Commission's Order was not erroneous, arbitrary of capricious, or made based on a violation of procedure. NRS 703.373(11). The Petition is devoid of any legitimate claim otherwise. Accordingly, the Commission's Order was supported by substantial evidence and, pursuant to the applicable standard of review, the Commission's Order should be affirmed.

Respectfully submitted June 21, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 16 in 14 pitch Century Schoolbook.

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

SOUTHWEST GAS CORPORATION, Petitioner, vs. PUBLIC UTILITIES COMMISSION OF NEVADA, *et al.*, Respondents.	CASE NO. A-19-791302-J DEPT. NO. 19

RESPONDENT PUBLIC UTILITIES COMMISSION OF NEVADA MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to the Nevada Revised Statutes ("NRS") 703.373(7), the Public Utilities Commission of Nevada ("PUCN"), by and through its legal counsel, respectfully submits its Memorandum of Points and Authorities in this matter.

Dated the 21st day of June, 2019.

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POINTS AND AUTHORITIES

I. INTRODUCTION

The Public Utilities Commission of Nevada ("PUCN" or "Commission") is charged with balancing the interests of the shareholders of a public utility with the interests of the utility's ratepayers. In achieving that balance, a public utility should not be protected from mismanagement or incompetence. Similarly, ratepayers should not be left to pay for mistakes or indolence on the part of the utility. At the core of this appeal is a deficient regulatory filing submitted by a utility, Southwest Gas Corporation ("Southwest Gas"), that was unwilling or unable to rehabilitate its filing as the case proceeded.

Southwest Gas filed a general rate application that lacked key details or exhibits and contained multiple errors and indefensible costs that Southwest Gas sought to recover through rates charged to its customers. Southwest Gas did not justify the rates that it wanted the PUCN to approve or provide sufficient evidence to support why its proposals in the case were just and reasonable. The evidence indicated that Southwest Gas demonstrated a systemic lack of accountability, oversight, and prudent management. Upon filing its deficient application, Southwest Gas was not prepared to move forward with the necessary discovery process to allow intervening parties to review the filing and prepare for hearing. Southwest Gas's witnesses were unprepared at hearing to answer questions on their own pre-filed written testimony or on issues raised by the other parties to the proceeding prior to hearing. Worse yet, Southwest Gas presented witnesses at hearing who lacked personal knowledge or a depth of understanding as to their own testimony.

Southwest Gas's ratepayers should not be held accountable for Southwest Gas's deficient filing. Southwest Gas was given every opportunity in discovery, in rebuttal testimony, and at hearing to rehabilitate its application and ensure that the evidence before the PUCN supported its requests. For the issues on appeal, the PUCN found that Southwest Gas failed to provide evidence to support its requests or that the weight of the record evidence did not support Southwest Gas's requests. Now, as a final effort to shore up its deficient filing, Southwest Gas is attempting to escape the consequences of its failure to sustain its burden by asking this Court to 1) apply a presumption of prudence that does not exist in Nevada law; 2) drastically expand the noticing requirements for administrative hearings; 3)

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fundamentally restrict the PUCN's authority to exercise discretion in setting just and reasonable utility rates; and 4) improperly substitute its judgment for that of the PUCN as to the weight of evidence on questions of fact.

Southwest Gas's Memorandum in support of its petition for judicial review does not establish that there was any error on the part of the PUCN. As to each issue on appeal, the PUCN acted within its legislatively-granted authority to weigh the evidence and determine just and reasonable rates. While Southwest Gas argues that the application of a presumption of prudence would have resulted in a different outcome for some of the issues on appeal, the PUCN found that there was no standard, presumed or otherwise, that would have cured Southwest Gas's failure to provide any evidence that its investments were prudently incurred and were the product of reasonable management practices. Southwest Gas also has no credible claim to a denial of its due process rights, as its central complaint turns on the fact that its witnesses lacked personal knowledge or were unprepared to provide testimony regarding issues about which they had already filed written testimony. Finally, the United States ("U.S.") Supreme Court has established a three-part standard that must be met to demonstrate confiscatory rates, and Southwest Gas has not satisfied any part of that standard.

This Court must deny Southwest Gas's requested relief and affirm the PUCN's Modified Order because the PUCN's findings and decisions within the Modified Order represent a lawful exercise of regulatory authority that does not prejudice Southwest Gas's substantial rights in any of the ways enumerated in Nevada Revised Statutes ("NRS") 703.373(11).

II. BACKGROUND

Southwest Gas Corporation ("Southwest Gas") is a public utility authorized to provide natural gas service in portions of northern and southern Nevada. Southwest has two operating units in Nevada, a Northern Nevada Division and a Southern Nevada Division.

The Regulatory Operations Staff ("Staff") of the PUCN is the investigative arm of the PUCN and acts as an entirely independent party in contested proceedings before the PUCN. When Staff participates in contested cases before the PUCN, Staff independently determines the testimony it will file and the issues it will raise at hearing. Staff is charged with balancing the interests of ratepayers and utility shareholder. The Bureau of Consumer Protection is a separate division with the Attorney

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General's office, and its obligation is to protect the interest of ratepayers.

On May 29, 2018, Southwest Gas filed its general rate application with the PUCN, designated as Docket No. 18-05031. In Docket No. 18-05031, Southwest Gas requested approval to increase its retail natural gas service rates. Both Staff and the Bureau of Consumer Protection participated actively in Southwest Gas's rate case. A hearing was held in Docket No. 18-05031 in late October 2018, spanning a total of six days. The PUCN admitted 115 exhibits in the record at the conclusion of hearing. Southwest Gas pre-filed both direct and rebuttal written testimony. The interveners to the proceeding, including the Bureau of Consumer Protection and Staff, filed written direct testimony. Southwest Gas's last general rate case was approximately six years ago and litigated in Docket No. 12-04005.

In this petition for judicial review, Southwest Gas appeals the PUCN's Modified Order issued on February 15, 2019. The Modified Order was issued after the PUCN granted reconsideration as requested by the parties to the proceeding. An Order on Petitions for Reconsideration and Clarification also was issued on February 15, 2019.

Among other laws and regulations, public utilities in Nevada are subject to Chapters 703 and 704 of the Nevada Revised Statutes ("NRS") and Nevada Administrative Code ("NAC").

III. STANDARD OF REVIEW

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."[1] With regard to the PUCN's statutory authority and duty to regulate utility rates, the Supreme Court of Nevada has described the PUCN's power as "plenary," meaning that it is "broadly construed."[2] The PUCN's decisions are "prima facie lawful."[3] Therefore, this Court must "not interfere with [PUCN] decisions other than to keep them within the framework of the law."[4]

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[1] *See* NRS 703.150 and 704.001.

[2] *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.

[3] NRS 704.130.

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

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The Supreme Court of Nevada has emphasized the PUCN's broad discretion in setting utility rates and practices, stating, for example, that "[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 reasonable' and that it is unlawful for a public utility to charge an unjust or unreasonable rate."[5]

NRS 703.373(11) requires that this 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 and shall affirm the decision of the PUCN unless "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." NRS 703.373(9) further clarifies that "[t]he burden of proof is on the petitioner to show that the final decision is invalid."

Southwest Gas attempts to expand the standard of review for this Court, arguing that when a regulated utility alleges that its constitutional rights have been violated, courts will independently review legal *and factual* issues, citing a 1920 United States ("U.S.") Supreme Court case that introduced the "*Ben Avon*" doctrine.[6] However, the Ben Avon doctrine – that a reviewing court must independently review "constitutional" facts (*i.e.*, allegations of confiscation) underlying rate-setting orders – has long disappeared from federal law and is thoroughly discredited. Acclaimed legal scholar Professor Kenneth Culp Davis, widely recognized as a pioneer in the field of administrative law,[7] twice pronounced the doctrine dead:

> § 29.23. Jurisdictional and Constitutional Facts: When Does the Constitution Require Facts to be Found De Novo by a Court?

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

[6] Mem. at 9:19-21 (citing *Ohio Valley Water Co. v. Borough of Ben Avon*, 253 U.S. 287, 289 (1920)).

[7] *Kenneth C. Davis, 94; Legal Scholar, Pioneer on Administrative Law*, LOS ANGELES TIMES, Sept. 23, 2003, at https://www.latimes.com/archives/la-xpm-2003-sep-23-me-davis23-story.html. There are more than 4,500 judicial citations to Mr. Davis' treatises. *Id.*

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> More than half a century ago, three celebrated cases enunciated a constitutional principle requiring exercise of independent judicial judgment on questions of jurisdictional or constitutional facts. Ohio Valley Water Company v. Ben Avon Borough, 253 U.S. 287 (1920) (valuation for utility for rate fixing); …
> The Supreme Court has never overruled the Ben Avon case but in many cases it denied certiorari when lower courts refused to follow it, and on that basis the 1958 Treatise said that 'the Ben Avon doctrine in the federal courts is dead.' Vol. 4, at 174. It has never been revived.[8]

Later cases decided by the U.S. Supreme Court, including *Fed. Power Comm'n v. Hope Natural Gas Co.,* have, in effect, replaced the *Ben Avon* doctrine with the rule that when a utility alleges 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.[9] In *Duquesne Light Co. v. Barasch*, the Supreme Court reviewed its decision in *Hope Natural Gas,* stating:

> We also acknowledged in that case that all of the subsidiary aspects of valuation for rate-making purposes could not properly be characterized as having a constitutional dimension, despite the fact that they might affect property rights to some degree. Today we reaffirm these teachings of *Hope Natural Gas:* '[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.'[10]

In setting rates, the PUCN may consider a "zone of reasonableness."[11] "Assuming that there is a zone of reasonableness within which the Commission is free to fix a rate varying in amount and higher than a confiscatory rate … the Commission is also free to decrease any rate which is not the 'lowest reasonable rate.'"[12]

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[8] 5 Davis, ADMINISTRATIVE LAW TREATISE, p. 441 (2d ed. 1984).

[9] *See Fed. Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 64 S.Ct. 281(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, 88 S.Ct. 1344, 312 (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)).

[10] *Duquesne,* 488 U.S. at 310, 109 S.Ct. at 617, (1989) (citing *Hope,* 320 U.S. at 602, 64 S.Ct. at 288).

[11] *FPC v. Natural Gas Pipeline Co.,* 315 U.S. 575, 62 S.Ct. 736.

[12] *Id.* at 585, 62 S.Ct. at 743 (internal citations omitted).

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IV. ISSUES PRESENTED

(1) Whether the PUCN-approved return on equity of 9.25 percent is based on substantial evidence, meets the U.S. Supreme Court standards for fair returns, and results in just and reasonable rates.

(2) Whether the pension expense as approved by the PUCN, which reflects normalization of volatile pension costs and a discount rate supported by the record evidence, represents a valid exercise of PUCN ratesetting authority.

(3) Whether the PUCN appropriately disallowed 100 percent of the costs associated with the Challenged Work Orders since Southwest Gas failed to put forth substantial evidence and demonstrated a systemic lack of accountability, oversight, and prudent management that raised serious doubts as to the prudence and reasonableness of all costs associated with the Challenged Work Orders.

(4) Whether the Court should decline to determine the existence or nonexistence of a rebuttable presumption of prudence because Southwest Gas's request for "guidance" on this issue became moot when the PUCN issued its Modified Order and did not base any of its decision making on a presumption of prudence.

(5) Whether a public utility benefits from a rebuttable presumption of prudence in a general rate case in Nevada even though neither the U.S. Supreme Court nor the Nevada Courts have recognized such a presumption in a general rate a case, and there is no statute or regulation mandating such a presumption in Nevada.

(6) Whether Southwest Gas raises any valid due process claims as to notice given that it had multiple opportunities to respond to pre-filed testimony and provide evidence at hearing in response to cross examination or clarifying PUCN questions.

(7) Whether the PUCN's disallowance of 100 percent of the costs included in the Challenged Work Orders can be claimed to be confiscatory or amount to a taking, even though Southwest Gas has presented no evidence that it is lacking sufficient operating capital to provide safe, adequate and reliable service to its customers; that it will be impeded from raising capital in the markets in the future; and that it cannot continue compensating its equity holders for the risks associated with their investment.

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V. ARGUMENT

This Court must affirm the PUCN Order because it 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 U.S. Supreme Court standards for determining an appropriate return on equity; 2) determined the 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, as such a presumption does not exist in Nevada law and is not a constitutional standard that must be applied in Nevada

A. The PUCN Based Its Findings on the Substantial Evidence in the Record, and Its Findings Did Not Turn on whether a Presumption of Prudence Exists.

Southwest Gas argues that a PUCN decision on a presumption of prudence is at the heart of all of the PUCN's findings that Southwest Gas asks this Court to reverse on judicial review.[13] While the PUCN found that Southwest Gas does not enjoy a presumption of prudence,[14] none of the PUCN's findings at issue turn on the existence or nonexistence of a presumption of prudence. None of the issues raised by Southwest Gas in its Memorandum survive or fail based on a presumption of prudence. Rather, the PUCN, as reflected in its Modified Order, weighed the evidence in the record,

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[13] Mem. at 3:9-10.

[14] 1 Certified Record ("CR") at 493, ¶ 622. The number that appears prior to "CR" in record citations refers to the volume in which that portion of the record can be found.

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took into account the lack of evidence presented by Southwest Gas, and issued a decision that resulted in just and reasonable rates charged for Southwest Gas's service.

This Court, upon a determination that none of the issues subject to this judicial review turn on a presumption of prudence, could find that a ruling on a presumption of prudence is not required. After all, by Southwest Gas's own acknowledgement, it is seeking "guidance for future proceedings" before the PUCN as to the presumption.[15]

"This court's duty is not to render advisory opinions but, rather, to resolve actual controversies …"[16] The question of mootness is one of justiciability,"[17] and "judicial power" is limited to the "authority to hear and determine justiciable controversies."[18] Thus, courts can only adjudicate cases that are justiciable, or "appropriate for court review."[19] "Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief."[20] For a justiciable controversy to exist, the harm alleged by the party seeking review must be concrete and not speculative, remote, or hypothetical.[21] "[L]itigated matters must present an existing controversy, not merely the prospect of a future problem."[22] A controversy must be present through all stages of the proceeding, and even though a case may present a live controversy at its inception, subsequent events may render the case moot and nonjusticiable.[23]

In the instant case, Southwest Gas's request became moot when the PUCN issued its Modified Order, basing none of its decision-making on an existence or nonexistence of a presumption of prudence. Southwest Gas, in asking this Court to offer "guidance for future proceedings," asks this

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[15] Mem. at 12:10-11.

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

[17] *Id.* at 602, 245 P.3d at 574.

[18] *Galloway v. Truesdale*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967).

[19] *Black's Law Dictionary*, 599 (6th ed. 1991).

[20] *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).

[21] *Herbst Gaming, Inc. v Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1231 (2006).

[22] *Bryan*, 102 Nev. at 525, 728 P.2d at 444.

[23] *Univ. Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004).

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Court to render an opinion as to a speculative or hypothetical issue. As such, Southwest Gas's request that this Court determine whether a presumption of prudence exists is not a justiciable issue for review.

There are exceptions to the mootness doctrine, however. Even if an appeal is moot, courts can consider the appeal if it "involves a matter of widespread importance that is capable of repetition, yet evading review."[24] Whether a presumption exists is not an issue capable of evading review. A future PUCN decision could base its decision-making on the existence or nonexistence of a presumption of prudence. Once such a decision is made, the issue is not capable of evading review.

Given the foregoing, this Court has ample latitude to render any decision as to the presumption of prudence moot and decline to issue any "guidance" to Southwest Gas for future cases.

1. The PUCN Return on Equity Finding Is Based on Substantial Record Evidence and Meets the United States Supreme Court Standards for Fair Returns.

Return on equity, or return on investment, is the amount that public utilities are permitted to earn on the equity that they spend on investments in infrastructure to serve their ratepayers.[25] The PUCN is legislatively mandated to ensure that established rates are just and reasonable.[26] (Certified Record ("CR") at 367.) Specific to return on investments, NRS 704.001(4) provides that the commission 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 U.S. Supreme Court cases, *Bluefield Waterworks & Improvement Co. v. West Va. Pub. Serv. Comm'n*, 262 U.S. 679. 43 S.Ct. 675 (1923) and *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 609 (1944), inform the PUCN's decisions regarding return on equity. In *Bluefield*, the Supreme Court stated:

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[24] *Personhood Nevada v. Bristol*, 126 Nev. at 602, 245 P.3d at 574.

[25] In its Memorandum, Southwest Gas refers to "return on investment." The PUCN Reply Brief will use the term "return on equity." While "return on investment" and "return on equity" can generally be used interchangeably, the PUCN and other state public utility commissions refer to "return on equity" as a term of art.

[26] *Nevada Power Co. v. Pub. Serv. Comm'n*, 91 Nev. 816, 825, 544 P.2d 428, 434 (1975) (citing NRS 704.040 and NRS 704.120).

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> 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.[27]

In *Hope*, the 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.[28] Additionally, in *Hope*, the Court stated that it is not the method of estimating return on equity that determines the reasonableness; rather, it is the result and the effect of the result on the public utility.[29] 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; it is the impact of the rate-setting order that matters.[30]

The Nevada Supreme Court has found that "[t]he crux to every rate case involving the cost of common equity is just how one goes about conforming to the *Bluefield* and *Hope* cases."[31] Consistent with this direction from the Courts, the PUCN relied heavily on both the *Hope* and *Bluefield* decisions to determine the appropriate return on equity for Southwest Gas. (CR at 307-08, 366-67, and 372.)

In setting a return on equity, the PUCN specifies a set percentage amount on which the public utility is permitted to earn a return. That specified percentage is based upon an approved range of reasonableness. (*Id*. at 368, ¶ 181.) In this rate case, for example, Southwest Gas recommended a return on equity of 10.30 percent within a range of 10.00 to 10.50 percent, Staff recommended a return

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[27] *Id.* (citing *Bluefield*, 262 U.S. at 692-93).

[28] *Id.* (citing *Hope*, 320 U.S. at 603).

[29] 1 CR at 367, ¶ 178 (citations omitted).

[30] *Id*. at 307, ¶ 15 (citing *Hope*, 320 U.S. at 602). *See also Duquesne Light Co. v. Barasch*, 488 U.S. at 310 ("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)).

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

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on equity of 9.40 percent within a range of 9.10 to 9.70 percent, and the Bureau of Consumer Protection recommended a 9.30-percent return on equity within a range of 9.00 to 9.50 percent. (*Id.* at 368, Table 1.) 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 the ratepayers and shareholders. (*Id.* at 372, ¶ 195; 370, ¶ 185.)[32] The PUCN found that this range of reasonableness was supported by Staff's testimony and even exceeds the high end of the Bureau of Consumer Protection's range. (*Id.* at 370, ¶ 185.)

To determine the appropriate return on equity and its conformance with applicable statues and the *Hope* and *Bluefield* decisions, the PUCN reviewed the evidence developed via expert testimony. (*Id.* at 367.) As the PUCN noted, the evidence that it considered included (1) the results of each expert's evaluation of various return on equity models; (2) the experts' judgement in 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. (*Id.*)

One of the tools used to determine an appropriate return on equity is a proxy group. The proxy group assists the PUCN in performing its evaluation consistent with *Hope*, which mandates that the return on equity be commensurate with the returns of investments in other enterprises having corresponding risks.[33] In this rate case, the proxy group consisted of a group of seven comparable natural gas utilities that were selected based on criteria that make them similar to Southwest Gas, namely size, operations, and credit metrics. (1 CR at 367.) No party challenged the proxy group used by Southwest Gas, and both Staff's and the Bureau of Consumer Protection's expert witnesses ran their models using Southwest Gas's proffered proxy group. (*Id.*)

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[32] 1 CR at 367, ¶ 179 ("In establishing a zone of reasonableness and determining [a return on equity] within that range, the [PUCN] relies upon expert testimony and evidence which applies principles of finance, accounting, and economics …").

[33] *Nevada Power Co. v. Pub. Serv. Comm'n*, 91 Nev. at 825, 544 P.2d at 435 (citing *Hope*, 320 U.S. at 603).

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In terms of evaluating the evidence presented on return on equity, the PUCN focused on the return on equity model analyses; macroeconomic conditions; and Southwest Gas's risk relative to the proxy group companies. As to the model analyses, the PUCN examined some of the key drivers of these models, which included the "market risk premium."[34] The PUCN concluded that Staff's and the Bureau of Consumer Protection's use of actual, historical, and published data to determine a "market risk premium" was more defensible than Southwest Gas's approach, which relied upon a forecast. (1 CR at 369-70.) Southwest Gas's use of high "market risk premium" estimates (ranging from 11.48 to 12.61 percent, compared to Staff's 6.88 percent and BCP's 7.50 percent) resulted in Southwest Gas overstating its return on equity for two of its models, namely the Capital Asset Pricing Model and the Empirical Capital Asset Pricing Model. (*Id*. at 369.) By merely replacing Southwest Gas's inflated estimates with either Staff's or the Bureau of Consumer Protection's estimates, the PUCN found that Southwest Gas's average return on equity modeling results would fall from 11.10 percent to 9.10 percent or 9.30 percent, respectively. (*Id*.)

As to macroeconomic conditions, Southwest Gas argued that the PUCN should consider recent decisions by the Federal Reserve to increase the borrowing rate on Treasury bonds. However, the Bureau of Consumer Protection and Staff argued that the federal borrowing rate must be considered in a broader context, specifically noting that the borrowing rate was at or near zero percent prior to the recent increase of just 25 basis points (0.25 percent). The PUCN found that "[t]he evidence on the record does not support or indicate the occurrence of signficant increases in federal interest rates in the near term that would justify the prospective increase in [return on equity] recommended by [Southwest Gas]." (*Id*. at 370.)

Finally, as to Southwest Gas's risks compared to its proxy group, the PUCN found that Southwest Gas does not face more risk than its proxy group. (*Id*. at 370-72.) One risk metric considered was whether Southwest Gas holds more debt than the other utilities in the proxy group. The Bureau of Consumer Protection's witness argued that a small upward adjustment was needed (20

[34] The market risk premium is the difference between the market return and the risk-free rate. *See* Roger A. Morin, NEW REGULATORY FINANCE 155 (Pub. Utils. Reports) (2006). The risk-free rate is the return that would be required by investors in the absence of risk. *See id.* at 37, 151.

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basis points, which is less than a quarter of a percent) to set Southwest Gas's return on equity given its debt levels compared to its proxy group. The PUCN found that the Bureau of Consumer Protection's adjustment was unnecessary, relying on the following evidence: (1) the credit rating agencies have improved Southwest Gas's credit rating since its last rate case in 2012; (2) the credit rating agencies view Southwest Gas's regulatory environment as credit supportive, given the PUCN's approval of various rate mechanisms and infrastructure cost recovery programs, as well as the PUCN's approval of Southwest Gas's use of a holding company to create more separation between regulated and unregulated operations. (1 CR at 371.)[35] Southwest Gas also was found to have as many rate mechanisms that support cash flow or reduce risk as the other utilities in its proxy group. (*Id.* at 371-72.) In total, the PUCN found that the evidence did not support Southwest Gas's claims that it is riskier than its peer utilities in its proxy group. Rather, "given the evidence presented, the PUCN [found] that [Southwest Gas's return on equity] is most appropriately set in the lower portion of the range of reasonableness." (*Id.* at 372.) The PUCN concluded that the approved 9.25-percent return on equity "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." (*Id.*)

Southwest Gas sought reconsideration from the PUCN of the 9.25-percent return on equity, arguing that no party had proposed a return on equity as low as 9.25 percent. In its Order on Petitions for Reconsideration and Clarification, the PUCN noted that it had established a zone of reasonableness between 9.10 and 9.70 percent. (*Id.* at 614, ¶ 110.) Testimony was presented that any number within the zone was reasonable. (*Id.* at ¶ 111.)[36] A return on equity of "9.25 percent falls within the range of reasonableness of multiple expert witnesses in this proceeding," is "based on substantial evidence in the record," is "commensurate with returns on investments in other enterprises having corresponding

[35] As to one of the credit-supportive rate mechanisms, the PUCN approved a "full" decoupling mechanism for Southwest Gas; very few of Southwest Gas's peers in its proxy group enjoy full decoupling. Full decoupling guarantees Southwest Gas a certain amount of revenue even if its customers purchase less gas than forecasted. 1 CR at 371.

[36] 5 CR 4227:8-13.

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risks," and is sufficient to maintain financial integrity and for Southwest Gas to attract capital. (*Id.* at 614-15, ¶¶ 111-12.)

In seeking judicial review, Southwest Gas again argues that the PUCN arbitrarily selected a return on equity that was lower than anyone requested.[37] To support its argument that the PUCN acted arbitrarily, Southwest Gas states that the average return on investment for the proxy group is 10.23 percent, while the industry average is 9.68 percent.[38] Southwest Gas raised these same percentages in its Petition for Reconsideration before the PUCN, and both percentages were soundly refuted by the other parties to the case and rejected by the PUCN. In fact, as noted in Staff's Answer to Southwest Gas's Petition for Reconsideration, the 10.23-percent figure appeared to be new evidence presented for the first time in the reconsideration proceedings, which is not permitted under the PUCN's regulations.[39] (2 CR at 1308.)

In claiming an average 10.23-percent return on equity for the proxy group, Southwest Gas cited to one of its witnesses' exhibits.[40] But the 10.23 percent is not explicitly identified in the referenced exhibit. (*Id.* at 1308-09.) The exhibit includes a list of the returns on equity authorized by various state commissions for ***all natural gas utilities across the country since 1980***. (*Id.* at 1308.) If the 10.23-percent figure could be derived from the exhibit referenced by Southwest Gas (which it cannot be),[41] then, at best, 10.23 percent is the average return on equity that the seven proxy gas companies have had since 1980. (*Id.* at 1309.) An average return on equity over the last 40 years, however, is

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[37] Mem. at 3.

[38] *Id.* at 8, 47.

[39] NAC 703.801(1)(b) states that a petition "may not contain additional evidentiary matter or require submission or taking of new evidence." *See* 2 CR at 1308-09.

[40] The exhibit referenced by Southwest Gas on page 8 of its Memorandum is Southwest Gas witness Robert Hevert's Exhibit RBH-R6, 12 CR at 10931-47.

[41] As noted above, the proxy group selected by Southwest Gas and used by Staff and the Bureau of Consumer Protection consisted of seven other public utilities. The exhibit that Southwest Gas uses to claim a 10.23-percent average return on equity for its proxy group does not provide any of the public utility names associated with the listed return on equity figures in the exhibit. As such, one absolutely cannot derive an average 10.23-percent return on equity for the seven proxy group companies from the exhibit that Southwest Gas references.

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meaningless and cannot be relied upon for rate-setting because it "does not reflect the current economic conditions, including historically low risk-free rates." (*Id.* at 1309.)

Southwest Gas's reliance on the industry average return on equity of 9.68 percent is similarly misguided. An industry-average return on equity does not consider any of the financial modeling that the PUCN evaluated to determine that 9.25 percent is an appropriate return on equity for Southwest Gas. (2 CR at 1309.) "The attempt by [Southwest Gas] to utilize one single data point to overcome the [PUCN's] careful deliberation in arriving at a just and reasonable return on equity by considering various financial models, macroeconomic conditions and Southwest Gas's risks as compared to its proxy groups"[42] falls far short of satisfying Southwest Gas's burden, pursuant to NRS 703.373(9), to demonstrate that the PUCN's Modified Order is invalid.

In its Memorandum, Southwest Gas makes other spurious claims that do not hold up to the evidence in the Certified Record. For example, Southwest Gas states that it is "undisputed" that it has more debt than the proxy group.[43] Southwest Gas cites only to its own rebuttal testimony, however, to support this claim.[44] In the cited portion of the rebuttal testimony, Southwest Gas's witness compares the company's equity-to-debt ratio in Southwest Gas's last rate case in 2012 to the equity-to-debt ratio in the 2018 rate case at issue in this appeal. None of that testimony cited by Southwest Gas demonstrates that it is "undisputed" that Southwest Gas holds more debt than its proxy group. In fact, what the testimony does demonstrate is that Southwest Gas's debt for its Southern Nevada jurisdiction has declined significantly (by 70 basis points, or 0.7 percent) when comparing the 2012 and 2018 rate cases.

Southwest Gas's other citation for its claim that it has more debt than its proxy group is to the Certified Record, at pages 10436 and 10437, which refers to the testimony of a Bureau of Consumer

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[42] 2 CR 1309.

[43] Mem. at 9.

[44] *See id.* (citing 12 CR 10701-02). A utility's rebuttal testimony should never amount to "undisputed" evidence. If the utility is following the standards for rebuttal as set forth in the PUCN regulations, its rebuttal testimony should only be explaining, repelling, counteracting or disproving facts offered in evidence by the other parties. NAC 703.097. Thus, by its very nature, rebuttal evidence cannot be "undisputed" evidence.

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Protection witness who states, "[Southwest Gas] does not face higher business risks than comparable gas operations and in terms of debt leverage (amount of debt in the capital structure) has ***slightly higher*** financial risks (in terms of higher debt levels in capital structure) than the comparable group." (CR at 10436-37 (emphasis added)). "Slightly higher" financial risks in terms of debt levels does not equate to "undisputed" evidence that Southwest Gas has more debt than every utility in its proxy group, and it certainly does not eliminate the body of substantial evidence that the PUCN relied upon in making its decision. In total, Southwest Gas's citations to the Certified Record do not accurately or sufficiently support its claims for judicial review.

Southwest Gas also argues that credit rating agencies rank Southwest Gas at a higher risk than all but one of the proxy group utilities. The source that Southwest Gas cites for this claim is again its own rebuttal testimony. To reach Southwest Gas's conclusion that it is riskier than all but one of its utility peers in the proxy group, Southwest Gas's witness had to convert each letter rating from rating agencies into a numerical scale and take the average.[45] While such a mathematical exercise results in some comparison, the results of such a comparison could be manipulated depending upon what numerical values Southwest Gas's witness used to convert letter ratings to numbers. Moreover, this portion of Southwest Gas's rebuttal was addressing alternative testimony from a Staff witness who had concluded that Southwest Gas's rate mechanisms, such as full decoupling, reduce Southwest Gas's risks, making it less risky than its peers. (12 CR at 10882; *id.* at 10539:24-10541:7.)

The PUCN was presented with differences of opinions from various experts as to whether Southwest Gas was more or less risky than its peers. In weighing the evidence presented, which the PUCN is required to do to determine just and reasonable rates, the PUCN concluded that the evidence did not support Southwest Gas's claims that it is riskier than its peer utilities in its proxy group. (1 CR at 372.) The PUCN's determinations regarding Southwest Gas's attractiveness to the investment community, including Southwest Gas's relative riskiness compared to its peers, are findings of fact based on an evaluation of the weight of the evidence; they are exactly the type of findings for which this Court must not substitute its judgment for that of the PUCN pursuant to NRS 703.373(11).

[45] *See* Mem. at 9 (citing 12 CR at 10881-82).

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Finally, Southwest Gas criticizes the 9.25-percent return on equity approved by the PUCN because no party requested this exact return on equity and because the PUCN provided no link to the evidence that 9.25 is commensurate with returns on investments in other enterprises having corresponding risks. First, even if no party recommended a specific 9.25-percent return on equity, the PUCN clearly established a zone of reasonableness between 9.10 and 9.70 percent. (1 CR at 614, ¶ 110, *id.* at 367, ¶ 179.) The PUCN took evidence that indicated that any number within that zone was reasonable and that Southwest Gas's risk profile supported a return on equity in the lower end of the zone. (*Id.* at 614, ¶ 111 and 372, ¶ 194.) As such, the evidence in the Certified Record fully supports the PUCN's decision to adopt a return on equity of 9.25 percent, even though no party specifically recommended this percentage. Even if the PUCN's methodologies used at arriving at the 9.25 percent are flawed (they are not), the *Hope* Court found that it was not the method of calculating the return on equity that determines its reasonableness; rather, it is the result and the effect of the result on the public utility.[46]

As to whether the return on equity is commensurate with returns of other enterprises of corresponding risk, the weight of the PUCN evidence supports its conclusions. As noted above, to reach its decision, the PUCN evaluated return on equity model analyses; macroeconomic conditions; and Southwest Gas's risk relative to the proxy group companies. The goal of the financial models used to establish the appropriate range of reasonableness for return on equity is to capture current market and macroeconomic conditions and investor expectations. (12 CR 10517:18-10531:14.) Each model is then applied to the proxy group.[47] In this case, all of the parties used Southwest Gas's proxy group, which included utilities of similar size, operations, and credit metrics. (1 CR 367.) Given the foregoing, the modeling in and of itself, which is applied to a proxy group of utilities similar to Southwest Gas, evaluates whether the return on equity estimates are commensurate with returns of other enterprises of corresponding risk.

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[46] 1 CR at 367 (citing *Hope*, 320 U.S. at 287-88).

[47] *See, e.g.*, 12 CR 10517:20-26. This attachment shows how the Constant Group Discounted Cash Flow modeling analysis is applied to each of the gas utilities in Southwest Gas's proxy group.

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None of Southwest Gas's arguments in its appeal put forth legitimate evidence to support a finding that the PUCN has run afoul of *Bluefield* or *Hope*. As noted above, the "average" returns cited by Southwest Gas (10.23 and 9.68 percent) fail to consider any of the financial modeling that the PUCN evaluated. Moreover, the PUCN weighed substantial evidence put forth by other parties in the proceeding to determine that Southwest Gas was not riskier than its peers. Based upon the PUCN modeling and consideration of other macroeconomic conditions and Southwest Gas's risks as compared to its proxy group, the 9.25-percent return on equity approved by the PUCN is "reasonably sufficient to assure confidence in the financial soundness of the utility"[48] and is "commensurate with the returns on investments in other enterprises having corresponding risks."[49]

Southwest Gas argues that this Court should reverse the PUCN's 9.25-percent return on equity decision and instruct the PUCN to approve the 10.30-percent return on equity requested by Southwest Gas.[50] Setting aside the fact that neither the evidence nor Southwest Gas's arguments on in its Memorandum support such a result, this Court does not have the authority to mandate that the PUCN simply give Southwest Gas its originally-requested return on equity amount. 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.[51]

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

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[48] *Bluefield*, 262 U.S. at 692-93. The Court should similarly reject any arguments by Southwest Gas that the PUCN has engaged in "[u]nreasonable, arbitrary or capricious regulation" that "fails to provide a sufficient return to the utility …" Mem. at 46:24-28 (citing *State v. Zephyr Cove Water Co.*, 94 Nev. 634, 639, 584 P.2d 698, 701 (1978)). As established above, the PUCN took the weight of the evidence under consideration to reach a determination that the approved return on equity would provide Southwest Gas with sufficient returns to maintain its financial integrity. Moreover, Southwest Gas's citation to invalid averages for the industry or its proxy group do not amount to sufficient support for its claim that the PUCN decision results in unreasonable, arbitrary or capricious regulation.

[49] *Hope*, 320 U.S. at 603.

[50] Mem. at 48: 8-10.

[51] *Nevada Power Co.*, 91 Nev. at 826, 544 P.2d at 435 (citations omitted).

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therefore, were the courts to prescribe such formulae, they would be exercising a legislative function not constitutionally entrusted to them."[52] As such, this Court cannot instruct the PUCN to award Southwest Gas its requested return on equity.

Moreover, in this case, the PUCN relied on substantial evidence in the form of voluminous testimony submitted by the parties during a multi-day hearing, which followed extensive discovery and investigation by Staff and the Bureau of Consumer Protection. While Southwest Gas may disagree with the PUCN's decision to approve 9.25 percent for its return on equity, the PUCN's decision was nonetheless based on substantial evidence in the Certified Record. "There may be cases where two conflicting views may each be sustained by substantial evidence."[53] Therefore, the PUCN Order does not need to disprove that Southwest Gas's requested return on equity of 10.30 may also be satisfactory in terms of the evidence taken and the standards set forth in the *Hope* and *Bluefield* cases. 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.'"[54] The PUCN weighed the evidence before it and concluded that a 9.25-percent return on equity would result in just and reasonable rates. This Court should uphold the PUCN's decision.

2. The PUCN's Determinations regarding Pensions Expenses Are Supported by Record Evidence, and Southwest Gas Had Ample Notice to Prepare to Defend Its Own Testimony Related to Pension Expenses.

Southwest Gas also challenges two of the PUCN's decisions regarding pension expenses: (1) the 2018 discount rate that is used to determine pension expenses and (2) normalization[55] of Southwest Gas's pension expenses over a three-year period.[56] Southwest Gas states that no party

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[52] *Id.* at 827, 544 P.2d at 436.

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

[54] *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).)

[55] NAC 704.9135 defines "normalized" as "adjusted to reflect normal or representatively variable conditions."

[56] Mem. at 8, 45-46.

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challenged the accuracy of its 2018 pension expense and that a presumption of prudence therefore applies and the pension expenses should have been approved.[57] Southwest Gas states that there was no evidence that its pension expenses were unreasonable and argues that a PUCN decision to award less than the requested amount is "'arbitrary, confiscatory, and erroneous, requiring reversal.'"[58] Finally, Southwest Gas argues that its due process rights were violated, claiming that "it was deprived of the opportunity to submit testimony or other evidence relating to the [PUCN's] decision to normalize and reduce the pension expenses."[59] Southwest Gas argues that it was required to justify its 2018 discount rate of 3.75 percent without prior notice.[60]

As is clear from the PUCN's Modified Order and the evidence considered by the PUCN, neither prudence nor due process rights were at issue in either of 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 the volatility in the pension expense. (1 CR at 436, ¶ 436.) Moreover, the PUCN found that Southwest Gas failed to provide evidence in support of its proposed dramatic change in the discount rate, even after an opportunity was provided at hearing to present such evidence. (*Id.* at 434, ¶ 428.) 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.

In attempting to apply a presumption of prudence to its proposed pension expenses, Southwest Gas illuminates its confusion regarding not just whether such a presumption exists in Nevada, but also regarding the way in which such a presumption is applied in jurisdictions where it does exist. Prudence relates to the reasonableness of a utility's decision to incur costs; it is not relevant in determining the appropriate discount rate for the regulator to adopt in forecasting future, not-yet-incurred costs. Southwest Gas incorrectly asserts, perhaps based on a sincere misunderstanding of the

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[57] *Id.* at 45:25-27.

[58] *Id.* at 46:4-8 (citing *Pub. Serv. Comm'n v. Ely Light & Powr Co.*, 80 Nev. 312, 322, 393 P.2d 305, 311 (1964)).

[59] *Id.* at 46:9-13.

[60] *Id.* at 46:9-13.

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law given its perplexing unwillingness to fully participate and present evidence in the proceedings underlying this appeal, that a presumption of prudence requires the PUCN to presume that evidence exists to support Southwest Gas's proposals, even when Southwest Gas refuses, or is unable, to provide supporting evidence when asked to do so. "A change it the presumption of prudence does not change the burden of proof set out in [the Commission's] governing statutes. The presumption of prudence does not address the burden of proof at all."[61]

a. Normalization is a Common Ratemaking Tool Used to Arrive at Just and Reasonable Rates, and Southwest Gas Had Notice of Staff's Proposal to Normalize Pension Expenses.

Southwest Gas proposed an $11.7-million increase in pension costs. (1 CR at 433, ¶ 426.) Southwest Gas states that since 2011, pension costs have fluctuated significantly, resulting in pension expense volatility.[62] (*Id.* at 432, ¶ 421; 435, ¶ 429.) To address this volatility, Southwest Gas proposed a pension tracker, which is a ratemaking mechanism that tracks the difference between pension expenses included in rates and the level of expense incurred by Southwest Gas. (*Id.* at 435, ¶ 429.) The other parties to the proceeding, however, raised concerns as to the functionality of Southwest Gas's proposed pension tracker.[63] The PUCN agreed that Southwest Gas's pension expenses were volatile but determined that normalizing the pension expenses over a three-year period, rather than using a pension tracker, is the appropriate way to address the volatility. (*Id.* at 436-37, ¶ 436.)

In this instance, it is clear that the PUCN determined that the normalization of pension expenses is the best means to arrive at just and reasonable rates; the question of prudent decision-making on the part of Southwest Gas's management was not a factor in the PUCN's decision. The PUCN, in weighing the evidence before it, is free to use the ratemaking method that will result in just and reasonable rates. The U.S. Supreme Court has found that there is no single ratemaking theory

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[61] *Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 409 S.W.3d 371, 379 (2013).

[62] 9 CR at 7914: 9 (quoting the Prepared Direct Testimony of Southwest Gas witness Christy M. Berger, stating "[h]istorically, the Company's pension costs have fluctuated significantly.").

[63] The Bureau of Consumer Protection, for example, contended that a pension tracker does not provide Southwest Gas with an incentive to control pension costs. 1 CR at 433, ¶ 423 (citation omitted).

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mandated by the Constitution,[64] and normalization is used frequently in ratemaking as a means to develop just and reasonable rates. (1 CR at 436, ¶ 436.) In fact, normalization is so commonly used that even Southwest Gas recommended normalization of its variable compensation expenses and its uncollectible (unpaid bills, etc.) expenses in this very case. (10 CR 8129:1-20; 9 CR at 7906:8-23.) The PUCN found that "Staff's proposal to address volatility in pension expense by normalizing the amount for recovery using an average of a number of historical years" was the appropriate approach. (1 CR at 436, ¶ 436.) While Staff had proposed a five-year average of historical years, the PUCN approved a three-year average. (*Id.* at 436-37, ¶ 436.)[65]

As noted above, Southwest Gas claims that its due process rights were violated in that it did not have the opportunity to submit testimony on the PUCN decision to normalize pension expense.[66] This argument fails for multiple reasons. 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. (9 CR at 7914.) 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.

Here, however, Southwest Gas's complaint is especially puzzling because it actually did receive advance notice that normalization of pension expenses was at issue. Staff proposed

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[64] *Duquesne Light Co.*, 488 U.S. at 316.

[65] 8 CR at 6426. ("The implication of significant year-over-year variability of pension expense is that the periodic pension expense in any single period is not likely to be an accurate predictor of future expense. So, the periodic pension expense recorded in 2018 may not be a valuable predictor of what the periodic pension expense will be in subsequent years. As such, using the single-point periodic pension expense in 2018 may not be a reasonable value for setting rates.").

[66] Mem. at 46:9-11.

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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. (8 CR at 6425-26.) Southwest Gas was fully-apprised of Staff's position and had more than adequate opportunity, both through pre-filed rebuttal testimony and at hearing, to address normalization. If Southwest Gas was unprepared to address normalization, it has no one to blame but itself.

Finally, Southwest Gas did not avail itself of the opportunity to seek rehearing, pursuant to NAC 703.801, to introduce additional evidence. Had Southwest Gas truly desired to present testimony that it believed it was unable to present at hearing, it could have petitioned the PUCN to allow it to do so.

b. Southwest Gas Did Not Provide Support for the Significant Increases to the Proposed 2018 Discount Rate that It Used in Calculating Pension Expenses.

Southwest Gas proposed a reduction in its discount rate from 4.50 percent in 2017 to 3.75 percent. A discount rate is used to estimate the existing liability for future pension benefits. (1 CR at 432-33, ¶¶ 421-22.) An increase in the discount rate will lower the following year's pension expense, while a decrease in the discount rate will increase the following year's pension expense. (9 CR at 7915:6-10.)

Southwest Gas filed testimony on the discount rate. This pre-filed testimony addressed how the discount is determined and the effect of the discount rate on pension costs. (*Id.* at 7914:26-7916:2.) At hearing, the PUCN asked follow-up questions of Southwest Gas's witness as to how a discount rate is determined and what influence Southwest Gas's management has on that discount rate. (1 CR at 433, ¶ 422.) At hearing, the following discussion occurred between a PUCN Policy Advisor and a Southwest Gas witness:

> Q: Okay. Now do you know who – how management determines what that discount rate is, or who makes that decision? Is it a pension committee? Is it your chief financial officer? Do you know how that decision gets made?
> A: That decision is made in conjunction with our actuary. Management, I believe, has some input on that, but it is not deciding – they do not control that completely.
> Q: But the actuary is not telling management what discount rate to use, is it –
> A: They make recommendations.
> Q: And do you know if they provide a range?
> A: That I'm not aware of, if they provide a range or not.

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> Q: And, but the person who would be aware of that, you know, hasn't provided testimony in the case or, to your knowledge, or is here today?
> A: That's not me, no.
> Q: Okay.
> A: I don't believe there is another witness that can speak directly to that.
> …
> Q: … [I]s there an explanation for why, in a zero interest rate environment that existed in 2013 and – 2012 through 2014, but the discount rate used to value that pension obligation was in the 4 and 5 percent range, and remained there effectively through 2017, and in 2018 was adjusted down 75 basis points despite, you know, increases in interest rates that have occurred … Do you know how that reconciles or –
> A: I know that the discount rate that's included here is from our actuarial studies that is based on information that is in conjunction with our senior management and the actuary. What goes into their recommendations for the discount rate that's appropriate for each year, I'm not aware of what that discussion is.
> …
> Q: Okay. And no one else here would be able to answer that?
> A: I don't believe so.[67]

As reflected in the above exchange, the PUCN provided Southwest Gas with ample opportunity to provide clarification as to the determination of a discount rate and, particularly, what role management had in selecting the discount. While the Southwest Gas witness did state that the actual analysis is only a recommendation to senior management, she was not able to provide any further information as to how senior management makes its decision or why Southwest Gas's discount rate was decreasing so significantly in 2018 compared to prior years. Given that this was the Southwest Gas witness who filed testimony proposing a particular discount rate, it is entirely reasonable for the PUCN to ask her clarifying questions to gather evidence to ascertain the reasonableness of Southwest Gas's proposed discount rate.

Southwest Gas claims that its due process rights were violated because it was not provided an opportunity to provide evidence related to the pension expense.[68] Given the exchange noted above, it is clear that Southwest Gas's claim is unfounded. The PUCN provided Southwest Gas an opportunity to answer questions and to justify its pension expense calculation through testimony, even asking similar questions multiple times and asking if other witnesses were available.

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[67] 5 CR at 3305:10-3306:7; 3306:22-3307:23.

[68] Mem. at 46:9-11.

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Southwest Gas further claims that the PUCN "violated Southwest Gas's due process rights by requiring it to justify a 3.75% discount rate without prior notice."[69] Southwest Gas submitted pre-filed direct testimony with its application specifically proposing the 3.75-percent discount rate. (9 CR at 7931; 7915-16.) PUCN rules mandate that "[a]n applicant must be prepared to go forward at a hearing on the data which have been submitted …"[70] Witnesses must be prepared at hearing to respond to questions about their written testimony.[71] The fact that Southwest Gas's witness was not prepared to answer questions does not amount to a due process violation or a lack of notice. In fact, the PUCN even asked Southwest Gas whether another witness could provide testimony. The PUCN provided ample opportunity for Southwest Gas to justify the discount rate proposed in Southwest Gas's application.

Southwest Gas appears to be suggesting that opposing counsel or even the PUCN is somehow prohibited from asking questions of a utility's witness at hearing unless the witness receives the questions in advance, even if the questions directly relate to the testimony offered by the witness in support of the utility's requested relief.

Southwest Gas attempts to support its ridiculous argument, at least with regard to questions from the PUCN, by referring to NAC 703.695, which governs the order of PUCN proceedings and explains that "[q]uestions to clarify testimony provided by witnesses may be asked of witnesses at any time by the presiding officer, any Commissioner, or any administrative attorney, policy adviser or legal counsel for the [PUCN]." Southwest Gas erroneously concludes, presumably based on the regulation's language contemplating only questions that "clarify testimony," that this rule prohibits the PUCN from asking questions that go beyond the objections raised by parties.[72] Southwest Gas apparently forgets that it is a party and that its application contained testimony from the witness to whom the PUCN directed clarifying questions, and the witness's testimony addressed the very issues that were the subject of the PUCN's questions. The above exchange clearly demonstrates that the PUCN was

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[69] *Id*. at 46:11-13.

[70] NAC 703.2231.

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

[72] Mem. at 42: 6-10.

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asking clarifying questions in accordance with the cited regulation, trying to understand how Southwest Gas arrived at its proposed discount rate.

Here, the evidence on the record indicated that from 2011 through 2017, the annual discount rate averaged 4.75 percent and never dropped below 4.25 percent. (1 CR at 434.) Southwest Gas proposed a reduction in the discount rate from 4.50 percent to 3.75 percent but offered no evidence to support its proposal, which, if adopted by the PUCN, would have resulted in an increase of approximately $4 million in projected pension costs, an increase that would have been collected from Southwest Gas's customers through higher rates. The PUCN relied on the available evidence to determine that there was no basis to change the discount rate as suggested by Southwest Gas.

3. Southwest Gas Failed to Sustain Its Burden of Proof in Seeking to Collect from Ratepayers the Costs Associated with the Challenged Work Orders, which Resulted in the PUCN Finding that It Is Not Reasonable to Include Any of the Costs Associated with the Work Orders in Approved Rates.

The issue on appeal is whether Southwest Gas provided sufficient evidence in support of five of its capital projects. This dispute over these five projects arose as part of the normal audit that Staff conducts for any rate case. Specifically, after a rate case is filed, Staff will audit a sample of high-dollar projects that a utility requests to be placed in rates. (5 CR at 3614:9-20.) In this case, Staff issued numerous data requests and made on-site visits regarding these high-dollar projects, attempting to evaluate whether the costs were prudently incurred and whether their inclusion in rates is just and reasonable. (4 CR at 2601:13-16.) Staff identified concerns with five of Southwest Gas's nine "system allocable" capital projects in its sampling review; these five projects, each of which concerned software development, are referred to as the "Challenged Work Orders." (*Id.* at 2601:16-19.)[73]

The PUCN found 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

[73] Each capital project is contained within one work order and costs/expenses are often reviewed by work order numbers, hence the reference to the "Challenged Work Orders." A "system allocable" project is a corporate-level project that Southwest Gas utilizes in all of its rate jurisdictions and for all of subsidiaries, i.e. Southern Nevada, Northern Nevada, Southern California, Northern California, South Lake Tahoe, Arizona, Paiute Pipeline Company, and Southwest Gas Transmission Company.

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unduly discriminatory or preferential. (1 CR at 493 (citing NAC 703.2231).) Because Southwest Gas had not met its burden of proof, the PUCN disallowed 100 percent of the costs associated with the projects in the Challenged Work Orders.

Southwest Gas claims that the approval or disapproval of the Challenged Work Orders comes down to one thing– the PUCN decision to not apply a presumption of prudence.[74] Based on the Modified Order, the PUCN clearly disagreed with Southwest Gas's contention that the rebuttable presumption was the crux of the issue:

> The [PUCN's] decision to disallow 100 percent of the costs associated with the Challenged Work Orders is separate from the [PUCN's] finding that [Southwest Gas] does not enjoy a rebuttable presumption of prudence regarding its expenditures in [rate case] proceedings. Rather than simply rejecting the Challenged Work Orders based solely on [Southwest Gas's] initial failure to support them, the [PUCN's] decision to disallow these costs is substantiated by the underlying evidentiary record, which predominantly reveals a systematic lack of accountability, oversight and prudent management by [Southwest Gas] as it incurred costs which it sought to recover from ratepayers in this case.[75]

Ultimately, the PUCN determined that there was no standard, "presumed, rebuttable or otherwise," that would have cured Southwest Gas's failure "to provide any evidence that its investments related to the Challenged Work Orders were prudently incurred and were the product of reasonable management practices."[76] The PUCN found Southwest Gas's discussion of the rebuttable presumption of prudence "irrelevant" in that, even if a presumption applied, such a presumption was clearly rebutted by other parties to the proceeding, and Southwest Gas still failed to provide substantial evidence to support the recovery of costs associated with the Challenged Work Orders.[77] The PUCN decision aligns with Nevada Supreme Court precedent that looks to the substantial evidence in the record, regardless of whether any presumption is appropriately applied or not.[78]

In examining how the PUCN arrived at its conclusion that Southwest Gas did not provide substantial evidence, the starting place is the PUCN's own regulations that memorialize the burden of

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[74] Mem. at 3:9-10, 7:24-26.

[75] 1 CR at 493, ¶ 622.

[76] *Id.*

[77] *Id.*

[78] *Nev. Power Co. v. Public Utilities Comm'n et al.*, 122 Nev. 821, 824, 138 P.3d 486, 488 (2006).

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proof in rates cases. Pursuant to these regulations, 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." (1 CR at 494, ¶ 623 (citing NAC 703.2231).) In Southwest Gas's initial application, the entirety of the evidence presented for the Challenged Work Orders was in Exhibit 42, the prepared direct testimony of a Southwest Gas witness. (*Id.* at 494, ¶ 623 (citing 10 CR at 8112-66).) However, despite being the only person sponsoring testimony on these projects in the initial application, the witness was not involved in the execution of any of the projects included in the Challenged Work Orders, did not review any of the charges made to the Challenged Work Orders, and did not possess any personal knowledge to support the underlying cost data included in the work orders. More importantly, the witness was not able to provide to the PUCN at hearing any information demonstrating why Southwest Gas made the decision to incur the costs associated with the software projects. (*Id.* at 494, ¶ 623 (citing 5 CR at 3856-59, 3900-01, 3904).) In fact, the witness was not aware until the hearing that her testimony omitted summaries of the Challenged Work Orders, even though she stated that she was providing such summaries. (*Id.* at 495, ¶ 623.)[79]

Even though Southwest Gas's initial application did not provide the evidence necessary to demonstrate that the costs that it incurred should be included in rates, Staff continued to work with Southwest Gas to illicit that information via discovery or other means. Staff propounded numerous data requests and had discussions with Southwest Gas personnel, attempting to get the utility to provide documentation that demonstrated prudent oversight and management or that the costs incurred were just and reasonable.[80] In other words, this is not an instance of Staff or another party not getting

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[79] Even though Exhibit 42 at RLC-4 (10 CR at 8147-65) was supposed to provide a description, work order number, amount, and brief summary for each item over $1 million placed in service since the last rate case, that information was not provided for the Challenged Work Orders, and all that Southwest Gas stated was that the exclusion of those summaries was "an oversight" and that "[i]t would have been nice to know" that the summaries were missing. (CR at 3852:12-18.) As discussed below, Southwest Gas repeatedly attempted to shift culpability for its failings in its case to Staff or to the PUCN itself.

[80] 5 CR at 3690:19-3691:3 (Staff witness testifying at hearing that "I talked to the director many times to indicate my level of frustration with the documentation, the types of information that I was looking for, and numerous different things. And Southwest Gas didn't provide anything as well. The

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all of the information that it wanted in the initial application and then surprising the utility with testimony alleging that Southwest Gas failed to meet its burden. Rather, this is a case of parties providing Southwest Gas with multiple avenues through which to demonstrate prudent oversight and management and just and reasonable costs.

Despite Staff's efforts to work with Southwest Gas, the utility inexplicably argues to this Court that "nobody explained why the documents Southwest Gas provided were insufficient to establish the reasonableness of the costs."[81] The narrative in Southwest Gas's Memorandum conflicts with the description of events in this exchange between Southwest Gas's attorney and a Staff witness at hearing:

> Q: Acknowledging that it could have been better, the parties still worked together to provide you the information, you explaining what you needed, and Southwest Gas working to identify where that was located, and subsequently to provide it to you.
> A: Correct. Staff and Southwest Gas – I never stopped coordinating with Southwest Gas. I believe that, you know, is not efficient, and it is not what we're here for. We're both trying to present as much information as we can to this Commission, and therefore I took it as very important to continue the dialogue and to continue to seek the information I was looking for.[82]

It is also worth noting that Southwest Gas's counsel acknowledged that Southwest Gas was slow to respond to Staff's discovery requests.[83] And Staff itself acknowledged concerns conducting its audits given that it seemed Southwest Gas was not prepared to support its case after the application was filed and did provide Staff with the necessary data in a timely fashion.

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responsibility can't all be on me to propound thousands of data requests to try to get that information. There has to be some accountability and some – the utility has to step up and actually give, you know, assist Staff.").

[81] Mem. at 6:10-12. The citation provided by Southwest Gas to this quote does not match the language in the Memorandum. The language in Vol. 5 of the Certified Record that spans the cited pages, 3883-84 states, "So we did the best we could, and when there were additional questions asked we did take the opportunity to add some additional information in some of these later questions."

[82] 5 CR at 3157:17-3158:5.

[83] *Id.* at 3157:17-22. In accordance with PUCN regulations (NAC 703.680(7)), parties have 10 business days to respond to discovery requests. Southwest Gas took 98 days to provide some responses to Staff regarding certain work orders. CR at 6471:3-12 ("It appears to me that [Southwest Gas] was not expecting that the $600 plus million in capital costs it is requesting be placed into rates would be vetted/examined in detail …"). *See also id.* at 3155:7-13.

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Through the discovery process, Staff concluded that Southwest Gas had provided documentation as follows for the Challenged Work Orders: 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. (4 CR at 2601:19-23.) This information was not sufficient, according to Staff, to demonstrate prudent management or why inclusion of these costs in rates was reasonable. In particular, Staff stated that Southwest Gas had not provided evidence indicating that the projects, authorized budgets, or expenditures were prudent investments, the least-cost option, the best available alternative project, or reasonable under the circumstances. (*Id.* at 2601:23-25.)[84] Additionally, Staff argued that little or no evidence was provided to indicate why various costs were incurred by Southwest Gas, including costs for consultants, expert fees or services, personnel overtime, rental car fees, and daily meals or refreshments. (*Id.* at 2601:26-28.) The PUCN largely agreed with Staff, finding that Staff had offered "substantial evidence" of Southwest Gas's failure to adequately support its case. (1 CR at 495, ¶ 624.)

After the discovery process was over and Southwest Gas was aware of Staff's concerns with the lack of evidence provided to justify full cost recovery of the Challenged Work Orders, Southwest Gas could have provided rebuttal testimony addressing Staff's concerns. But it chose not to do so.[85] The PUCN found that the rebuttal witness offered by Southwest Gas could not provide the PUCN "with any evidence regarding the prudence of the expenditures associated with the Challenged Work

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[84] Regarding one of the Challenged Work Orders, a Staff witness agreed that Southwest Gas had provided the "program charter" for the project, but that charter "doesn't identify alternatives to the software or the companies [used] ... It doesn't lay out risks associated with any alternatives, … budgets, cost data, any other pertinent information that you would see typically in a business case."). 5 CR at 3681:1-15.

[85] 5 CR at 3214:9-25. ("Q: So even though it would have been outside Staff's audit process and it would have frustrated Staff, Southwest Gas, in rebuttal, could have provided additional information to supplement the record and to demonstrate the prudency and just[ness] and reasonableness of the costs in this rate case. A: Correct. And Southwest Gas could have provided the answers to all the questions that [their attorney] asked me, you know, about airfare and the lodging and the meals, in their rebuttal, and there was no description of any key decisions made of projects, any decision, you know, supporting decisions, there was just lack of information, and it seemed like the rebuttal was more of a focus on myself than the Company's actions of actually executing those projects.").

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Orders," particularly because that witness was not directly involved in the execution of any of the projects at issue and had not started working with Southwest Gas until after the projects were completed. (1 CR at 496, ¶ 626.)

a. The Evidence Indicated A Lack of Accountability, Oversight, and Prudent Management by Southwest Gas.

Southwest Gas makes numerous claims in its Memorandum that there was no showing of imprudence regarding the Challenged Work Orders, as if that fact alone is enough to overcome the complete failure on Southwest Gas's part to produce a witness who was personally involved in or could meaningfully speak to the execution of the Challenged Work Orders.[86] The PUCN never had to conclude imprudence given that it found Southwest Gas had wholly failed to meet its burden of proof. The PUCN, however, did find that Southwest Gas was "unable to provide the [PUCN] with any evidence regarding the prudence of the expenditures associated with the Challenged Work Orders." (*Id.* at 496, ¶ 626.) So, while it is true that imprudence was not a conclusion in the Modified Order, there was a determination of lack of evidence overall, and particularly a lack of evidence to support a finding of prudence or a finding that Southwest Gas's rates would be just and reasonable if the costs of the Challenged Work Orders were allowed to be recovered.

Astonishingly, Southwest Gas also argues that there was no showing of abuse of discretion, lack of good faith, inefficiency, or improvidence,[87] even though the record contains substantial evidence cited in testimony and discussed at hearing that led the PUCN to conclude that the underlying evidentiary record revealed "a systematic lack of accountability, oversight and prudent management" by Southwest Gas. (*Id.* at 607, ¶ 89.)

The facts below highlight just some of the expenditures that Southwest Gas inappropriately included in its application and attempted to recover through rates charged to its customers:

- Financial System Modernization ("FSM") Program –one voucher included, without explanation, a Casio Digital Piano, a Yamaha 7.2-channel home theater system, a Broil

[86] *See* Mem. at 23:21-23, 45:9-22.

[87] *Id.* at 44:7-9.

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King natural gas grill, multiple Bose wireless speaker systems, multiple JBL Bluetooth headphones, all totaling $7,568.39. Another two vouchers included dozens of Polo Shirts with the "FSM" Program Logo, totaling $2,400. Southwest Gas also booked approximately $41,000 in non-travel meals to this program. Staff found two vouchers from Deliotte and Touche LLP related to professional services rendered in connection with the NPL Construction Co. Cyber Risk Assessment (totaling $40,000) that were erroneously booked to the FSM Program. (8 CR 006475:21-006476:1, 006478:25-006479:1.)

- Field Operations Management ("FOMS") System Phase I, Customer Service – Southwest Gas rented office space just for this project. In addition to the $6,183 per month lease for the space, Southwest Gas spent an estimated $94,000 in tenant improvements on the leased office space. CR006481:16-21. According to Staff, Southwest Gas never explained why it needed to lease office space for this project and why its own corporate office couldn't be used. (8 CR 006481:22-26.)
- GIS Mapping Migration Project – Southwest Gas paid its consultants to attend seminars or conferences, even though Southwest Gas's Consulting Services Agreement contains language representing that consultants must have the expertise, experience, personnel and resources to perform the consulting services. Given that consultants are hired for their expertise, Staff found it disconcerting that Southwest Gas never explained why it was paying for its consultants to go to seminars or conferences. (8 CR 006484:23-006485:5.)
- Web Content Management Phase II Project – Invoices included, without explanation, purchases for an Apple Mac computer and multiple Apple iPads, totaling $4,000. Staff also identified instances where multiple consultants billed excessive amounts of time when Southwest Gas did not provide any justification as to why the project was time-sensitive. (8 CR 006487:4-10.)

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- $90,000 for a backhoe that Southwest Gas had previously agreed to remove from rates as part of a civil penalty stipulation for a pipeline safety violation; the stipulation was approved by the PUCN in Docket No. 17-08020. (8 CR 006469:24-006470:1.)
- Bi-weekly or weekly massages from the European Massage Therapy School during 2015. (8 CR 006469:12-20.)
- A consultant charge for just one project team meeting that cost $800 and took place at Brio in Las Vegas. (8 CR 006469:21-22.)
- Expenditures for bartender costs and a golf course membership. (8 CR 006469:23-24.)

Once these costs were identified by the parties as inappropriate inclusions, Southwest Gas did not even argue that they should be included and instead voluntarily removed the costs from various work orders before hearing.[88] Other than stating that mistakes were made or that the problematic costs were inadvertently included,[89] Southwest Gas never offered an explanation as to how any of these questionable costs ever made it into work orders that were to be charged to ratepayers.[90] In fact, Southwest Gas admitted that no internal audit of the costs in its work orders was conducted prior to filing the rate case. (5 CR 003861:6-14).

Although this issue will be addressed in more detail below, it is worth noting here that the fact that some of these costs made it into Southwest Gas's application in the first place highlights the problem with a presumption of prudence.[91] When the Nevada Legislature considered legislation that

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[88] Mem. at 6:25-26. 5 CR 3175:19-23 ("Q: [Southwest Gas attorney] And again, Southwest Gas has removed those costs; correct? A: [Staff witness] Correct. And that's to my point, that Southwest Gas itself is admitting that those costs aren't appropriate for recovery from ratepayers …").

[89] *See, e.g.,* 5 CR 3352:11-25.

[90] It should be noted that Southwest Gas's own procedures mandate that before any particular charge can be included in a capital work order, someone at the utility has to review and determine that the purchase qualifies for assignment to a particular work order. By Southwest Gas's own admission, for each of the more problematic costs identified by Staff in its audit, someone at Southwest Gas authorized that cost/purchase to be charged to a work order that would be collected from ratepayers. 5 CR 3860:5-24.

[91] Southwest Gas used its claim that it enjoys a presumption of prudence to routinely attempt to shift its burden to Staff or other parties – or even the PUCN itself – during the course of the underlying case. For example, Southwest Gas stated that it should have been alerted by others to the deficiencies in its case (5 CR 3852:12-18); that Staff should have issued more data requests (5 CR 3178:11-17, 3719:13-

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would clarify the absence of a presumption of prudence in deferred energy accounting cases, Assemblywoman (and, at the time, Speaker of the Assembly) Barbara Buckley made it clear that a presumption of prudence is disfavored because it risks burdening customers with the costs of imprudent business decisions. Assemblywoman Buckley stated:

> When we reinstated deferred cost accounting, we told the utilities that they could not use this to ask for rate increases unless it was to recover costs resulting from reasonable and prudent business practices. That is what we meant. ***There is no presumption favoring a public utility when it files a rate change. We do not burden Nevada consumers for mistakes.*** They must demonstrate that any cost they seek to recover was reasonably and prudently incurred. That is what this bill does.[92]

The Legislature did not want ratepayers to pay for mistakes made by the utility. Had a presumption of prudence been applied in Southwest Gas's rate case, ratepayers could have paid for massages, a $90,000 backhoe that the utility had already agreed to remove from rates, golf club memberships, and other egregious items.

b. Even if the Challenged Work Orders Were for Projects that the Utility Needed, the PUCN's Inquiry Does Not End Where Southwest Gas Says It Ends.

Southwest Gas, in its appeal, raises a host of irrelevant or unpersuasive arguments to try to convince this Court that the PUCN decision was in error or exceeded its authority. None of the issues raised by Southwest Gas, however, get past the utility's failure to present substantial evidence; the utility's failure to make available a witness capable of meaningfully speaking to the execution of the

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16, 3181, 4-20); and that Staff should have interviewed or deposed Southwest Gas personnel (5 CR 3643:24-3644:4). When asked if it is Staff's responsibility to sift through Southwest Gas's data and attempt to guess whether the costs were reasonable and necessary, Southwest Gas stated, "that's what the discovery process is for." (CR 002603:11-2604:10.) Southwest Gas's attempts at burden-shifting were apparent to the PUCN, which stated in the Modified Order: "[T]he [PUCN] is troubled by [Southwest Gas's] lack of oversight and its continuous implication that it is Staff's responsibility to not only identified the deficiencies in [Southwest Gas's] filing, but to issue discovery to determine the reasonableness of the costs that [Southwest Gas] seeks to recover from ratepayers." (CR 000495, ¶ 624 (citations omitted).)

[92] 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 000592-000593, ¶ 48.

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Challenged Work Orders; or the systematic lack of accountability, oversight and prudent management exhibited by the utility.

One central theme to Southwest Gas's argument is that no party said that the projects included in the Challenged Work Orders were not needed, and even Staff agreed that the projects at issue do provide some benefits to ratepayers. (*See, e.g.*, 8 CR 6483.). The PUCN does not dispute this argument; the projects might have been needed and provide a benefit to ratepayers. The PUCN was not trying to substitute its judgment for utility management about whether the projects were needed or not. But the inquiry cannot end there. The PUCN still must evaluate the evidence that a utility provides to support a capital project, including whether the choice made by the utility was the least-cost option or the best available alternative project, or that the project expenditures were reasonable under the circumstances.[93] (4 CR 2601:23-25.). The PUCN found that Southwest Gas failed to provide such evidence.[94]

Southwest Gas also states that no party argued that the projects were over-priced, noting that some projects came in under budget.[95] Staff addressed this issue at hearing, arguing that costs could have been even lower "if Southwest Gas was a proper steward of ratepayer funds." CR003624:13-14. Moreover, not every part of the Challenged Work Orders came in under budget. Staff stated at hearing that it appeared that the Web Content Management Phase II Project was approximately $2 million over its original estimate of $1.25 million. (5 CR 3193:13-25.)

Southwest Gas seemingly faults Staff for not taking certain actions as part of its audit process, but had Staff undertaken such actions, it surely could have been faulted for trying to substitute its

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[93] 5 CR 3684:20-3685:8 ("Q: [from Southwest Gas attorney] You don't dispute, in fact you testified that there is no dispute over the need to replace the 30-year old software, right? A: [from Staff witness] Correct. But in that need to replace the 30-year old software, there has to be an identification of what do we replace it with? And then there's multiple vendors out there, and there are risks associated with each vendor's project, or each vendor's program, and I didn't find any documentation that actually performed that type of analysis or performed an analysis that had any cost impact to ratepayers or risks associated with …").

[94] It is worth noting that this is evidence that would be presented in a resource plan. Because Southwest Gas is not subject to resource planning requirements, however, it must present such evidence in its rate case.

[95] Mem. at 5:28-6:1, 6:17-19.

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judgment for that of management. For example, Southwest Gas states that Staff did not review similar projects completed by other utilities; did not determine what a reasonable budget would have been; did not investigate alternative vendor options for Southwest Gas; and did not conduct its own RFP.[96] In fact, when Southwest Gas asked Staff why it did not undertake such actions, Staff said that Southwest Gas should have taken such actions.[97]

As to Southwest Gas's questioning of whether a Staff witness had the sufficient expertise to evaluate the projects, the key is not whether Staff has expertise regarding software projects. Staff's witness had sufficient expertise to audit the information that Southwest Gas presented to the PUCN to support the costs that the utility was seeking to recover through rates. As the Staff witness testified at hearing, he has had over nine years of experience reviewing multi-million-dollar utility projects.[98]

The last two major issues raised by Southwest Gas concern both Staff's investigation and the PUCN's ultimate decision. Specifically, Southwest Gas tries to fault Staff for not challenging every single cost item in each work order. Southwest Gas also argues that because Staff did not find at least 50 percent of the costs in each of the Challenged Work Orders unreasonable to support its proposed 50 percent disallowance, the PUCN disallowance of 100 percent of the costs of the Challenged Work Orders is not supportable.[99]

Southwest Gas is missing the crux of both Staff's argument and the PUCN's conclusion as to the weight of the evidence. After Staff identified the more problematic costs in each of the Challenged Work Orders, it began to question all of the costs in the work orders. Even after Southwest Gas removed the costs that Staff cited as particularly problematic, Staff stated that it "couldn't in fact determine that all of the other costs were reasonable as well." CR 003694:18-19. If Southwest Gas originally thought it was reasonable to book costs like massages and expensive consultant dinners to the Challenged Work Orders, costs that Southwest later voluntarily removed when Staff questioned their reasonableness, then how was Staff supposed to believe that "all other costs associated with the

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[96] *Id.* at 6:20-22; 5 CR 3687:21-3688:8.

[97] *Id.* at 6:20-22; 5 CR 3687:21-3688:8.

[98] 5 CR 3209:7-3210:14.

[99] Memorandum at 6:26-27, 7:11-28.

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project [could] then be automatically considered reasonable?" (5 CR 3694:5-24.).[100] In other words, given that the controversial costs hit Southwest Gas's books in the first place, this fact alone demonstrates faulty oversight and a lack of accountability on the part of Southwest Gas. (*Id.* at 3694:8-10.). It does not matter if problematic costs represent 50 percent or 100 percent of the total – everything was tainted by the complete lack of accountability and oversight.

While Staff acknowledged that it could not find any of Southwest Gas's costs associated with the Challenged Work Orders reasonable, Staff in essence "split the baby" and recommended only a 50-percent disallowance of each of the Challenged Work Orders, in part recognizing that each of those projects provided some benefits to ratepayers. (*See, e.g.*, 8 CR 6485:9-24.). The PUCN, however, appropriately found that the 50-percent disallowance as proposed by Staff was arbitrary. (1 CR 496-497, ¶ 627.). The PUCN determined that Southwest Gas did not offer sufficient evidence to sustain its burden of proof for any of the costs associated with Challenged Work Orders, thus disallowing 100 percent of the costs. (*Id.* at 493, ¶ 621.). Moreover, the PUCN decision to disallow 100 percent of those costs was substantiated by the underlying record, "which preponderantly reveals a systematic lack of accountability, oversight and prudent management" by Southwest Gas. (*Id.* at 493, ¶ 622.). The PUCN reached the same conclusion as Staff in that Southwest Gas's utter lack of accountability and oversight raises questions regarding all of the Challenged Work Orders.

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[100] Staff witness Adam Danise added at hearing in response to questions from Southwest Gas's attorney:

> Q: And you said it describes Southwest Gas's lack of accountability, but I would directly challenge you on that, because when presented with those costs, Southwest Gas acknowledged that they were misclassified, it was a mistake, and they removed them. So the Company was accountable; correct?
>
> A: The Company was accountable for the costs I identified at the time this occurred. There was no accountability or determination of reasonableness of the costs that were incurred. And to me, sir that's the real issue here is, yes, after you were alerted to these costs[,] you pulled them out, but when they were incurred and booked to plant, Southwest Gas didn't care. It didn't look, or didn't care, and that's troubling … I have to question every cost, since these were deemed reasonable and prudent at the time all the other costs were booked. No assurance has been given that the other costs are then reasonable.

5 CR 3695:11-3696:10.

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Southwest Gas would have this Court believe that the PUCN based its 100-percent disallowance solely on Southwest Gas's lack of oversight, noting Nevada Supreme Court case law indicating that "management mistakes" alone cannot be a reason for denying an entire application.[101] Southwest Gas is wrong. First, the Modified Order cannot be read to rely solely on mismanagement or a lack of oversight for complete dismissal of the case or even select issues/projects in the case. The PUCN took evidence on the Challenged Work Orders and only disallowed the costs associated with those work orders after weighing the evidence; there was a weighing of the evidence, not an outright dismissal. Moreover, the PUCN specifically permitted Southwest Gas to seek recovery in a future rate case of the costs associated with the Challenged Work Orders. (*Id.* at 497, ¶ 627.).

Second, the 100-percent disallowance rests just as heavily on the lack of evidence as it does on the credibility of the evidence. The Modified Order walks through each phase of the case, and the evidence – or lack thereof – received during that phase. Paragraph 623 discusses Southwest Gas's initial application and testimony, paragraphs 624 and 625 discuss the discovery portion of the case along with intervener (Staff) testimony, and paragraph 626 concerns the rebuttal testimony filed by Southwest Gas. (1 CR 494-497, ¶¶ 623-27.). At nearly every step of the way, the PUCN found that Southwest Gas failed to put forth a witness with direct knowledge that could explain the utility's basis or decision-making for the costs that were incurred and booked to the work orders.

It is also worth noting that Southwest Gas's proposed version of a presumption of prudence would allow the utility to meet its burden through supplemental information submitted only after other parties discover improperly-included items within an application. The Modified Order, however, specifically found that Southwest Gas "cannot establish the prudence of expenditures through the discovery process." (1 CR 495, ¶ 62.). Discovery cannot be relied upon to make an applicant's case given that NAC 703.2231 plainly requires:

> An applicant must be prepared to go forward at a hearing on the data which have been submitted and to sustain its burden of proof … To avoid delay by the Commission in its consideration of the proposed changes, the applicant must 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.

[101] Mem. at 45:2-8 (citing *Nev. Power Co.*, 122 Nev. at 837, 138 P.3d at 497).

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Discovery also cannot be a tool to meet an applicant's burden given that discovery only becomes evidence to the extent that the applicant or another party introduces discovery responses through testimony or at hearing. Consistent with the requirement in regulation that an applicant must be prepared to go forward on its own evidence and the limitations on discovery becoming evidence, the PUCN found in the Modified Order:

> While this record includes discovery responses received by Staff, those responses were introduced during hearing and not in [Southwest Gas's] Application, and similarly fail to establish the prudence of [Southwest Gas's] expenditures related to the Challenged Work Orders given that the sponsoring witness was not involved in the execution of the projects, did not have direct knowledge of the manner in which the projects were overseen, and could not even explain the company's basis for incurring the costs associated with the projects.[102]

Even if a presumption existed, Southwest Gas still has to produce evidence. In states where utility commissions utilize a presumption, they have stated that "a public utility should do more than present a list of transactions and costs and summarily assert all costs were prudently incurred."[103] As such, Southwest Gas cannot merely rely upon the fact of payment as a demonstration of prudence or reasonableness. Southwest Gas even admitted as much during the hearing.[104] The utility still bears responsibility for adequately supporting the costs requested in its application 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.[105]

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[102] 1 CR 496, ¶ 625.

[103] *In re: Petition of Mississippi Power Co. for Finding of Prudence in Connection with the Kemper County Integrated Gasification Combined Cycle Generating Facility*, Order, 2013 WL 6044209, at *2-*3 (2013) ("If prudency is measured by reference to the processes for decision-making and responses of [Mississippi Power Company], then it stands to reason that an initial filing for prudency would contain an overview of such processes and responses related to the prominent aspects of the construction project … the Commission finds that simply demonstrating that costs were incurred is insufficient to establish a prima facie case for prudency which would shift the burden of production to the intervenors."). *See also Coalition of Cities for Affordable Util. Rates v. Pub. Util. Comm'n of Texas*, 798 S.W.2d 560 (Tex. 1990).

[104] 3 CR 3883:5-3884:8.

[105] *See* NRS 233B.123, NAC 703.2231.

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This Court should therefore find that none of the issues raised by Southwest Gas in its Memorandum are sufficient to overcome the PUCN's finding that the utility failed to put forth substantial evidence and demonstrated a systemic lack of accountability, oversight, and prudent management that raised serious doubts as to the prudence and reasonableness of all costs associated with the Challenged Work Orders.

4. The PUCN Did Not Substitute Its Judgment for that of Southwest Gas's Management.

The record does not indicate that the PUCN was substituting its judgment for that of Southwest Gas's management. The *Ely Light* case places limitations on when the PUCN can substitute its judgment for that of management. Specifically, the Nevada Supreme Court indicated in *Ely Light* that where 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.[106] For the matters subject to this judicial review, the PUCN did not decide to substitute its judgment for that of Southwest Gas's management.

For return on equity, the PUCN relied heavily on both the *Hope* and *Bluefield* decisions to determine the appropriate return on equity for Southwest Gas. (1 CR 307-308, 366-367, 372.). The Nevada Supreme Court has found that "[t]he crux to every rate case involving the cost of common equity is just how one goes about conforming to the *Bluefield* and *Hope* cases."[107]

Regarding pension expenses, the PUCN applied the often-used ratemaking methodology of normalization to overcome volatile pension costs. (*Id.* at 436, ¶ 436.). As to the discount rate, which is a component of pension expense, 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 at hearing to present such evidence. (*Id.* at 434, ¶ 428.). As such, the PUCN did not substitute its judgment for that of Southwest Gas's management as to the discount rate given the lack of evidence of the

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

[107] *Nev. Power Co. v. Pub. Serv. Comm'n*, 91 Nev. at 825, 544 P.2d at 435.

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reasonableness of the discount rate as proposed by Southwest Gas. In such a case, the PUCN's decision was entirely consistent with *Ely Light.*

As to the Challenged Work Orders, the PUCN found 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. (1 CR 493 (citing NAC 703.2231).). More specifically, the PUCN found that Southwest Gas did not provide the PUCN "with any evidence regarding the prudence of the expenditures associated with the Challenged Work Orders," particularly because Southwest Gas's witnesses were not directly involved in the execution of any of the projects at issue. (*See* 1 CR 000496, ¶ 626.). The evidence as to the Challenged Work Orders also revealed a systemic lack of accountability, oversight, and prudent management by Southwest Gas. Having not met its burden of proof, the PUCN disallowed 100 percent of the costs associated with the projects in the Challenged Work Orders.

The PUCN does not believe that its actions with regard to the Challenged Work Orders constitute the PUCN substituting its judgment for that of management. The PUCN did not tell Southwest Gas that it should not have undertaken the software projects or that Southwest Gas should have used different vendors for the projects or implemented a different timeline. The PUCN's decision rested on a lack of evidence or evidence that demonstrated no accountability or oversight. However, to the extent that an argument can be made that the PUCN Modified Order, as to the Challenged Work Orders, was a substitution of judgment by the PUCN for Southwest Gas management's judgment, the PUCN was still within the limitations of *Ely Light.* Clearly, the record on the Challenged Work Orders indicates that contrary evidence was presented demonstrating an abuse of discretion, a lack of good faith, inefficiency or improvidence.

It is important to note that the PUCN actions subject to this judicial review epitomize the type of rate-setting and regulatory oversight contemplated and expressly authorized by the Legislature.[108] The PUCN acted to ensure efficient, prudent, and reliable operation and service by Southwest Gas.[109]

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

[109] NRS 704.001(3).

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The PUCN also balances the interest of the ratepayers and shareholders of Southwest Gas, while still allowing Southwest Gas to earn a fair return on investments and ensuring just and reasonable rates.[110] Finally, if after hearing and investigation, the PUCN finds any rates to be unjust or unreasonable, the PUCN shall have the power to fix and order substituted rates as shall be just and reasonable.[111] Given the foregoing, this Court cannot find that the PUCN's Modified Order exceeded its authority or was an abuse of discretion.

Moreover, this Court should not find that the PUCN is bound in it is decision-making by the positions as filed by Southwest Gas pursuant to the theory that the PUCN cannot substitute its judgment for that of Southwest Gas's management. Courts have found that regulatory bodies are not bound to the positions presented by the parties, even if the conclusions drawn are contrary to the uncontradicted opinions of the experts.[112] While the Commission may not completely disregard uncontroverted testimony from the parties, where substantial evidence exists to support a conclusion different from the position of the parties, the Commission may use its own expertise and judgment in making such findings.[113]

5. This Court Cannot Substitute Its Judgement for that of the PUCN on Issues of Fact.

The Nevada Legislature has unambiguously stated that "[t]he court shall not substitute its judgment for that of the [PUCN] as to the weight of the evidence on questions of fact."[114] The Supreme Court of Nevada has similarly established that it "...will not reweigh evidence or witness

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[110] NRS 704.001(4).

[111] NRS 704.120(1).

[112] *See Heidtman v. Nevada Indus. Comm'n*, 78 Nev. 25, 368 P.2d 763 (1962); *Pub. Serv. Comm'n v. Cont'l Tel. Co. of California*, 94 Nev. 345, 580 P.2d 467 (1978); *Intermountain Gas Co. v. Idaho Pub. Utilities Comm'n*, 97 Idaho 113, 126-27, 540 P.2d 775, 788-89 (1975).

[113] *Intermountain Gas.* 540 P.2d at 788-89; *State, Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608 n.1, 729 P.2d 497, 498 n.1 (1986) (*quoting Robertson Transp. Co. v. Pub. Serv. Comm'n.*, 39 Wis.2d 653, 159 N.W.2d 636, 638 (Wis. 1968)).)

[114] NRS 703.373(11).

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credibility, nor will [it] substitute [its] judgment for the administrative judge's."[115] "Furthermore, when an agency's conclusions of law are closely related to its view of the facts, those conclusions are entitled to deference, and [the court] will not disturb them if they are supported by substantial evidence."[116] When specifically addressing "an exercise of the [PUCN's] ratemaking authority," the Supreme Court of Nevada has found that "such judgment is not for the courts to question."[117]

Here, Southwest Gas is asking this Court to do what courts are expressly prohibited from doing when reviewing administrative decisions – reweigh the evidence on questions of fact. Southwest Gas also inappropriately requests that this Court substitute its judgment for the PUCN's as to witness credibility and the proper weight that should be assigned to evidence that was presented during a hearing presided over by the PUCN. This Court should decline to reweigh the evidence, the law applied to the evidence, and the PUCN's findings as to credibility or weight.

B. The Presumption of Prudence Relied Upon by Southwest Gas Is Not Controlling Law in Nevada, Is Inconsistent with Nevada's Existing Statutory Scheme, and Was Not the Basis of the PUCN's Decision.

Southwest Gas repeatedly states that a presumption of prudence applies in rate case, arguing that it is "universally recognized" that the PUCN's duty is to regulate rates but not to manage the utility's business.[118] This general principle that a regulatory commission may not substitute its judgement for the judgment of the utility is enforced by a presumption that a utility's business decisions are prudent, according to Southwest Gas.[119] Southwest Gas also argues that the presumption

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[115] *Bisch v. Las Vegas Metro Police Dep't*, 129 328, 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).

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

[117] *Saguaro Power Co. v. Pub. Utils. Comm'n of Nev*, 128 Nev. 931, *5, 381 P.3d 658, 2012 WL 1572112 (2012).

[118] Memorandum at 13:25-26 (citing Ely Light, 80 Nev. 312, 324).

[119] *Id.* at 14:4-13.

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of prudence was first recognized by the Nevada Supreme Court in the *Ely Light* decision and has been consistently applied by that Court.[120] Finally, Southwest Gas states that the presumption has been law for nearly a century, citing *SW Bell Tel. Co.* and *W. Ohio Gas Co.*[121]

As discussed in more detail below, 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 rate case – only that managers of utilities are presumed to have acted in good faith. 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. *See* NRS 704.185. While some jurisdictions have adopted a presumption of prudence, the case law addressing those jurisdictions is not controlling in Nevada.

As to the few prior PUCN decisions that referred to a presumption, there is no *stare decisis* in Nevada, and reliance on those cases ignores the direction that the PUCN specifically provided to Southwest Gas in its 2012 rate case when this purported presumption was raised as an issue in that case.

While Southwest Gas would have this Court believe that applying a presumption of prudence avoids practical problems, its argument ignores the more dire reality that a finding that a presumption applies would render several statutes and PUCN regulations meaningless. In particular, applying the presumption of prudence to all utilities as Southwest Gas argues, not just natural gas utilities, will require the Nevada Legislature and the PUCN to revisit important statutes and rules that directly affect nearly all Nevada residents, businesses, and visitors. Such an interpretation represents a drastic departure from the existing regulatory framework, which protects customers of utilities by requiring an affirmative demonstration that significant project costs were prudently incurred before the costs can be recovered through rates.

A review of the types of expenditures that Southwest Gas initially included in its application in

[120] Mem. at 14:13-14, 15: 1-2.

[121] Mem. at 16:14-26.

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this case, such as massages, gratuitous employee perks, and a $90,000 backhoe that Southwest Gas had previously committed to not include in rates, makes a presumption of prudence seem impractical and unwise. Certainly, it tends to dispel the notion that it is reasonable to presume good faith on the part of a profit-motivated utility seeking to increase its revenues.

1. Neither the United States Supreme Court nor the Nevada courts have recognized a presumption of prudence in a general rate case.

Contrary to Southwest Gas's central argument in its Memorandum, the U.S. Supreme Court has not found that a presumption of prudence should be applied to every public utility expenditure. While Southwest Gas claims that the U.S. Supreme Court first established this presumption in 1923 in *Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276 (1923),[122] the Court did not actually set forth such a presumption of prudence in that case. Southwest Gas relies on a statement within the majority opinion in *Sw. Bell Tel. Co.*, which provides 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.'"[123] As discussed above, none of the PUCN's decisions in this case amount to the PUCN substituting its judgment for that of the utility. For return on equity, pension costs, and the Challenged Work Orders, the PUCN (1) acted within its discretion to weigh the evidence before it and to set a just and reasonable rate for ratepayers; and (2) found that the applicant had provided insufficient evidence to support its application. Neither of these PUCN actions can be construed as a substitution of the PUCN's judgment for that of the directors of a utility with regard to management decisions to incur costs. In fact, the PUCN recognized that Southwest Gas perhaps exercised prudent judgment with regard to the disallowed costs associated with the Challenged Work Orders, which is why the costs were denied without prejudice. 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.

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[122] Mem at 16:14-23.

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

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Southwest Gas also relies upon footnote 1 of the concurrence of Justice Brandeis in *Sw. Bell Tel. Co.*, which reads:

> The term 'prudent investment' is not used in a critical sense. There should not be excluded, from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.[124]

However, a concurring opinion is *not* the majority opinion because it failed to receive a majority of the Supreme Court's vote. While a concurring opinion may be considered persuasive authority, it has no binding precedential authority over any lower court or agency. Also, in referring to the prudence of an investment, Justice Brandeis was not proposing that utilities be granted a presumption of prudence but, rather, was proposing a more practical methodology for determining a fair return of the amounts prudently invested by utilities.[125] At the time when this case was decided, the legal test for determining a fair return was whether the rates allowed by a utility were based on the fair value of a utility's property.[126] Justice Brandeis argued that such a test was "legally and economically unsound."[127] Thus, his "prudent investment" analysis was intended to shift the focus from a fair market valuation analysis to historical costs.

The U.S. Supreme Court adopted Justice Brandeis' view in *Hope*[128], moving away from using the fair value of property to determine rates and holding that a regulator is not bound by any single formula in determining rates. Notably, the *Hope* Court did not adopt any presumption of prudence for historically-incurred costs. Subsequently, the U.S. Supreme Court again reiterated this notion that there is no single ratemaking theory mandated by the Constitution in the case of *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 109 S. Ct. 609 (1989).

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[124] *Sw. Bell Tel. Co.*, 262 U.S. at 289 n.1.

[125] *See id.* at 306-12. *See also* Venessa Korzan and Moin A. Yahya, *A Requiem for the Presumption of Prudence after OPG and ATCO*, 4 ENERGY REGULATION QUARTERLY, no. 4, Nov. 2016, at 1.

[126] *Smyth v. Ames*, 169 U.S. 466, 18 S. Ct. 418, (1898).

[127] *Missouri ex rel.*, 262 U.S. at 290.

[128] 320 U.S. 591 (1944).

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Southwest Gas also asserts that the U.S. Supreme Court decision in *W. Ohio Gas Co. v. Pub. Util. Comm'n of Ohio*, 294 U.S. 63, 72, 55 S. Ct. 316, 321 (1935) further supports that it is entitled to a presumption of prudence in general rate case proceedings.[129] In the case of *W. Ohio Gas Co.*, the utility sought to recover an average cost of $12,000 per year for advertising expenses incurred in procuring or trying to procure new business.[130] The state commission cut down the allowance to $5,000 per year, stating that "anything more was unnecessary and wasteful."[131] The Supreme Court found that ***there was no basis in evidence, either direct or circumstantial***, for the state commission to find that the costs were "unnecessary and wasteful."[132] In so finding, the U.S. Supreme Court held that the good faith of the managers of the business were to be presumed, and "[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."[133] The Supreme Court did not find that a utility is entitled to a presumption of prudence – only that the managers of the business were presumed to have acted in good faith. As argued by Staff, presuming the good faith of managers is not the same as presuming prudence, in that a utility manager can act with good faith in authorizing a business or utility expenditure but still make an imprudent decision.[134]

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[129] Memorandum at 16:23-26.

[130] *W. Ohio Gas Co. v. Pub. Util. Comm'n of Ohio*, 294, U.S. 63, 72, 55 S. Ct. 316, 321 (1935). A D.C. Court of Appeals case questioned whether the *W. Ohio Gas* case could be applied outside the specific circumstances of advertising expenses incurred by a public utility. *Potomac Elec. Power Co. v. Public Service Comm'n of District of Columbia*, 661 A.2d 131, 139-40 (D.C. Ct. App. 1995)

[131] *W. Ohio Gas Co. v. Pub. Util. Comm'n of Ohio*, 294, U.S. at 72.

[132] *Id.* (emphasis added).

[133] *Id.*

[134] 2 CR 1290:9-12 ("For example, a utility manager may believe in good faith that the utility needs to purchase and install new software and takes action to incur costs for such an expenditure. However, the utility did not issue any requests for proposals for possible software and/or software installation options; did not investigate to confirm the new software was needed; and/or did not seek out least cost alternatives for the software or installation options. In this case, the utility manager acted in good faith, but the decision was ultimately imprudent.") Staff also provided an example of how a utility manager might authorize a prudent expenditure that was made in bad faith. CR 001290:12-13 and n. 17.

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Collectively, the Supreme Court cases 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. In other words, the Supreme Court's rulings stand for the proposition that a state commission must base its findings on the evidentiary record.[135] (2 CR 1290:17-18.). However, that is not to 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 CR 1290:18-001291:2.).

Turing to Nevada law, Southwest Gas states that the presumption of prudence was first applied by the Nevada Supreme Court in *Pub. Serv. Comm'n v. Ely Light & Power Co.*, 80 Nev. 312, 393 P.2d 305 (1964). In the *Ely Light & Power Co.* case, the Nevada Supreme Court found that:

> 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.[136]

Thus, *Ely Light* stands for many of the same propositions as the *Sw. Bell Tel. Co.* and *W. Ohio Gas* cases. Specifically, a correct reading of *Ely Light* indicates that where 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. CR 001291:3-14.

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[135] *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).

[136] *Ely Light & Power Co.*, 80 Nev. at 324 (emphasis added).

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Contrary to what Southwest Gas would have this Court believe, 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.

Southwest Gas next turns to the *Nevada Power Co. v. Pub. Util. Comm'n of Nevada*, 122 Nev. 821, 138, P.3d 486 (2006) case to argue that a presumption of prudence has been consistently applied by the Nevada Supreme Court.[137] Setting aside the fact that *Ely Light* did not address any such presumption of prudence and, therefore, a consistent application argument cannot be made, the *Nevada Power Co.* case does not apply in the context of this general rate case. The Nevada Supreme Court's decision in *Nevada Power Co.* applies only to deferred energy costs and rate adjustments proposed in a deferred energy accounting application. CR 001293:3-13. Specifically, the Court held:

> Under the PUCN's presumption framework, a utility requesting a customer rate increase enjoys a presumption that the expenses reflected ***in its deferred energy application*** were prudently incurred and taken in good faith.
>
> … Accordingly, we ***conclude*** that a utility enjoys a rebuttable prudence presumption as to its incurred costs ***in deferred energy accounting proceedings***.[138]

While the Court generally refers in its opinion to the deferred energy accounting application as a "rate increase," the Court's findings are consistently specific to deferred energy accounting application rate increases, not increases requested in general rate cases. Thus, any application of the Court's findings in the deferred energy accounting case to a general rate case proceeding is misplaced. (2 CR 1293:16-20.).

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[137] Mem. at 15:1-5.

[138] *Nevada Power Co.*, 122 Nev. at 834-36 (citations omitted). The authority relied upon by the Court for the proposition that a utility is entitled to a presumption of prudence applies to a deferred energy accounting application before the PUCN in *In re Nevada Power Co. Id.* at 834 n.26-27 (emphases added) (*citing In re Nev. Power Co.*, 1986 WL 1301282 (Nev. P.S.C.), 74 P.U.R. 4th 703 (1986)).

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Given the foregoing, the PUCN's Modified Order in this case properly determined that a utility is not entitled to a presumption of prudence in general rate case proceedings. (1 CR 493, ¶ 622.)

2. A presumption of prudence is not rooted in the Constitution.

Southwest Gas claims that its proposed presumption of prudence has roots in the Constitution.[139] However, none of the cases cited by Southwest Gas in its Memorandum appear to provide a direct link between a presumption of prudence and constitutional guarantees. Notably, many of the cases cited by Southwest Gas do not even recognize the presumption. As already discussed at length above, *Sw. Bell Tel. Co.*, *W. Ohio Gas*, and *Ely Light* do not stand for the proposition that a utility is entitled to a presumption of prudence.[140] The other cases cited by Southwest Gas are not controlling or are no longer good law.[141]

For example, Southwest Gas cites to *United Fuel Gas Co.* for the proposition that "[t]he presumption is a constitutionally based protection because it ensures that the utility's right to carry on its business and deal with its property is not taken away through the 'guise' of ratemaking."[142] The *United Fuel Gas Co.* case only supports the latter half of Southwest Gas's statement in that it stands for the widely-held proposition that the PUCN cannot substitute its judgment for that of management.[143] The case does not even mention a "presumption" of any kind, which means that it cannot stand for the notion that a presumption of prudence is constitutionally based.

Southwest Gas also cites to the *Duquesne* case for the idea that the presumption is constitutionally based. The *Duquesne* case certainly is one of the more recent cases decided by the

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[139] Mem. at 19:17-23:23.

[140] *See also*, the other cases cited by Southwest Gas at pages 19 to 23 of its Memorandum that do not discuss a presumption of prudence and, as such, cannot stand for the link between the presumption and the Constitution. It should be noted that some of these cases might stand for other principles, like an assumption of good faith on the part of management or an adherence to the prudent investment rule. These other principles are distinguishable from the presumption of prudence that Southwest Gas is trying to apply.

[141] As discussed above, the *Ben Avon* case is no longer considered to be good law. Mem. at 21.

[142] Mem. at 21:25-22:2 (citing *United Fuel Gas Co. v. R.R. Comm'n of Ky.*, 278 U.S. at 320).

[143] *United Fuel Gas Co.*, 278 U.S. at 320.

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U.S. Supreme Court regarding ratemaking and, in particular, ratemaking procedures.[144] While the *Duquesne* Court does not recognize any presumption of prudence, it does make a finding that the Constitution leaves the States "free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public."[145] Moreover, the Court found that the Constitution does not mandate one specific ratemaking methodology, in that "[t]he designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors."[146] So, even if this Court were to buy into Southwest Gas's theory that the presumption of prudence is rooted in the Constitution in spite of the fact that Southwest Gas's citations do not support such a theory, the U.S. Supreme Court has recently found that the Constitution does not mandate a single theory of ratemaking and that ratemaking decisions are best left to the states.

Finally, the Nevada Supreme Court appears to have come to a different conclusion than Southwest Gas as to the root of the presumption of prudence. In *Nevada Power Co.*, the Court stated that the "[r]easoning behind granting a utility a presumption of prudence is rooted in economics."[147]

In addition to making its erroneous claims that its proposed presumption is rooted in the Constitution, Southwest Gas provides citations to other state cases regarding a presumption of prudence.[148] Those cases are not controlling.[149] The PUCN acknowledges that other states or jurisdictions have adopted presumptions related to prudence.[150] But there are distinguishing factors in

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[144] It seems axiomatic that a presumption of prudence would be considered a ratemaking procedure.

[145] *Duquesne*, 488 U.S. at 316 (footnote omitted).

[146] *Id.*

[147] *Nev. Power Co.*, 122 Nev. 821, 835.

[148] Mem. at 16:14-19:16.

[149] Southwest Gas cites to cases from Vermont, Washington, Louisiana, Maryland, Maine, New York, Oklahoma, Utah, Idaho, Virginia and Wisconsin. The cases should be reviewed carefully. It is not clear that all of the cited cases actually hold that a presumption of prudence exists. Moreover, many of these cases are older than *Duquesne*, which, as noted above, holds that the Constitution does not mandate a single theory of ratemaking and that such a decision is best left to the states.

[150] 2 CR 001291:21-001293:2; CR 000585-000586, ¶¶31-33; CR 000590, ¶ 41lCR 000595, n.20;

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those other states or jurisdictions. For example, the FERC, "as a matter of practice," does not require utilities to prove in their case-in-chief that all expenditures were prudent, but that does not mean that the law provides that utilities are *entitled* to a presumption of prudence as Southwest Gas has attempted to argue. In fact, the FERC specifically notes that it retains the authority to require that utilities demonstrate the prudence of their expenditures when ordering that a case be set for hearing, or in any later order of the FERC.[151] Unlike Nevada, the FERC has well-developed case law indicating when a presumption of prudence does and does not apply.[152]

In the underlying PUCN proceeding, Staff cited other jurisdictions besides FERC that apply a presumption of prudence for public utilities in rate cases. Staff's review indicated that these other states appear to have statutes or rules explicitly stating where the presumption is applied and what standards are required to overcome the presumption.[153] In these states, well-developed case law also

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[151] *Minnesota Power & Light Co.*, Docket No. ER76-827, Opinion No. 86, 11 FERC 61,312, at 61,645 n.44 (1980).

[152] 1 CR 1292:2-28 an n.24; *see, e.g.*, Regulations Implementing Section 110 of the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act, Docket No. RM80-47-002, *Order Clarifying the Policy Statement in Order No. 94-A* (1983) ("Because the policy announced in Order No. 94 was amended by Order No. 94-A to establish a presumption of prudence regarding any production-related activity performed by an interstate pipeline so long as the seller is not obligated by contract to perform the activity, and does not substantially affect anyone's rights, we will apply it in all pending and future rate cases …"); Potomac-Appalachian Transmission Highline, LLC and PJM Interconnection, L.L.C., Docket Nos. ER09-1256-002, ER12-2708-003, *Initial Decision*, (2015) ("However, the land disposition process, which is triggered after a project has been abandoned, is a distinct phase that is separate and apart from the normal operations of a utility and does not fall under the umbrella of the presumption of prudence standard."); *El Paso Natural Gas Co.*, Docket Nos. RP91-26-007, RP91-162-002, RP92-18-004, RP88-184-013, RP89-132-014 and RP90-81-006, Order on Rehearing at 62,133 (1994) ("The Commission recognizes that it has disallowed recovery through Order Nos. 500/528 of 'punitive damages or penalties awarded pursuant to a court order.' The Commission held that such costs cannot be the subjection of the usual presumption of prudence in an Order Nos. 500/528 proceeding, since punitive damages have not traditionally been considered prudently incurred costs that can be recovered from the ratepayers.") (internal citations omitted).

[153] 1 CR 1297; *see, e.g.*, 4 CCR 723-3:3617(d) (Colo.), which states:

> (d) Effect of the Commission decision. A Commission decision specifically approving the components of a utility's [resource] plan creates a presumption that utility actions consistent with that approval are prudent.
>
> (I) In a proceeding concerning the utility's request to recover the investments or expenses associated with new resources.

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provides guidance to parties as to what the presumption means for utilities, including the reach and scope of the presumption, as well as how other parties can refute the presumption.

Taking into account the various state statutes, rules, and case law, as well as the FERC cases, that both explain the rebuttable presumption and place limits on the scope of the presumption, Justice Brandeis's concurrence in *Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*[154] and the U.S. Supreme Court opinion in *W. Ohio Gas Co. v. Pub. Util. Comm'n of Ohio*[155] do not extend as far as Southwest Gas would have this Court believe. If these cases stood for the proposition that a utility is *entitled by law* to a rebuttable presumption of prudence and that the presumption is rooted in the Constitution, all of the statutes, rules, and case law from the FERC and other states, which have specified instances in which the standard should not apply in rate case proceedings, would have been overturned. In fact, the limited applicability of this U.S. Supreme Court precedent has been recognized by other legal scholars, who note that the prudent investment standard (which encompasses a rebuttable presumption of prudence) has "never been given express majority approval by the U.S. Supreme Court" and that the standard in its modern application "leave[s] broad discretion for the application of the concept by regulators to specific investment decisions."[156]

> (A) The utility must present prima facie evidence that its actions were consistent with Commission decisions specifically approving or modifying components of the plan.
>
> (B) To support a Commission decision to disallow investments or expenses associated with new resources on the grounds that the utility's actions were not consistent with a Commission approved plan, an intervenor must present evidence to overcome the utility's prima facie evidence that its actions were consistent with Commission decisions approving or modifying components of the plan. Alternatively, an intervenor may present evidence that, due to changed circumstances timely known to the utility or that should have been known to a prudent person, the utility's actions were not proper.

Colorado's law is not unlike Nevada's resource planning statute, except that it provides additional detail as to what evidence a utility must present to sustain its presumption, as well as the evidence another party must put forth to rebut the presumption. *See also* A.A.C. R14-2-103(A)(3)(l) (Ariz.),

[154] *Sw. Bell Tel. Co/.*, 262 U.S. 276 (1923).

[155] *W. Ohio Gas Co.*, 294 U.S. 63 (1935).

[156] Robert E. Burns, et. al., *The Prudent Investment Test in the 1980s*, THE NATIONAL REGULATORY RESEARCH INSTITUTE, Apr. 1985, at 34-35.

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3. Nevada courts and the Nevada Legislature have discussed a presumption of prudence only within the context of deferred energy accounting adjustments and not general rate cases, but the Legislature's latest pronouncements are instructive.

As noted above, the only court case in Nevada to explicitly address a rebuttable presumption of prudence was *Nevada Power Co.*, which applies only to deferred energy costs and rate adjustments proposed in a deferred energy accounting application. CR 001293:3-13. Because the findings in that case only apply to deferred energy accounting applications, the purpose and plain language of Assembly Bill 7 ("AB 7") does not extend to general rate case proceedings. The Legislature explicitly superseded the findings regarding deferred energy accounting applications in the *Nevada Power Co.* case when it enacted AB 7 to make clear that utilities are not entitled to a presumption of prudence. 4 CR 002599:13-002600:5.[157] In that sense, the PUCN largely agrees with Southwest Gas's Memorandum; AB 7 is not directly applicable, and general rate cases are very different from deferred energy accounting proceedings.[158]

But if AB 7, and the resulting modification to NRS 704.185, is inapplicable, so are the findings in *Nevada Power Co.* as to any presumption of prudence existing in Nevada. Southwest Gas talks out of both sides of its mouth in the Memorandum. It spends an inordinate amount of paper arguing why AB 7 is not applicable to this general rate case, yet continues to rely heavily upon *Nevada Power Co.* for its argument that a presumption exists in Nevada. Southwest Gas cannot have it both ways.

The PUCN also cannot agree with Southwest's characterization of the PUCN's Modified Order as relying upon AB 7 as the basis for the determination that Southwest Gas did not enjoy a rebuttable presumption of prudence in this rate case. The Memorandum states that "[t]he [PUCN's] reversal of its own decades-long application of the rebuttable presumption was based in large part on an amendment to a Nevada statute (NRS 704.185) that does not apply in general rate cases like this

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[157] 4 CR 002600:3-5 ("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) …") (citing Sec. 1 of AB 7).

[158] Mem. at 23-27.

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one."[159] The "Commission Discussion and Findings" section of the Modified Order does not even address AB 7 or the changes to NRS 704.185. 1 CR 000493-000497. The Order on Petitions for Reconsideration and Clarification does address the intent of AB 7 but concludes that it is unclear whether the Legislature, at least in terms of the testimony put forth during the adoption of AB 7, might have meant for the bill to explicitly ban a presumption of prudence beyond a deferred proceeding. 1 CR 000592-000594, ¶¶48-52. As such, Southwest Gas's statement that the PUCN reversed the presumption "in large part" because of AB 7 is flat wrong.

Though AB 7 is not directly applicable, the PUCN does find it instructive, particularly when you compare the facts and circumstances of a general rate case to a deferred energy accounting case. The Legislature was so distressed by the *Nevada Power Co.* Court finding that a presumption of prudence should be applied in a deferred accounting proceeding that it changed the law in the legislative year (2007) immediately after the case was decided (2006). In changing the law so quickly, Assemblywoman Buckley stated, "There is no presumption favoring a public utility when it files a rate change. We do not burden Nevada consumers for mistakes."[160]

Given this fast action, it can be inferred that the Legislature did not like a presumption being applied in deferred energy accounting rate adjustment proceedings. But applying a presumption in a deferred energy accounting proceeding is far less dangerous than applying a presumption in a general rate 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. The PUCN explained that "[b]ecause 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."[161] 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 natural gas costs. If there were an

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[159] Mem. at 11:12-14.

[160] 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. CR 000592-000593, ¶ 48.

[161] 1 CR 310, ¶ 9.

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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 (the PUCN approved a return on equity of 9.25 percent for Southwest Gas in this case) is applied to all approved capital costs in a general rate case, allowing the utility to earn more as it spends more.

Southwest Gas wants this Court to reach the nonsensical conclusion 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. Southwest Gas argues that the Legislature's decision to only overturn the presumption of prudence in deferred energy accounting cases somehow strengthens the notion that a presumption exists for general rate cases.[162] Southwest Gas avoids the obvious explanation: the Legislature did not feel compelled to pass a law banning a presumption of prudence in general rate cases because no such presumption exists in Nevada – not in common law, not in case law, not in statute, and not in regulation.

4. The PUCN did not "eliminate" the presumption of prudence and, therefore, did not violate the Administrative Procedure Act.

Southwest Gas attempts to characterize the PUCN's Modified Order as eliminating a presumption of prudence that exists in Nevada law. As discussed above, no such presumption of prudence exists.[163]

There are instances where the PUCN has applied a presumption of prudence, which Southwest

[162] Mem. at 35:21-36:21.

[163] However, a statute does exist that requires the prudent operation and service of public utilities. NRS 704.001(3).

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Gas notes in its Memorandum.[164] However, administrative agencies in Nevada are not bound by *stare decisis*.[165] Moreover, at least one of the cases cited by Southwest Gas is a deferred energy accounting case, and as such, any presumption applied in those cases has been superseded by statute.

Citation to these older PUCN cases ignores what happened in Southwest Gas's last rate case. As noted above, Southwest Gas raised the presumption of prudence in its 2012 rate case as to its Management Incentive Plan. Southwest Gas argued that the presumption applied, 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. "Whether a cost was prudently incurred" was one step.[166] The next step was to apply the tests set forth in NRS 704.001, which includes a balancing test for shareholder and ratepayer benefits. Ultimately, the PUCN is charged with ensuring that a decision results in just and reasonable rates in accordance with NRS 704.040 and 704.120.[167] Even though the PUCN is not bound by stare decisis, Southwest Gas was at least on notice that the first step in its most recent rate case was for the PUCN to determine "[w]hether a cost was prudently incurred." The 2012 case was consistent with other recent PUCN cases. In a 2008 case, the PUCN stated that "[j]ust and reasonable is the standard the [PUCN] applies to evaluate whether expenditures incurred in the execution of a prudent project are recoverable."[168] In this case, Staff argued that the Commission cannot determine whether costs are just and reasonable without delving into whether those costs are prudently incurred. The example provided by Staff was a utility

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[164] *See, e.g., In Re Nevada Power Co.*, 1986 WL 1301282 (Nev. PSC), 74 PUR 4th 703 (1986); *In Re Sierra Pacific Power Co.*, 1988 WL 391152 (Nev. PSC), 96 PUR 4th 1 (1988); *Application of Nevada Power Co.*, 2009 WL 1893687 (Nev. PUC) (2009). In its Order on Petitions for Reconsideration and Clarification, the PUCN fully addressed why it did not believe these prior Commission cases could be relied upon for good law or policy. CR 000597-000599, ¶¶ 61-66.

[165] *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.").

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

[167] *Id.*

[168] 4 CR 002597:24-27 (citing Docket No. 07-04028, Order at ¶ 83 (Mar. 18, 2008).

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that, in order to reliably serve its customers, decides it needs a new power plant. Staff explained that if the utility does not look at alternatives to building the new facility (i.e., purchasing a used plant or purchasing power in the wholesale market) to ensure that the decision to build the new power plant is the most economic, efficient, and sound decision out of its options, then the PUCN will never be able to determine that the purchase of the plant was also just and reasonable. CR 002598, n.1.

Southwest Gas makes a very confusing argument that the PUCN violated the Administrative Procedure Act ("APA"), essentially stating that the elimination of the presumption amounts to a rule of general applicability and should have gone through a formal rulemaking.[169] However, as discussed at length above, the presumption does not exist in Nevada law, so it could not be eliminated. Southwest Gas's APA argument also illuminates yet another instance of the utility contradicting itself as it grasps at straws. If, as Southwest Gas suggests, its proposed presumption of prudence is based in the Constitution, then "the rule *cannot* be changed."[170] Except there is no rule to be changed. It seems that the utility believes that the PUCN violated the APA because a rule was not changed (even though there is no rule), and at the same time, the non-existent rule cannot be changed given that it is based in the Constitution. The PUCN's own analysis, on the other hand, indicates that it would have been required to conduct a rulemaking pursuant to the APA if it was going to adopt a presumption of prudence, which is best construed as a rule of procedure.[171]

Either way, it would be difficult for the PUCN to adopt regulations that apply to all utilities. As discussed in the next section, a determination of when prudence is decided by the PUCN varies by utility type. Both electric and water utilities must file resource plans where acceptance of certain projects by the PUCN results in a prudence determination by the PUCN. Gas utilities are not required to file resource plans, so prudence is at issue in rate cases for gas utilities.

Regardless of any rule or lack of any rule, a statute applies. NRS 704.001 requires the efficient, prudent, and reliable operation and service by a public utility. "[W]here power is clearly

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[169] Mem. at 42:25-43:28.

[170] Mem. at 43:1-3 (emphasis in original).

[171] 1 CR 000594-000595, ¶¶ 53-55.

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conferred or fairly implied, and is consistent with the purposes for which the [PUC] 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."[172] The Legislature conferred to the PUCN exclusive powers to not only set rates, but also to ensure prudent and reliable operation and service by public utilities.[173]

5. A presumption of prudence is not consistent with existing Nevada law and is out-of-step with legislative policies.

Finding that all utilities enjoy a presumption of prudence could render several of the PUCN's statutes and regulations meaningless and strip the PUCN of its ability to *sua sponte* determine that a cost is imprudent, despite the existence of evidence supporting such a determination. Southwest Gas does not argue that only gas utilities enjoy a rebuttable presumption of prudence, but that utilities in general enjoy such a presumption. However, if this were true, the PUCN's integrated resource planning ("IRP") statutes and regulations applicable to electric and water utilities would serve little purpose or would have to be modified. The Legislature has created the resource planning construct, wherein a PUCN finding accepting a utility's plan in an IRP case deems any facility investment contained in that plan as "prudent."[174] If a presumption of prudence already applied to all utilities in Nevada, there would have been no need for the Nevada Legislature to determine when prudence is determined as part of resource planning. In fact, if the utility is entitled to a presumption of prudence, then all of its investments would already be deemed prudent automatically even without an IRP filing. If this Court adopts a presumption of prudence for all utilities in this case, the existing statutes as to a prudence determination in a resource plan have no meaning.[175]

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

[173] NRS 704.001, 704.040, 704.120 and 704.110.

[174] *See, e.g.*, NRS 704.110(13), NRS 704.661(6).

[175] While not directly applicable, it is still instructive that 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 (2010) (citing *Karcher Firestopping v. Meadow Valley Constr.*, 125 Nev. 111 (2009) and *AllState Insurance Co. v. Fackett*, 125 Nev. 132 (2009)).

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Moreover, the PUCN's regulations confirm that no presumption exists, making it abundantly clear that the utility is required to demonstrate prudence in a rate case. As an example, the recently-adopted regulations regarding gas infrastructure replacement and expansion applications specifically state that a utility must demonstrate that its costs were prudent in its general rate case.[176] Southwest Gas's argument does not harmonize all Nevada laws or account for the fact that its proposed presumption would render certain Nevada laws meaningless.

Furthermore, following Southwest Gas's arguments, it appears that the utility believes that the PUCN cannot find that a utility's actions were imprudent unless an intervening party first makes the proposal, even if there is evidence in the record of such imprudence. Southwest Gas argues that it is entitled to a presumption of prudence unless and until an intervening party raises a serious doubt as to the prudence of a cost item. In other words, despite there being blatant evidence in the record of imprudence in the utility's actions, if an intervening party does not specifically address such imprudence in its testimony, the PUCN is powerless to address the imprudence or prevent a finding of prudence. This argument, however, eviscerates the Legislative mandates that the PUCN establish just and reasonable rates and that unjust and unreasonable rates are unlawful.[177]

Among the broad implications of Southwest Gas's proposal that it fails to address 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 theory, it can 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

[176] 4 CR 2597:9-22 (citing NAC 704.7984 and LCB File No. R116-15).

[177] NRS 704.040, 704.120.

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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 believes 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.

C. The PUCN Did Not Violate Southwest Gas's Constitutional Rights.

In its Memorandum, Southwest Gas claims that its Constitutional rights are at issue. However, Southwest Gas's arguments consist entirely of conclusory statements and citations to case law, without any reference to facts or any explanation for why the cited authorities should apply in this case. Upon examination of the Certified Record and applicable law, this Court should find that Southwest Gas's due process rights have not been violated and that the rates set by the PUCN are not confiscatory.

1. Southwest Gas had notice of all of the subject matters that it was required to address or defend at hearing.

Southwest Gas's argument regarding an alleged deprivation of due process consists almost entirely of a list of legal standards for notice of hearings.[178] Essentially, Southwest Gas states that parties to a contested proceeding must have an awareness of the matters to be considered at hearing so that they may meaningfully present evidence and respond to the evidence presented by others. The PUCN agrees. Here, Southwest Gas was fully aware of the issues that it had to address and defend at hearing,[179] and there can be no question that the hearing was meaningful.[180]

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[178] Mem. at 41.

[179] Mem. at 41

[180] Mem. at 41:3; *Pub. Serv. Comm'n of Nev. v. Southwest Gas Corp.*, 99 Nev. 268, 271 662 P.2d 624, 626 (1983); *Nev. Power Co. v. Pub. Serv. Comm'n*, 91 Nev. 816, 824, 544 P.2d 428, 434 (1975). The *Nev. Power Co.* case concerns notice to the public itself, not to the litigants of a case. While Southwest Gas's notice and due process claims are a bit haphazard and lack any factual support, the PUCN does not believe that Southwest Gas is claiming that the public was not properly on notice. If

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Southwest Gas's Memorandum does not provide a factual basis to support its due process argument, so it is not entirely clear which of the issues on appeal fall within this discussion. Nevertheless, the record supports that each of the issues on appeal was a matter that Southwest Gas knew or should have known would be addressed at hearing. This is not a case of the PUCN putting forth an entirely new proposed subject matter – rate design in the case of the *Southwest Gas Corp.* case[181] – at hearing. Of the three issues on appeal, Southwest Gas filed both direct and rebuttal testimony on return on equity, filed direct and rebuttal testimony on pension expenses, and filed direct and rebuttal testimony regarding the Challenged Work Orders. As such, these are all "[subject] matters … submitted by the applicant" for approval by the PUCN,[182] and Southwest Gas was on notice to be prepared to adequately address or defend its testimony at hearing.

Southwest Gas claims that its due process rights are violated if the PUCN received "new evidence" at hearing.[183] Again, without any factual basis as to what the "new evidence" is to which Southwest Gas is referring, the PUCN can only guess how to respond. If the "new evidence" Southwest Gas complains of concerns its pension expense and, in particular, the discount rate that it was asked to defend at hearing, Southwest Gas's due process claims have no merit. While no party to Southwest Gas's rate case challenged the utility's direct testimony as to the discount rate prior to hearing, the discount rate was addressed by a Southwest Gas witness in testimony contained within Southwest Gas's application. That witness was provided with an opportunity to defend and explain her testimony at hearing. The fact that she was unprepared to answer the questions posed at hearing does not amount to a due process violation.

Alternatively, if the "new evidence" is whether Southwest Gas was required to establish the prudence and reasonableness of the costs included in the Challenged Work Orders, this issue was

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Southwest Gas was raising such an issue, it would be improper, as an issue of sufficiency of notice to the public was not raised first at the agency level. *Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada*, 120 Nev. 948, 959, 102 P.3d 578, 586 (2004) (requiring exhaustion of administrative remedies).

[181] *Southwest Gas Corp.*, 99 Nev. at 271 662 P.2d at 626.

[182] *Id.*

[183] Mem. at 41:13-15.

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addressed in Staff's pre-filed testimony. As such, Southwest Gas was provided an opportunity to rebut Staff's testimony on the issue, both in its own pre-filed rebuttal testimony and at hearing. Moreover, Southwest Gas spent nearly one full day cross-examining the Staff witness who addressed this issue. So, again, Southwest Gas's due process rights were not violated.

Southwest Gas similarly has no constitutional claims as to the notion that the PUCN has "arbitrarily switch[ed] back and forth between methodologies" in rate cases.[184] As noted above, Southwest Gas raised the presumption of prudence in its 2012 rate case. The PUCN did not apply the presumption in that case either. Rather, the PUCN followed multiple steps to determine whether rates were just and reasonable. "Whether a cost was prudently incurred" was one step.[185] The next step was to apply the tests set forth in NRS 704.001, which include a balancing test for shareholder and ratepayer benefits. In Southwest Gas's 2012 rate case, the PUCN found that its ultimate charge was to ensure that its decision resulted in just and reasonable rates in accordance with NRS 704.040 and 704.120.[186] As such, it should have been abundantly clear to Southwest Gas based on the PUCN order in its last rate case that the PUCN would inquire as to whether the costs in its rate case were prudently incurred. The PUCN has not modified its ratemaking methodologies between Southwest Gas's last rate case and this rate case.

Southwest Gas's failure to substantiate its due process argument with facts is another symptom of its misunderstanding of how a presumption of prudence operates in practice. Rather than examining the nature of the PUCN's inquiries, Southwest Gas simply labels all PUCN inquiries as inappropriate because Southwest Gas apparently believes that a presumption of prudence would relieve it of any obligation to present evidence at hearing to support its requested relief. As discussed throughout this brief, the presumption does not exist in Nevada, but in jurisdictions where it does exist, that is not the way that it works. Southwest Gas attempts to support its unique version of the presumption with a discussion of the practical problems avoided by not requiring the utility to initially supply evidence in

[184] Mem. at 41:16-20 (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315, (1989)).

[185] *Re Southwest Gas Corp.*, 2012 WL 7170426, at ¶ 45 (Dec. 19, 2012).

[186] *Id.*

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support of its rate case application. Certainly, it would be unmanageable for the utility to provide supporting testimony for every minor expenditure with its initial filing. However, here, the costs at issue were large enough and important enough that Southwest Gas chose to specifically address them in testimony contained within the initial application. There is no practical problem with the utility being expected to provide supporting evidence to address the major projects that the utility itself has identified as significant enough to warrant presentation through witness testimony. Moreover, it is not impractical for the utility to provide evidentiary support for a particular project or cost once an intervening party challenges its prudence. With regard to the Challenged Work Orders in this case, they were specifically identified, and Southwest Gas had multiple opportunities to support them with evidence after the initial filing.

2. The PUCN's decision was not confiscatory.

Southwest Gas claims that the PUCN's disallowance of 100 percent of the costs included in the Challenged Work Orders was confiscatory.[187] But Southwest Gas has not, either before the PUCN in its petition for reconsideration or in its Memorandum submitted to this Court, produced evidence as to how the rates resulting from the disallowance "jeopardize[d] the financial integrity" of the company.[188] The *Duquesne* Court states 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) are inadequate to compensate current equity holders for the risk associated with their investments.[189]

As already discussed at length, it is the overall impact of the rate order that must be found to be "constitutionally objectionable."[190] Southwest Gas has made baseless claims that the 100-percent disallowance of the Challenged Work Orders is confiscatory or may amount to a taking, but it has failed to provide any review of the overall impact of the Modified Order. There is no argument in its

[187] Mem. at 44:17-22

[188] *Duquesne*, 488 U.S. at 312.

[189] *Id.*

[190] *Duquesne*, 488 U.S. at 312; i*d.* at 310 ("'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).

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Memorandum 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 Modified Order will be that Southwest Gas cannot access capital in the market in the future. Finally, there is no evidence that Southwest Gas cannot continue compensating its equity holders for the risks associated with their investment.

Southwest cites to *Ely Light* and argues that there was no "competent evidence" before the PUCN to support the PUCN's findings and that the Modified Order is therefore "arbitrary, confiscatory and erroneous, requiring reversal."[191] However, the PUCN's Modified Order sets forth "competent evidence" that Southwest Gas failed to sustain its burden of proof by not providing substantial evidence. Moreover, Southwest Gas's inability to explain the reasoning behind its decision-making demonstrated a systematic lack of accountability, oversight, and prudent management as to the Challenged Work Orders.

VI. CONCLUSION

Based on the foregoing discussion, the PUCN respectfully requests that this Court deny Southwest Gas's Petition for Judicial Review.

DATED this 21st day of June, 2019.

Respectfully submitted,

THE PUBLIC UTILITIES COMMISSION OF NEVADA

By: /s/ Garrett Weir

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[191] *Ely Light*, 80 Nev. at 323, 393 P.2d at 311.

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Affirmation
Pursuant to NRS 239B.030/603.040A

The undersigned does hereby affirm that upon the filing of additional documents in the above matter, an Affirmation will be provided **ONLY** if the document contains a social security number (NRS 239B.030) or "personal information" (NRS 603A.040), which means a natural person's first name or first initial and last name in combination with any one or more of the following data elements:

1. Social Security number.

2. Driver's license number or identification card number.

3. Account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account. The term does not include publicly available information that is lawfully made available to the general public.

Dated the 21st day of June, 2019.

by: */s/ Garrett Weir*

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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 copies of the foregoing **RESPONDENT PUBLIC UTILITIES COMMISSION OF NEVADA'S ANSWERING BRIEF** in Case No., A-19-791302-J via the 8th Judicial District Court's Odyssey E-Filing system on the parties listed below. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

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DATED this 21st day of June, 2019

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DISTRICT COURT
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SOUTHWEST GAS CORPORATION, Petitioner, *vs.* PUBLIC UTILITIES COMMISSION OF NEVADA, Respondent.	Case No.: A-19-791302-J Dep't No.: 19 **MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR JUDICIAL REVIEW** **(Hearing Requested)**

Petitioner Southwest Gas requests leave to file the Reply in Support of Petition for Judicial Review attached as **Exhibit A.** Although NRS 703.373 does not expressly provide for a reply brief, that is standard practice in appeals generally and in appeals from agency determinations in particular. *Cf.* NRS 233B.133(3). A reply is especially necessary in this case because it involves important questions of constitutional and Nevada law upon which the Commission has dramatically changed position, repudiating its own prior decisions. The resolution of those issues are of importance to all utilities in Nevada, so the Court should have the benefit of full briefing. The reply is only 19 pages long and focuses on the most important topics that are raised in this petition for review.

Dated this 6th day of August, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

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CERTIFICATE OF SERVICE

I hereby certify that on the August 6, 2019, I served the foregoing "Motion for Leave to file Reply in Support of Petition for Review" on counsel by the Court's electronic filing system to the persons and addresses listed below:

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EXHIBIT A

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EXHIBIT A

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

REPLY IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

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The Commission wants this Court to believe that the Commission can do anything it wants and the Court is powerless to do anything about it. For example, the Commission tells the Court that it has no choice but to affirm the Commission's conclusion that Southwest Gas's property was not confiscated when the Commission refused to approve a penny of the $51,000,000 spent on software improvements, even though the Commission agrees that it "did not find that the [Challenged Work Order] costs were imprudently incurred." (AB at 45.) Everyone agreed that those improvements are benefitting Southwest Gas's customers. And nobody requested more than a 50% reduction in the cost. Yet Southwest Gas was left to shoulder the entire financial burden for those improvements. If that's not confiscation of property, it's hard to tell what is.

The Commission's brief leaves the reader in the dark about what, exactly, it expects a utility to prove in a general rate case. Until recently, the rule had always been that expenses were presumed prudent until a party produced evidence to demonstrate that the expenses were not prudent. Speculative opinions about what the utility could, in hindsight, *maybe* have done better were not enough to rebut the presumption. Now, the Commission apparently has decided that it can disapprove of expenses that it deems not to be "just and reasonable," regardless of whether there is any evidence demonstrating that an expense was unreasonable or imprudent. (AB at 42.) The Commission contends that if its confiscation of a utility's property is purportedly in furtherance of its mission of providing for "safe, economic, efficient, prudent, and reliable operation and service of public utilities," that decision is effectively unreviewable under the toothless substantial evidence standard. (AB at 3, 41, 58-59.)

The U.S. Supreme Court has repeatedly held that constitutional rights cannot be adjudicated by an agency, leaving the judiciary with only substantial evidence review. And Southwest Gas's arguments are primarily legal, subject to *de novo* review by this Court.

The Commission's argument that there has never been a presumption of prudence in general rate cases ignores the voluminous case law (including Nevada case law) recognizing such a presumption. Every treatise says the same thing. The Commission does not cite a single case or other authority holding that there is no presumption of prudence in a general rate case. Instead, it tries to persuade the Court to ignore the uniform case law, backed by the Constitution, that has developed over a century.

If the Court recognizes the presumption, as it must, and carefully reviews the Commission's brief, it will see that there is little to no *evidence* cited to support the Commission's decision. The Commission's Staff merely *questioned and speculated* about the sufficiency of Southwest Gas's explanations of the expenses at issue in this appeal. There is no evidence of imprudence or bad faith in the record to rebut the presumption of prudence. If the Commission's view is upheld, no utility will ever know what it needs to prove at a general rate proceeding. If Southwest Gas's evidence (and the express finding of no imprudence) wasn't enough, what would be?

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I.

THE STANDARD OF REVIEW

The standard of review is important in this case. The Commission suggests that it is abuse of discretion or substantial evidence for all issues Southwest Gas has raised. That is incorrect. It's *de novo*.

A. The Petition for Review Raises Primarily Legal Issues that are Reviewed *De Novo*

Legal questions "are reviewed *without any deference whatsoever* to the conclusions of the agency." *Manke Truck Lines, Inc. v. Pub. Serv. Comm'n of Nev.*, 109 Nev. 1034, 1036-37, 862 P.2d 1201, 1203 (1993) (emphasis added); *see also see also O'Keefe v. Dep't of Motor Vehicles*, 134 Nev. Adv. Op. 92, 431 P.3d 350, 353 (2018) (court reviews "pure legal questions" decided by agency hearing

officer *de novo*). The question of whether the agency applied the wrong standard (such as the failure to apply a rebuttable presumption) is a legal question that this Court reviews de novo.[1] *See Staccato v. Valley Hospital*, 123 Nev. 526, 530 & n.4, 170 P.3d 503, 506 (2007).

B. <u>Constitutional Facts are Reviewed De Novo</u>

In rate-setting cases where confiscation is alleged, as it is here, facts of constitutional magnitude are reviewed *de novo*. *See Ohio Valley Water Co. v. Borough of Ben Avon*, 253 U.S. 287, 289 (1920) ("In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts . . . ."). The judiciary has the ultimate responsibility and authority "to pass upon the fact of confiscation." *Opinion of the Justices*, 106 N.E.2d 259, 263 (Mass. 1952).

The separation of powers is severely undermined by undue deference to agencies when constitutional rights are at stake. *Bixby v. Pierno*, 481 P.2d 242, 249 (Cal. 1971). "The venerable doctrine of constitutional fact evinces fundamental mistrust of the ability of agencies to judge constitutional challenges to their authority, and with good reason." Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, 94 Notre Dame L. Rev. 297, 322 (2018). To say that the agency's "findings of fact may be made conclusive where constitutional rights or liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial

[1] Even if the substantial evidence standard of review applies, it requires the Court to examine the *entire record* before the agency to ensure that "*quality and quantity* of the evidence" suffices to support factual determinations. *See Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 249, 327 P.3d 487, 490 (2014) (emphasis added).

safeguards." *Bixby*, 481 P.2d at 247. The most fundamental protection provided by the separation of powers "lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the minority." *Id.*; *see also* Redish & McCall, 94 Notre Dame L. Rev. at 322 ("[A]dministrators whose very purpose is to regulate would likely have great difficulty maintaining objectivity in deciding between the claims of fellow agency members seeking to regulate and the private actor opposing regulation."); Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 262 (1985) ("In terms of the constitutional design, the whole process of substituting administrative for judicial adjudication may be thought to suffer from a serious 'legitimacy deficit'" for which constitutional fact doctrine is the antidote). "The problem of maintaining objectivity is far greater when an external constitutional challenge to the exercise of agency authority is presented."[2] Redish & McCall, 94 Notre Dame L. Rev. at 322. If a fundamental right is at stake, "the courts have held the loss of it is sufficiently vital to the individual to compel a full and independent review." *Bixby*, 481 P.2d at 252.

This is of particular concern in Nevada, where "[t]he separation of powers doctrine is *the most important foundation* for preserving and protecting liberty by preventing the accumulation of power in any one branch of government." *Berkson v. LePome*, 126 Nev. 492, 498, 245 P.3d 560, 564 (2010) (emphasis added). The Nevada Supreme Court has "been especially prudent to keep the

[2] The inherent conflict of interest faced by a utility regulator is of real concern in this case. One of the attorneys for the Staff at the hearing on Southwest Gas's rate application is now representing the Commission itself in this appeal. Staff is supposed to be independent from the Commission. NRS 703.301(1); NRS 704.100(1)(h). Staff and the Commission are not independent if they're both represented by the same counsel. This case cries out for judicial review without deference to a conflicted regulator.

powers of the judiciary separate from those of either the legislative or the executive branches." *Id.* at 498, 245 P.3d at 565-66.[3] That is because "the Nevada Constitution embraces separation of powers to an even greater extent than then United States Constitution." *Id.* at 501 n.5, 245 P.3d at 566 n.5. So, the constitutional facts doctrine is even more important in this Court than it is in federal courts. This Court has inherent power to do whatever is necessary "'so as not to become a subordinate branch of government.'" *Id.* at 498, 245 P.3d at 564 (quoting *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 439 (2007)).

It follows, as recognized by *Ben Avon* and many other authorities, that the Court has the power and responsibility to independently determine whether to invalidate a rate that violates the Southwest Gas's constitutional rights because it is confiscatory. Substantial evidence review does not apply to a constitutional claim that is initially adjudicated by an agency. *See Verizon Commc'ns v. F.C.C.*, 535 U.S. 467, 527 (2002) ("[T]here may be a taking challenge distinct from a plain-vanilla objection to arbitrary or capricious agency action if a rate-making body were to make opportunistic changes in ratesetting methodologies just to minimize return on capital investment in a utility enterprise.").

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[3] Setting rates is a legislative function akin to passing a statute. *See City of Las Vegas v. Sw. Gas Corp.*, 90 Nev. 178, 179, 521 P.2d 1229, 1230 (1974) ("The fixing of rates is a legislative act."). And it's the responsibility of the judiciary to invalidate statutes that conflict with the constitution. *See Clean Water Coalition v. The M Resort, LLC*, 127 Nev. 301, 319, 255 P.3d 247, 259 (2011) (refusing to defer to legislature's "decision on whether a general law can be made applicable in a given case" and invalidating portion of budget legislation); *State v. Irwin*, 5 Nev. 111, 120 (1869) ("'[T]he power of determining whether a given law is repugnant to the principles of a Constitution, with which it is alleged to conflict, belongs to the judiciary, and . . . their decision is conclusive.'"). There's no reason that an unconstitutional legislative act performed by an agency should have extra protection from invalidation by the courts. In fact, there's even more reasons to invalidate an unconstitutional agency action taken under a delegation of authority than a direct action of the legislature.

C. The Constitutional Facts Doctrine is Good Law

The Commission argues that *Ben Avon* is no longer good law, but that's wrong. *Ben Avon* has never been overruled and multiple courts have held that the constitutional facts doctrine is still good law.[4] Likewise, the U.S. Supreme Court has not overruled *Crowell v. Benson*, 285 U.S. 22, 56 (1932), which held that an agency cannot be given the "final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." Nor has it overruled *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936), which stated that "to say that [agencies'] findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards." *Ben Avon*, *Crowell*, *St. Joseph Stock Yards*, and the constitutional facts doctrine have been reaffirmed repeatedly.[5] The Court has

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[4] *See, e.g.*, *Woodard v. Personnel Comm'n*, 152 Cal. Rptr. 658, 661-62 (Ct. App. 1979); *Bixby*, 481 P.2d at 247 n.4 (rejecting argument that *Ben Avon* has been overruled and noting that even Professor Davis (who is the Commission's sole authority on this topic) concedes that state courts continue to apply it); *Opinion of the Justices*, 106 N.E.2d at 262 (noting court's inability to discover "when and where" *Ben Avon* line of cases had been overruled, rejecting Professor Davis's opinion, and stating that if the *Ben Avon* line of cases are truly overruled, court "would prefer to see the death certificate"); *City of Dallas v. Stewart*, 361 S.W.3d 562, 576-77 & n.22 (Tex. 2012) (noting that the U.S. Supreme Court recently "reinvigorated the constitutional fact doctrine").

[5] *See United States v. Raddatz*, 447 U.S. 667, 683 (1980) (reaffirming "that administrative agencies cannot finally determine 'constitutional fact,'" and that the ultimate decision must be made by a court); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81-83 (1982) (reaffirming *Crowell* and *Raddatz*); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984) (reaffirming that the Court's "'duty is not limited to the elaboration of constitutional principles; [it] must also in proper cases review the evidence to make certain that those principles have been constitutionally applied,'" which requires an "'independent examination of the whole record'" (quoting *Speiser v. Randall*,

also noted that where, as here, questions of fact are mixed with questions of constitutional law, de novo review of facts is required "'in order to pass upon the Federal question.'" *Bose*, 466 U.S. at 508 n.27 (quoting *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927)).

The constitutional fact doctrine is still good law, especially in the context of administrative agency decisions, where it originated. *See* Redish & McCall, 94 Notre Dame L. Rev. at 322-23 & n.126 ("It has been incorrectly suggested that the [constitutional facts] doctrine no longer exists . . . ."); Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 Ariz. L. Rev. 289, 299 (2017) (noting that early Supreme Court decisions "establishing the constitutional fact doctrine in the administrative context" have never been overruled).

D. *Hope* Is Irrelevant Because this Appeal Does Not Deal with Valuation of Property; It Only Involves *What* Property Should Be Included in the Rate Base

The Commission argues that *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), overruled *Ben Avon*, and that after *Hope*, utility commissions can choose any "ratemaking theory" it chooses with impunity. (AB at 4-5, 46) The Commission apparently sweeps all of its decisions within the scope of "ratemaking theory."

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357 U.S. 513, 525 (1958), and *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963))); *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (citing *Crowell* and reaffirming that the Court "retains an independent constitutional duty to review factual findings where constitutional rights are at stake"). In *Carhart*, the factual findings were made by Congress (not an agency) and the Court *still* refused to defer to them. 550 U.S. at 166 ("Uncritical deference to Congress' factual findings in these cases is inappropriate."); *see also Latta v. Otter*, 771 F.3d 456, 469 (9th Cir. 2014) (quoting *Carhart* and refusing to defer to Nevada legislature's findings of fact regarding same-sex marriage).

But *Hope* dealt with a question that is not presented by this petition for review: what method a state may use to determine the *value* of property. Before *Hope*, the Court limited regulators to using the "fair value" standard for valuing property. *See Smyth v. Ames*, 169 U.S. 466, 544 (1898). *Hope* overruled *Smyth* and held that a state is not restricted to any particular valuation method. 320 U.S. at 602.

This petition for review does not involve valuation of property—it involves the complete disallowance of expenses, the imposition of a pension discount rate that is arbitrary, and the erroneous setting of a rate of return on equity. The prudent investment test is a "concept useful in determining <u>what</u> facility costs should be allowed, rather than <u>how</u> costs for specific facilities should be calculated." Robert E. Burns, et al, *The Prudent Investment Test in the 1980s*, The National Regulatory Research Institute, Apr. 1985, at 34-35 (hereinafter "Burns Report"). The U.S. Supreme Court recognized this in *Verizon Communications* by citing Justice Scalia's concurrence in *Duquesne*, which states that "'<u>all prudently incurred investment may well have to be counted</u>' to determine 'whether the government's action is confiscatory.'" 535 U.S. at 527 n.37 (quoting *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 317 (1989) (Scalia, J., concurring)) (emphasis added).

The distinction between disallowance of expenses and valuation of property is highlighted by the Nevada Supreme Court's decision in *Public Service Commission v. Ely Light & Power Co.*, 80 Nev. 312, 393 P.2d 305 (1964). In that case, the Nevada Supreme Court held that under *Hope*, the district court erred by substituting its judgment for the Commission and rejecting the use of the "original cost, less depreciation" method to determine the value of the property included in the base rate. *Ely Light*, 80 Nev. at 321-23, 393 P.2d at 310-11. Later in the opinion, the Court held that there is a "presumption of the proper exercise of judgment by the utility in matters which are particularly a function

of management" and applied the presumption to pension expenses. *Id.* at 324, 393 P.2d at 311. The Court held that the full amount of the pension expenses should have been included in the rate base. *Id.* at 329, 393 P.2d at 314 (affirming district court order "holding invalid the commission's deletion from the rate base computations of 50% of the expense of the utility's pension plans").

II.

THERE IS, AND ALWAYS HAS BEEN, A REBUTTABLE PRESUMPTION OF PRUDENCE AND GOOD FAITH

A. The Authorities Are Uniform

Southwest Gas has cited dozens of cases applying the presumption of prudence, including Nevada Supreme Court cases and decisions by the Commission. The Commission, nevertheless, argues that there is no presumption of prudence in Nevada and that the United States Supreme Court has never adopted it either. It also contends that *Ely Light* only establishes a presumption of "good faith" (which the Commission does not appear to argue is lacking here), and that "good faith" is not the same as "prudence."

But *Ely Light* doesn't use the words "good faith" or "prudence" when it defines the presumption. It says that there is a "presumption of the *proper exercise of judgment* by the utility in matters which are particularly a function of management." 80 Nev. at 311, 393 P.2d at 324 (emphasis added). The phrase "proper exercise of judgment" is virtually identical to the phrase "exercise of reasonable judgment" that Justice Brandeis used in the concurrence that authorities have uniformly treated as one of the first invocations of the presumption of prudence. *See Mo. ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Mo.*, 262 U.S. 276, 289 n.1 (1923) (Brandeis, J., concurring) ("Every investment may be assumed to have been made in the *exercise of reasonable judgment*, unless the contrary is shown." (emphasis added)); 2 Leonard Saul Goodman, THE PROCESS OF RATEMAKING 860 (1998) (citing Brandeis concurrence as original

source for presumption of prudence, which is still applied today). The Nevada Supreme Court adopted the concurrence in *Ely Light*, which is binding on this Court.

The presumption is not simply one of good faith. "Proper exercise of judgment" is a synonym for prudence.[6] As used in *Ely Light & Power*, the words "proper exercise of judgment" encompass both prudence and good faith (to the extent there is even a difference) because the presumption of the proper exercise of judgment can be rebutted with evidence "showing lack of good faith, inefficiency or improvidence." 80 Nev. at 311, 393 P.2d at 324.

The Idaho Supreme Court implicitly recognized that *Ely Light* applied a presumption of prudence and reasonableness by citing it, along with cases like *West Ohio Gas*, for the proposition that a utility establishes a "prima facie case for the reasonableness of its operating expenses to non-affiliates by showing actual incurrence." *Boise Water Corp. v. Idaho Pub. Utils. Comm'n*, 555 P.2d 163, 169 (Idaho 1976).

Like *Boise Water*, *Ely Light* cited numerous cases to support the application of a presumption of the proper exercise of judgment, including *West Ohio Gas* and *Southwestern Bell Telephone*. *Ely Light*, 80 Nev. at 324, 393 P.2d at 311-12. The majority opinion in *West Ohio Gas* expressly states that "[g]ood faith is to be presumed on the part of the managers of a business" and that "[i]n

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[6] *See Kelly-Nevils v. Detroit Receiving Hosp.*, 526 N.W.2d 15, 20 (Mich. Ct. App. 1994) ("'[P]rudent' means 'exercising good judgment or common sense' . . . ."; *Elio v. Akron Transp. Co.*, 71 N.E.2d 707, 711 (Ohio 1947) ("The Century Dictionary defines 'prudence' as 'good judgment.' Under synonyms, in the definition of 'prudence,' Webster's New International Dictionary uses the quotation 'a sane and temperate judgment.'"); *Westbrook v. Watts*, 268 S.W.2d 694, 698 (Tex. Ct. App. 1954) ("Prudence has been further defined as 'exercising sound judgment; recognized by practical wisdom.'"); ROGET'S II: THE NEW THESAURUS 359 (Office ed. 1984) (defining "prudence" as "[t]he exercise of good judgment or common sense in practical matters").

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*." 294 U.S. at 72 (emphasis added). Yet the Commission argues that these U.S. Supreme Court cases are inapplicable or don't actually apply a presumption of prudence. That's simply not borne out by a careful reading of the cases and the voluminous authorities cited by Southwest Gas unanimously disagree with the Commission.

The Commission has no real response to that authority, other than the anemic arguments that (1) out-of-state cases aren't binding, and (2) some jurisdictions have statutes or regulations governing when the presumption of prudence does and does not apply, so the presumption cannot be based in the Constitution. Of course, out-of-state and U.S. Supreme Court cases are persuasive authority (especially when they are consistent with Nevada law). *Gonzales v. State*, 131 Nev. Adv. Op. 49, 354 P.3d 654 (2015) (United States Supreme Court cases are persuasive authority); *Zahavi v. State*, 131 Nev. Adv. Op. 7, 343 P.3d 595 (2015) (considering persuasive authority from other states). And there are circumstances where the presumption of prudence doesn't apply under the common law or the Constitution.

The fact that some jurisdictions have codified the presumption of prudence and defined its scope is meaningless. Legislatures codify common law doctrines all the time. *See Edgar v. Wagner*, 101 Nev. 226, 228, n.1 699 P.2d 110, 112 n.1 (1985) ("The legislature has codified some aspects of common law immunity . . . ."). But they don't always get it right. And, if tested, some of those statutes could be held unconstitutional. The Commission cites no authority holding that any of the statutes have been held constitutional. Instead, it cites statutes and decisions that don't even involve general rate cases, but rather things like punitive damages awards, land dispositions that are "separate

and apart from the normal operations of a utility," and utility resource plans. (AB at 52 & nn. 152-53.)

B. Authority Cited by the Commission and the Commission's Previous Decisions Conclude that There is a Presumption of Prudence

Even some of the Commission's own authority supports Southwest Gas. The Commission cites the Burns Report for the proposition that the rebuttable presumption of prudence has "never been given express majority approval by the U.S. Supreme Court" and that regulators have "broad discretion for the application of the concept." (AB at 53 (citing Burns Report at 34-35)). First, the portion of the Burns Report cited by the Commission is inapplicable because it discusses valuation and *Hope*, not the question of what property should be included in the rate base. Second, and more importantly, when the Burns Report does discuss the issue of what goes into the rate base, it states, repeatedly, that "*there should exist a presumption that the investment decisions of utilities are prudent*." Burns Report, at iv (emphasis added); *id.* at 55. It notes that "[w]hen applying the prudent investment test, state commissions have taken seriously Justice Brandeis' admonition regarding prudent investments: 'Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.'" *Id.* at 55-56 (quoting *Sw. Bell Tel.*, 262 U.S. at 289 (1932) (Brandeis, J., concurring)). "Commissions have interpreted this as *requiring* a rebuttable presumption of prudence." *Id.* at 56 (emphasis added). "The presumption of prudence makes for efficient regulation in that commissions are not required, *or allowed*, to review the prudence of all utility decisions regardless of their number, importance, or result." *Id.* (emphasis added). A comprehensive treatise on utility ratemaking agrees. 2 Leonard Saul Goodman, THE PROCESS OF RATEMAKING 860 (1998) ("A legal presumption that utility management has acted prudently surrounds their investment decisions."); *see also id.* at 134 ("Regulatory agencies have only limited authority to

interfere with discretionary power of a utility management over legitimately internal affairs of a company subject to economic regulation.”).

The Burns Report states that “[i]t has been held that without ‘affirmative evidence showing management, inefficiency, or bad faith,’ an investment decision is presumed to be prudent.” Burns Report at 56 (quoting *Re Chesapeake & Potomac Tel. Co.*, 57 Pur.3d 1, 7 (D.C.P.S.C. 1964)). That language is strikingly similar to the language used in *Ely Light*. 80 Nev. at 311, 393 P.2d at 324 (“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 . . . the commission should not substitute its judgment for that of management.”). And that’s what the law has been for decades in Nevada—until the Commission decided to abandon it in this case for no reason.

In fact, the Commission’s own decisions have applied a presumption of prudence in general rate cases, which is striking in light of the Commission’s argument that no such presumption has ever existed. *See, e.g.*, *In re Application of Nev. Power Co.*, 2009 WL 1893687, at * 75 (Nev. Pub. Utils. Comm’n June 24, 2009). The Commission tries to distance itself from those decisions by claiming that *stare decisis* does not apply to agency decisions. It’s one thing for *stare decisis* not to apply—it’s quite another for the Commission to pretend that the presumption never existed and refuse to explain its dramatic change in position.

III.

THE PRESUMPTION AND STANDARD OF REVIEW ARE DISPOSITIVE

The existence of a presumption and the attendant burden of proof can be dispositive, as they are here. *See Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 190, 209 P.3d 271, 274 (2009) (answer to certified question of whether Nevada law recognizes a presumption “may . . . be determinative” of litigation in federal

court); *Lavine v. Milne*, 424 U.S. 577, 585 (1976) ("Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application."). It was legal error for the Commission to place the burden on Southwest Gas to defend its purchasing and other business practices in the absence of evidence that they were made in bad faith or imprudently. *Nev. Power*, 122 Nev. at 829 n.15, 138 P.3d at 492 n.15 ("Nevada Power's defense of its purchasing practices was contrary to the rebuttable prudence presumption framework that the PUCN proceedings should have followed.").

A. Parties Challenging Southwest Gas's Expenses Were Required to Demonstrate by a Preponderance of the Evidence that the Expenses were Imprudent

"A presumption . . . imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." NRS 47.180. "[A] presumption not only fixes the burden of going forward with evidence, but it also shifts the burden of proof." *Vancheri v. GNLV Corp.*, 105 Nev. 417, 421, 77 P.2d 366, 368 (1989). A presumption must be rebutted by a "preponderance of the evidence" before the burden shifts back to the party who originally had the burden of proof. *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 107 (2006).

Here, Staff and the Bureau needed to prove by a preponderance of the evidence that there was a "serious doubt" that Southwest Gas incurred the disallowed expenses imprudently. *See Nev. Power*, 122 Nev. at 835, 138 P.3d at 495-96 ("[T]he intervener bears the initial burden of overcoming the prudence presumption by presenting evidence that creates a serious doubt as to the prudence of the utility's expenditure. Only then will the prudence presumption be rebutted and the burden of production shifted back to the utility." (footnotes omitted)); *Construction Indus. Workers' Compensation Group v. Chalue*, 119 Nev.

348, 353, 74 P.3d 595, 598 (2003) (where statute created rebuttable presumption that marijuana was proximate cause of workers' compensation claimant, claimant had burden to establish by preponderance of the evidence that marijuana did not cause his injuries); *Psaty v. United States*, 442 F.2d 1154, 1160 (9th Cir. 1971) ("Where a presumption owes its origin, as here, to an important public policy, it should operate to fix the burden of persuasion, as well as the burden of going forward.").

B. <u>There Was No Evidence of Imprudence</u>

1. Work Orders

There is no evidence that any of the Challenged Work Order expenses for which Southwest Gas sought reimbursement were imprudent. The Commission admits as much, which is conclusive. (AB at 45 (Commission "did not find that the [Challenged Work Order] costs were imprudently incurred.")) "While the [Commission] was highly critical of some of [Southwest Gas's] . . . practices, the [Commission] stopped short of labeling those practices imprudent." *Nev. Power Co.*, 122 Nev. at 838, 138 P.3d at 497. The expenses therefore should have been approved. *Id.*

The Commission did not make a finding of imprudence because there was no actual evidence rebutting the presumption of prudence. The Commission merely relied on Staff's questioning of the expenses. That's not enough. Staff was required to "present facts, not merely opinion." Burns Report at 71. Suspicion, speculation, and criticism are not evidence. *See Gramanz v. T-Shirts & Souvenirs, Inc.*, 111 Nev. 478, 485, 894 P.2d 342, 347 (1995) (speculation is not substantial evidence); *Deiss v. S. Pac. Co.*, 56 Nev. 151, 53 P.2d 332 (1936) ("[V]erdicts cannot rest upon mere surmise, speculation, conjecture, guess, supposition, or imagination . . . ."); *In re Nielsen*, 526 B.R. 351, 361 (Bankr. D. Haw. 2015) ("[C]riticisms are not evidence, let alone expert opinion evidence."); *Neal*

v. Wilson Cnty. Bank, 263 P. 18, 19 (Colo. 1927) ("Mere suspicions and surmises are not evidence.").

The Commission says that Southwest Gas was required to prove that "the choice made by the utility was the least-cost option or the best available alternative project" and that "the project expenditures were reasonable under the circumstances. (AB at 35.) And it says that Southwest Gas was required to "produce a witness who was personally involved in or could meaningfully speak to the execution of the Challenged Work Orders." (AB at 31.)

Just this kind of second-guessing "you could have done better" is exactly what the Nevada Supreme Court refused to allow in *Nevada Power Co.* In that case, the Commission found that Nevada Power should have entered into a contract with Merrill Lynch that would have avoided significant costs in purchasing electricity. 122 Nev. at 839, 138 P.3d at 498. The Court reversed the Commission's order disallowing $180,082,532 for the failure to enter into a "Merrill Lynch" kind of agreement because there was no evidence that a "Merrill-Lynch-type transaction was an available option." *Id.*; *see also* Burns Report at 60 ("The decisions of the utility are not subject to 'Monday-morning quarterbacking.").

Here, the Commission's rationale suffers from the same fatal flaw. The Staff's testimony before the Commission was that Southwest Gas could have tried to pay less for the software or otherwise save on expenses. But Staff's witness did not explain what Southwest Gas should have done or identify any other options that were actually available to Southwest Gas. In fact, he testified that he could not conclude that the expenses were imprudent. Criticizing Southwest Gas's evidence and speculating about whether the projects could have cost less is not enough to overcome the presumption. *See id.* at 840, 138 P.3d at 499 (where staff "failed to present evidence" to support argument that

utility should have made different decisions because it had other options, Commission's finding was "speculative and unsupported by evidence in the record")

Southwest Gas's witness, in contrast, explained the basis for the decisions to pursue the software upgrades. (13 ROA 011392-11451.) It is simply false for the Commission to contend that Southwest Gas provided "no evidence" to support its expenses. And despite the Commission's insistence to the contrary, there is no requirement that Southwest Gas produce a witness with first-hand knowledge. A witness may testify based on a review of the company's books and records. *Kroll v. Incline Village Gen. Improvement Dist.*, 2014 WL 5840049, at *4 (Nev. Nov. 10, 2014) ("A review of relevant business records can be the basis for personal knowledge in affidavits.").

The only other thing the Commission relied on as justification for disallowing over $50 million in expenses is the inclusion of some expenses that Southwest Gas agreed to remove from the application. The Commission argues that the inclusion of those expenses demonstrated a comprehensive lack of oversight. But the inclusion of those expenses in an application does not demonstrate that all of the other expenses are questionable, particularly when the questioned expenses were removed. And even if it did, the Nevada Supreme Court held that a broad stroke conclusion that "'colossal management mistakes' cannot operate as a ground for denying" an entire rate increase application. *Nev. Power*, 122 Nev. at 837, 138 P.3d at 497. Evidence of mismanagement "must be specific, not diffuse; it should directly relate to the rate or service in dispute, and if no such relation can be established, it must be shown to be so extensive as to relate to the overall operation of the company." 2 Leonard Saul Goodman, THE PROCESS OF RATEMAKING 850 (1998). There is no evidence in the record to demonstrate a connection between the erroneous inclusion of expenses in a rate application and the overall operation of Southwest Gas. Moreo-

ver, employee incentive awards and the other expenses are legitimate and reasonable business expenses. Southwest Gas recognized, however, that they are the types of expense that the Commission traditionally does not allow, and Southwest Gas agreed to remove them for that reason. And the removed expenses were **less than 1%** of all of the costs.

2. Pension Costs

As for the pension costs, there is, likewise, no evidence to demonstrate that Southwest Gas's determination of the discount pension rate was imprudent. The Commission admits that Southwest Gas filed testimony on the discount rate that "addressed how the discount [was] determined and the effect of the discount rate on pension costs." (AB at 23.) Southwest Gas's witness explained that the discount rate was determined by an actuary. (*Id.*) Yet, the Commission decided to substitute its judgment for Southwest Gas's again by selecting an arbitrary discount rate and normalizing the pension costs over a three-year average. Without evidence of imprudence, the pension costs should have been approved. *See Ely Light*, 80 Nev. at 311-12, 393 P.2d at 323-24. The Commission's conclusion that normalizing expenses is a "common practice in ratemaking"[7] is not supported by any evidence. It's yet another example of the Commission substituting its judgment for Southwest Gas's. 1 Leonard Saul Goodman, THE PROCESS OF RATEMAKING 125 (1998) ("Agencies should not indulge in self-importance, personality, or reputation. An agency, for example, that suggests its depth of understanding of the regulated industry or the problems of regulation are inexpressable . . . invites judicial inquiry into whether the basis for the decision has been sufficiently revealed for judicial review to occur.").

[7] (4 ROA 002145.)

IV.

THE COMMISSION'S DECISION ON RETURN ON EQUITY WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The Commission's selection of a return on equity at the low end of its self-described "zone of reasonableness" was not supported by substantial evidence. Although the presumption of prudence does not strictly apply to return on equity, the Commission was still required to identify some evidentiary basis for its determination. There was no evidence to support the Commission's selection of a return on equity that was at the low end of every model presented to the Commission. The Commission found that Southwest Gas does not face *more* risk than the proxy group, but it did not find that Southwest Gas faces *less* risk than the proxy group. The Commission adopted the 9.25% figure without explanation. That "is not the recommended approach to such an important element of a general rate case." 1 Leonard Saul Goodman, THE PROCESS OF RATEMAKING 213 (1998) (discussing case where regulatory "made detailed findings regarding the weaknesses in the company's case for its recommended return on equity; but when it came to finding an appropriate return on equity, the department provided little justification for it, and indeed made no subsidiary findings"). At the very least, the Commission should have selected a return on equity that was closer to the middle of the returns suggested by the parties. *Id.* at 128 (noting that an "agency that is satisfied that opposing views are both well supported in the record may adopt the midpoint," but noting that "[t]here is a limit to an agency's resolving issues by striking a middle ground between opposing views" and that an agency "may indeed need to reject outright positions outrageously sated or unfounded in logic or the evidence").

CONCLUSION

The Commission's order should be vacated and the Commission should be instructed to approve all of the Challenged Work Orders, the pension expenses, and the return on equity proven by Southwest Gas.

Dated this 6th day of August, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

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I hereby certify that on the August 6, 2019, I served the foregoing "Reply in Support of Petition for Judicial Review" on counsel by the Court's electronic filing system to the persons and addresses listed below:

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DISTRICT COURT
CLARK COUNTY, NEVADA

Southwest Gas Corporation, Petitioner, vs. Public Utilities Commission of Nevada, Respondent.	)	Case No.: A-19-791302-J Department No.: 19

BUREAU OF CONSUMER PROTECTION'S OPPOSITION TO SOUTHWEST GAS' MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

The Bureau of Consumer Protection, by and through counsel, Ernest D. Figueroa, Consumer Advocate for the State of Nevada, and Whitney F. Digesti, Deputy Attorney General, hereby opposes Southwest Gas's Motion for Leave to File Reply in Support of Petition for Judicial Review ("Motion"). As Southwest Gas Corporation ("Petitioner") acknowledges, Nevada Revised Statutes ("NRS") 703.373(7) provides:

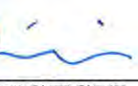
> The Commission and any other respondents shall serve and file a reply memorandum of points and authorities within 30 days after service of the memorandum of points and authorities, whereupon the action is at issue and the parties must be ready for a hearing upon 20 days' notice.

See NRS 703.373(7).

Thus, NRS 703.373 does not provide for the party seeking judicial review to file a reply to the respondent's reply. Allowing the Petitioner to file a reply when the applicable law specifically does not allow for such is a violation of the express intent, spirit, and language of NRS 703.373. NRS 703.373 affords petitioners and respondents the same opportunity to address the issues to be heard before the Court while maintaining judicial economy (much like the appeal process before the Nevada Supreme Court). Here, the Petitioner is attempting to take a second bite at the apple and present its arguments, including some new arguments, when the Respondents, who have followed the applicable law, are not afforded an opportunity to address those arguments. Moreover, Petitioner's claim that there should be an exception to the clear rule because this case "involves important questions of Constitutional and Nevada law upon which the Commission has dramatically changed position, repudiating its prior decisions" is in itself argumentative, and nothing more than an attempt by the Petitioner to have the last word when the law does not provide authority for the Petitioner to do so. The law establishes the duty upon Petitioner to include all of its arguments in its Petition and a duty upon Respondents to include all of their arguments in the Reply. This Court should apply the applicable law governing the procedure for petitions for judicial review from the Commission's decision and deny Petitioner's August 6, 2019, Motion for Leave to File Reply as procedurally improper. However, if the Court is inclined to allow the Petitioner to file a second Reply, the Respondents should also be afforded an opportunity to file a supplemental Reply.

Respectfully submitted August 8, 2019.

ERNEST D. FIGUEROA
Consumer Advocate



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AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned hereby affirms that this Reply Brief does not contain the personal information or social security number of any person.

The undersigned does hereby affirm that upon the filing of additional documents in the above matter, an Affirmation will be provided only if the document contains a social security number (NRS 239B.030) or "personal information" (NRS 603A.040), which means a natural person's first name or first initial and last name in combination with any one or more of the following data elements:

1. Social Security number;

2. Driver's license number or identification card number;

3. Account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account. The term does not include publicly available information that is lawfully made available to the general public.

Respectfully submitted August 8, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Bureau of Consumer Protection and that on the 8th day of August, 2019, I electronically filed the foregoing BUREAU OF CONSUMER PROTECTION'S OPPOSITION TO SOUTHWEST GAS' MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR JUDICIAL REVIEW with the Clerk of the Court by using the electronic filing system. Participants in this case who are registered electronic filing system users will be served electronically.

I certify that participants who are not registered electronic filing system users, will be served with the foregoing document by First-class mail, postage prepared, and addressed as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

SOUTHWEST GAS CORPORATION, Petitioner, vs. PUBLIC UTILITIES COMMISSION OF NEVADA, *et al.*, Respondents.	CASE NO. A-19-791302-J DEPT. NO. 19

PUBLIC UTILITIES COMMISSION OF NEVADA'S OPPOSITION TO SOUTHWEST GAS'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

The Public Utilities Commission of Nevada ("PUCN" or "Commission"), by and through its undersigned counsel, hereby opposes the Motion for Leave to File Reply in Support of Petition for Judicial Review ("Motion") filed by Southwest Gas Corporation ("Southwest Gas"). The statute governing appeals of PUCN cases, Nevada Revised Statutes ("NRS") 703.373, does not permit a reply from a petitioner; rather, the statute is explicit as to an appeal process that contemplates only one memorandum filed by each petitioner and respondent. Moreover, the legislative history of NRS 703.373 reflects an intent for a fast-tracked appeal process to prevent harm to ratepayers. This Court should deny Southwest Gas's Motion and find that Southwest Gas had ample opportunity to make the arguments set forth in its Reply in its initially-filed memorandum.

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I. NRS 703.373 Does Not Permit a Reply, and the Supreme Court of Nevada Found that the Mandates in NRS 703.373 Limit a District Court's Discretion.

NRS 703.373 governs appeals of PUCN decisions. This statute is explicit, and the Supreme Court of Nevada has found its effect clear as to the scope of judicial discretion and "the Legislature's intent to provide an expedited timeline for judicial review."[1] Specifically, the Supreme Court of Nevada found that NRS 703.373(3), (6), and (7) contain mandatory language as to filing timelines that must be followed by petitioners.[2] NRS 703.373(3) sets forth the timing for a petition for judicial review, stating that it "must be filed within 30 days" after final Commission action on reconsideration or rehearing. NRS 703.373(6) states that a petitioner seeking judicial review is required to file and serve a memorandum of points and authorities within 30 days after the PUCN provides written notice that the certified record has been filed with the court. NRS 703.373(7) requires the PUCN and any other respondents to file and serve a reply memorandum of points and authorities within 30 days of service of the petitioner's memorandum.

Southwest Gas's request in its Motion is a direct contravention of NRS 703.373(7), which explicitly provides that after respondents file a reply memorandum, "the ***action is at issue*** and ***parties must be ready for a hearing*** upon 20 days' notice."[3] The mandatory language in NRS 703.373(7) reflects the Nevada Legislature's intent for courts to proceed quickly after petitioners and respondents each file a single memorandum of points and authorities; the Legislature specifically chose not to allow an opportunity for a petitioner to file a reply brief. In interpreting NRS 703.373, the Supreme Court of Nevada, in *Rural Telephone,* found that "'it is fair to assume that, when the [L]egislature enumerates certain instances in which an act or thing may be done, or when certain privileges may be enjoyed, it names all that it contemplates, otherwise what is the necessity of specifying any?"[4] Further, the Supreme Court of Nevada explained that "'[s]tatutes should be read as a whole, so as not to render superfluous words or phrases or make provisions nugatory."[5] NRS 703.373 does not provide for the "privilege" of a reply from a petitioner, indicating that the Legislature did not intend for one to be

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[1] *Rural Telephone Co. v. Pub. Utils. Comm'n of Nev.*, 398 P.3d 909, 911-12 (2017).

[2] *Id.* at 911.

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

[4] *Rural Telephone*, 398 P.3 at 911 (citing *Ex parte Arascada*, 44 Nev. 30, 35, 189 P. 619, 620 (1920)).

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

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permitted. Instead, NRS 703.373(7) provides that the action is at issue and that the briefing schedule is concluded after the 30-day timeframe within which respondents may file memoranda. The provision in NRS 703.373(7) allowing courts to act expeditiously (within 20 days) to conduct a hearing after each party has filed a single memorandum illuminates the Legislature's clear intent to eliminate delays associated with prolonged briefing. Simply, NRS 703.373 cannot be read to support Southwest Gas's Motion.

Importantly, the Supreme Court of Nevada found that only NRS 703.373(5) provides district courts with discretionary power to adjust the procedural schedule for reviewing a PUCN decision.[6] NRS 703.373(5) states that the PUCN is required to transmit the certified record to the court "within 30 days after the service of the petition for judicial review ***or such time as is allowed by the court***."[7] NRS 703.373(7), which mandates that the action is at issue and that the parties be prepared to go to hearing within 20 days after the date by which respondents must file and serve their memoranda, does not include similar discretionary language that would permit this Court to grant leave to parties to file additional pleadings instead of moving forward toward a decision.

II. The Legislative History of NRS 703.373 Does Not Support Southwest Gas's Request in its Motion.

While NRS 703.373(7) is clear on its face and is not subject to further interpretation,[8] the legislative history is nonetheless informative as to why this Court should deny Southwest Gas's Motion. The legislative history of NRS 703.373 indicates that it was modeled after NRS 233B, with important exceptions: NRS 233B.133(3) permits reply memoranda and NRS 233B.133(6) permits courts to extend the time for filing memoranda upon a showing of good cause. Similar provisions are noticeably absent from NRS 703.373. The Legislature purposefully chose ***not*** to include an opportunity for reply memoranda or an extension of time provision within NRS 703.373. The legislative history signals that the exclusion of such language was purposeful to streamline judicial review of the PUCN's decisions.

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[6] *Id.*

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

[8] It is well-settled in Nevada that, where a statute is clear on its face, a court may not go beyond the language of the statute in determining the Legislature's intent. *Thompson v. District Court*, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984).

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Assembly Bill ("AB") 17 before the 2011 Nevada Legislature addressed judicial review of agency proceedings, specifically considering whether NRS 233B.039 should be amended to state that judicial review of PUCN decisions is exempt from the provisions of Chapter 233B. The PUCN's Assistant General Counsel and Utilities Hearing Officer testified at a February 9, 2011, legislative hearing on AB 17 as follows:

> The reason for the fast-track review of [PUCN] decisions is based on two premises: money and infrastructure. All [PUCN] decisions basically touch on one of these two issues. With regards to money, there is the issue of rate stability. The [PUCN] has, in its process, general rate cases – that is a top down review of all utilities operations, revenues, and recovery rates which are on a two to three-year cycle. If the judicial review process of a decision takes one, two, or three years you have the potential of a spike in rates. If that happened, a [PUCN] decision would go into effect at the same time that a Supreme Court decision would go into effect. That would have the effect of spiking the rates. The other issue is carrying charges. Once [PUCN] decisions are issued they are deemed effective. Unless there is an injunction they go into effect immediately. Those binding rates are then recovered by ratepayers. If there is subsequently a refund or additional monies to be recovered from or to the ratepayers there are carrying charges – basically interest on these monies that either the [PUCN] or the ratepayers are going to have to pay. The shorter the time frame for judicial review that we have, the less carrying charges there are.
>
> Lastly, with regards to money, there is what is called 'intergenerational equities.' When a rate goes into effect, there is a certain pool of ratepayers. If judicial review takes one to three years, that pool of ratepayers changes over that time and there is not an equal comparison. If a refund needs to be issued, there are some people that are going to get that refund without having paid previously and others who are no longer in the area that should have gotten that refund. …
>
> [NRS Chapter 233B] … allow[s] for cross-petitions. It allows for extended briefing and new evidence to come in. Those were never things that were contemplated for judicial review of the PUC[N].[9]

Essentially, the concern relevant to this case is the effect on ratepayers if this Court were to reverse the PUCN decision and, for example, permit recovery of the costs associated with the Challenged Work Orders or increase the allowed return on equity. The PUCN would be required to modify rates to collect the funds associated with the Challenged Work Orders and increased return on

[9] Minutes of the Meeting of the Assembly Comm. on Government Affairs, Seventy-Sixth Session, Feb. 9, 2011, pp. 45-47.

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equity for the period of time over which this appeal was pending. The longer the appeal is pending, the larger that pot of money grows, thereby making it more likely that ratepayers will experience a spike in their utility bills as a result of a court decision.[10] Thus, the explicit exemption of the PUCN's decisions from the potentially longer and more discretionary timeframes as set forth in Chapter 233B of the NRS was intentional and should not be overlooked. Taking into account this legislative history, the Court should deny Southwest Gas's Motion and take action to schedule a hearing in this case.

III. NRS 703.373 is a Stand-Alone Statute Governing Appeals of PUCN Decisions, and It Conflicts with NRS 233B.133.

NRS 703.373 directly conflicts with, and cannot be harmonized with, NRS 233B.133, the statute governing judicial review of the decisions of other Nevada administrative agencies.[11] Whereas NRS 233B.133(1) allows a petitioner 40 days to file a memorandum of points and authorities subsequent to the agency's notice of filing of the administrative record with a court, NRS 703.373 allows only 30 days. NRS 233B.133(3) allows a petitioner to file a reply to the agency's response, but NRS 703.373 contains no provision that allows a reply from the petitioner. NRS 233B.133(4) permits the parties an option to request a hearing within seven days of the briefing closure, but NRS 703.373(7) provides that the parties *must* be ready for a hearing upon 20 days' notice following the submission of the PUCN's brief. And, whereas NRS 233B.133(6) allows a court to extend the timeline for filing memoranda upon a showing of good cause, no such provision exists in NRS 703.373. Thus, the timelines and flexibility, including for reply memoranda, set forth in NRS 233B.133 do not apply to judicial review of PUCN decisions. Following the Nevada Legislature's

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[10] While Southwest Gas claims that $51 million is at issue in the Challenged Work Orders (Reply at 1), this number is highly overstated and is not representative of the amount of money that would have been collected through Nevada rates had the PUCN approved recovery of the Challenged Work Orders. This misstatement of fact is just one reason why this Court should deny the motion for leave to reply or, alternatively, provide the PUCN and the Bureau of Consumer Protection with an opportunity to file a sur-reply.

[11] *See Rural Telephone*, 398 P.3 at 912 (comparing and contrasting the differences between NRS Chapter 233B and NR 703.373).

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addition of NRS 233B.039(5)(d), expressly exempting "[t]he judicial review of decisions of the [PUCN]" from Chapter 233B, NRS 703.373 is clearly meant to be a stand-alone operative statute that prescribes the process for judicial review of PUCN decisions. Thus, this Court's review of the instant case is subject to the timelines and briefing schedule outlined in NRS 703.373. Southwest Gas is not permitted to file a reply brief, and it cites no authority that would allow a contrary determination.

IV. Southwest Gas's Arguments in Its Motion and the Timing of the Motion Should Not Persuade this Court to Grant the Requested Relief.

Southwest Gas argues that a reply is "necessary" because this case involves important questions of constitutional and Nevada law and because the PUCN has "dramatically changed position, repudiating its own prior decisions." Motion at 1. Southwest Gas further argues that this Court should have the benefit of a full briefing because resolution of the issues in this case is important to all Nevada utilities.

The PUCN agrees that this Court should have the benefit of a full briefing, but Southwest Gas offers no reason why this Court was not afforded the benefit of a full briefing based upon the already-filed memoranda. It appears that all of the arguments raised in Southwest Gas's Reply could have been made in its memorandum filed in May. While Southwest Gas implies some changed position of the PUCN, the Reply argues only that the PUCN order at the center of this appeal repudiated its own prior decisions. Even if that were true, any changed position of the PUCN was already an issue in May when Southwest Gas filed its initial memorandum. Southwest Gas does not appear to argue that the PUCN's responsive memorandum somehow altered the PUCN's position as stated in the final order at issue in this appeal. If that were the case, which it is not, there could be some merit in allowing Southwest Gas to file its Reply; however, no such arguments have been made, or can be made, in good faith.

Certainly, the PUCN agrees that this appeal is of great importance to the State, other utilities, and, in particular, ratepayers. As the PUCN memorandum points out, the presumption of prudence concept advanced by Southwest Gas would entirely upend the existing regulatory framework that requires utilities to demonstrate prudence in planning decisions and may expose ratepayers to imprudent or unreasonable costs, the likes of which Southwest Gas included in the case on appeal here.

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Southwest Gas's Motion fails to explain why this Court should feel compelled to reach beyond the explicit and mandatory terms of NRS 703.373 to provide Southwest Gas the benefit of one more bite of the apple. Southwest Gas argues that replies are "standard practice in appeals generally and in appeals from agency determinations in particular." Motion at 1. However, since the enactment of NRS 703.373 and the revision of NRS 233B to explicitly exempt PUCN decisions from the statutes governing judicial review of other administrative agencies' decisions, the standard practice has been to prohibit replies from petitioners challenging PUCN decisions. For example, in a pending appeal in the Second Judicial District involving rate recovery of approximately $22 million a year associated with the effects of the Tax Cuts and Jobs Acts, the petitioner did not attempt to request or file a reply.[12] Extended briefing may be standard practice in other types of appeals, given that NRS 233B.133 expressly permits replies, but they are neither standard nor allowed when appealing a PUCN order for the reasons delineated above.

Additionally, the timing of Southwest Gas's Motion undermines its arguments. Had Southwest Gas been attempting to follow "standard practice" under NRS 233B.133, it would have been required to file its reply memorandum on July 22, 2019, which is 30 days after the PUCN filed its memorandum. Instead, Southwest Gas filed its Motion 46 days after the PUCN's filing. While Southwest Gas's suggests that there is some pressing need for this Court to take its Reply, Southwest Gas clearly did not act with any sort of urgency to request leave to file such a Reply. Southwest Gas's Reply would have failed to meet even the 30-day statutory deadline set forth in NRS 233B.133, were that statute applicable.

V. The PUCN Was Not Served with Southwest Gas's Motion Until August 20, 2019.

Southwest Gas filed its Motion on August 6, 2019, at which time the PUCN's legal representatives had been inadvertently removed from the Court's electronic service as administered through the Eighth Judicial District Court portal. The PUCN was not aware that its attorneys, General Counsel Garrett Weir and Assistant General Counsel Debrea Terwilliger, were not listed as counsel for Respondent PUCN. Exhibit A to this Opposition is the Affidavit of Shayla Hooker, the Executive

[12] Case No. CV-18-02497, *Sierra Pacific Power Company et al. v. Public Utilities Commission of Nevada.*

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Assistant to General Counsel of the PUCN, as to the administrative error that led to the PUCN not receiving electronic service of Southwest Gas's Motion.

Additionally, Exhibit B to this Opposition is the Notification of Service received by Consumer Counsel Mark Krueger, which was then forwarded to the Consumer Advocate Ernest Figueroa with the Bureau of Consumer Protection. Exhibit B lists all persons served electronically via the Eighth Judicial District Court Portal. Neither Mr. Weir nor Ms. Terwilliger are listed on this Notice of Service. While the PUCN does not purport to believe there was any specific intent on the part of Southwest Gas to not serve the PUCN, Southwest Gas presumably received the same notice as Mr. Krueger and should have ascertained that the PUCN attorneys did not receive service. A copy of the Motion was provided by Southwest Gas on August 20, 2019, via electronic mail to Ms. Terwilliger. Thus, while the PUCN discovered of its own accord on August 19, 2019, that Southwest Gas's Motion had been filed, the PUCN was not served by Southwest Gas until August 20, 2019.

VI. In Conclusion, the Court Should Deny Southwest Gas's Motion or, in the Alternative, Grant the Respondents Sufficient Time to File a Sur-Reply.

Based on the foregoing, the Court should deny Southwest Gas's Motion. Southwest Gas has not provided the Court with any compelling arguments as to why the Court should ignore the explicit language in NRS 703.373, which does not permit the filing of a reply brief by petitioners.

If the Court is inclined to grant Southwest Gas's Motion, it should provide the respondents, the PUCN and the BCP, with sufficient time for each to file a sur-reply. As noted above, Southwest Gas took 46 days to file its Motion and Reply. While the PUCN does not request such an extended period, it requests at least 15 days to file a sur-reply.

As alluded to in footnote 10 of this Opposition, the Reply as filed by Southwest Gas misstates facts in evidence and mischaracterizes the PUCN's memorandum. If the Court grants Southwest Gas leave to file a Reply, the Court should permit respondents adequate time to file a sur-reply.

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Carson City, NV 89701-3109

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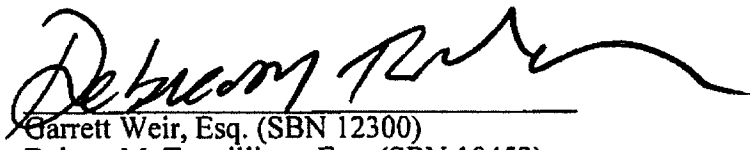
Respectfully submitted by:



Garrett Weir, Esq. (SBN 12300)
Debrea M. Terwilliger, Esq. (SBN 10452)
PUBLIC UTILITIES COMMISSION OF NEVADA
1150 E. William Street
Carson City, NV 89701
Attorneys for Respondent, the Public Utilities Commission of Nevada

Public Utilities Commission of Nevada
1150 E. William Street
Carson City, NV 89701-3109

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AFFIRMATION

Pursuant to NRS 239B.030 and 603A.040

The undersigned does hereby affirm that the preceding document, **PUBLIC UTILITIES COMMISSION OF NEVADA'S OPPOSITION TO SOUTHWEST GAS'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR JUDICIAL REVIEW**, filed in Case No. A-19-791302-J, does not contain the personal information of any person.

Dated the 21st day of August, 2019.

PUBLIC UTILITIES COMMISSION OF NEVADA

By: [signature]

GARRETT WEIR, ESQ.
Nevada Bar No. 12300
DEBREA M. TERWILLIGER, ESQ.
Nevada Bar No. 10452
1150 E. William Street
Carson City, NV 89701-3109
Tel: (775) 684-6132

Attorneys for:
Public Utilities Commission of Nevada

Public Utilities Commission of Nevada
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Carson City, NV 89701-3109

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EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

SOUTHWEST GAS CORPORATION, Petitioner, vs. PUBLIC UTILITIES COMMISSION OF NEVADA, *et al.*, Respondents.	CASE NO. A-19-791302-J DEPT. NO. 19

AFFIDAVIT OF SHAYLA HOOKER

STATE OF NEVADA)

)ss:

County of Clark)

I, SHAYLA HOOKER, Executive Assistant for General Counsel for the Public Utilities Commission of Nevada ("PUCN"), do hereby swear under penalty of perjury that the assertions of this affidavit are true and correct to the best of my knowledge.

1. On August 19, 2019, I logged onto the Clark County Courts electronic filing portal, called the "Eighth Judicial District Court Portal." I typed in the case number as referenced above and found that a motion, opposition, and Notice of Hearing were posted in Case No. A-19-791302-J.

2. After discovering the filings, I spoke with Assistant General Counsel Debrea Terwilliger, who stated that neither she nor PUCN General Counsel Garrett Weir were served with the filings or Notice of Hearing.

3. As part of my investigation to determine why the PUCN was not served, I discovered that the PUCN attorney(s) were not listed as counsel for the PUCN on the Eighth Judicial District Court Portal. Rather, Ernest Figueroa, Consumer Advocate with the Bureau of Consumer Protection ("BCP"), was listed as counsel for the PUCN.

4. I contacted Tia Everett, the Eighth Judicial District Court Clerk for Dept. 19, to find out

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what could have happened and how this error could be fixed. At approximately 2:03 p.m. on August 19, 2019, I spoke with Tia Everett via telephone, and she informed me that when the BCP filed its intervention in the above-referenced case, the Master Calendar Department may have been confused and added Mr. Figueroa as counsel for the PUCN. Ms. Everett stated that this was the Court's error. I asked how it could be fixed, and she said that she would amend it and that I did not need to do anything further.

5. Prior to August 19, 2019, I had not discovered that PUCN attorneys Mr. Weir and Ms. Terwilliger were not listed as counsel for the PUCN. Mr. Weir, Ms. Terwilliger, and I had received service of electronic filings prior to August 19, 2019, so it was not evident to the PUCN that it would not receive electronic service of filings made in Case No. A-19-791302-J.

DATED this 21st day of August, 2019.

SHAYLA HOOKER, Executive Assistant
for the Public Utilities Commission of Nevada

SUBSCRIBED and SWORN to before me
this 21st day of AUGUST, 2019.

NOTARY PUBLIC

ERIKA HERNANDEZ
NOTARY PUBLIC
STATE OF NEVADA
My Appt. Exp. June 15, 2020
No. 99-54747-1

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EXHIBIT B

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From: Ernest D. Figueroa [mailto:EFigueroa@ag.nv.gov]
Sent: Monday, August 19, 2019 11:41 AM
To: Debrea Terwilliger <dterwilliger@puc.nv.gov>
Subject: FW: Notification of Service for Case: A-19-791302-J, Southwest Gas Corporation, Petitioner(s)vs.Public Utilities Commission of Nevada, Respondent(s) for filing Motion for Leave to File - MLEV (CIV), Envelope Number: 4708723

From: Mark J. Krueger <MKrueger@ag.nv.gov>
Sent: Tuesday, August 6, 2019 3:34 PM
To: Ernest D. Figueroa <EFigueroa@ag.nv.gov>
Subject: Fwd: Notification of Service for Case: A-19-791302-J, Southwest Gas Corporation, Petitioner(s)vs.Public Utilities Commission of Nevada, Respondent(s) for filing Motion for Leave to File - MLEV (CIV), Envelope Number: 4708723

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Begin forwarded message:

From: efilingmail@tylerhost.net
Date: August 6, 2019 at 3:27:23 PM PDT
To: mkrueger@ag.nv.gov
Subject: Notification of Service for Case: A-19-791302-J, Southwest Gas Corporation, Petitioner(s)vs.Public Utilities Commission of Nevada, Respondent(s) for filing Motion for Leave to File - MLEV (CIV), Envelope Number: 4708723

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Notification of Servic

Case Number: A-19-791302
Case Style: Southwest Gas Corporatio
Petitioner(s)vs.Public Utilities Commission
Nevada, Respondent(
Envelope Number: 470872

This is a notification of service for the filing listed. Please click the link below to retrieve the submitted document.

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

Date/Time Submitted	8/6/2019 3:26 PM PST
Filing Type	Motion for Leave to File - MLEV (CIV)
Filing Description	Motion for Leave to File Reply in Support of Petition for Judical Review
Filed By	Jessie Helm
Service Contacts	State of Nevada, Bureau of Consumer Protection: Paul Stuhff (pstuhff@ag.nv.gov) Mark Krueger (mkrueger@ag.nv.gov) Other Service Contacts not associated with a party on the case: Joel Henriod (jhenriod@lrrc.com) Abraham Smith (asmith@lrrc.com) Jessie Helm (jhelm@lrrc.com) Adam Crawford (acrawford@lrrc.com) Beverly Joiner (bjoiner@ag.nv.gov) Jana Whitson (jwhitson@ag.nv.gov) BCPServ BCPServ (BCPServ@ag.nv.gov) Vivian Barrera-Monroy (vbmonroy@ag.nv.gov) Dorianne Potnar (dpotnar@ag.nv.gov)

Document Details	
Served Document	Download Document
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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 copies of the foregoing **PUBLIC UTILITIES COMMISSION OF NEVADA'S OPPOSITION TO SOUTHWEST GAS'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR JUDICIAL REVIEW** in Case No., A-19-791302-J via the 8th Judicial District Court's Odyssey E-Filing system on the parties listed below. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

Daniel F. Polsenberg, Esq.
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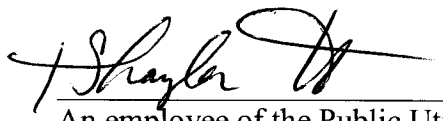
Justin J. Henderson, Esq.
Abraham G. Smith, Esq.
DPolsenberg@LRRC.com
JHendriod@LRRC.com
JHenderson@LRRC.com
ASmith@LRRC.com
Attorneys for Petitioner, Southwest Gas Corporation

Ernest Figueroa, Esq.
Mark Krueger, Esq.
Paul E. Stuhff, Esq.
mkrueger@ag.nv.gov
pstuhff@ag.nv.gov
bcpserv@ag.nv.gov
Attorneys for the Attorney General's Bureau of Consumer Protection

DATED this 21st day of August, 2019



An employee of the Public Utilities Commission of Nevada

Public Utilities Commission of Nevada
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Carson City, NV 89701-3109

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Steven D. Grierson
CLERK OF THE COURT

RIS
DANIEL F. POLSENBERG (SBN 2376)
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Attorneys for Petitioner Southwest Gas Corporation

DISTRICT COURT
CLARK COUNTY, NEVADA

SOUTHWEST GAS CORPORATION, Petitioner, *vs.* PUBLIC UTILITIES COMMISSION OF NEVADA, Respondent.	Case No.: A-19-791302-J Dep't No.: 19 **REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR JUDICIAL REVIEW**

The Court should reject the Commission's untimely[1] opposition to Southwest Gas's motion for leave to file a reply. There is no statute that prohibits the Court from allowing Southwest Gas to file a reply in support of its petition for judicial review. The Commission's argument that the "explicit language in NRS

[1] The Commission attempts to blame Southwest Gas for its failure to timely file a response to Southwest Gas's motion for leave to file a reply. Whatever technological and staffing problems the Commission faced, Southwest Gas is certainly not responsible for them, nor is it required (as the Commission suggests) to make sure that the Commission's lawyers have complied with their duties to ensure that they receive electronic service.

703.373" "does not permit the filing of a reply brief" is simply false. The statutes say nothing whatsoever about replies. The absence of any statutory language about replies means that the court has discretion to allow a reply if a petitioner wants to file one. *See Double Diamond v. Second Judicial Dist. Court*, 131 Nev. 557, 563, 354 P.3d 641, 645 (2015) (declining to "read additional language into the statute"); *McKay v. Bd. of Cnty. Comm'rs*, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987) ("[I]t is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done."); *cf. Sheriff, Pershing Cnty. v. Andrews*, 128 Nev. 544, 548, 286 P.3d 262, 264 (2012) (where legislature prohibited certain conduct, but not other conduct, omission was deliberate); *In re Boyce*, 27 Nev. 299, 75 P. 1, 4 (1904) (where Nevada Constitution was silent, legislature had discretion to exercise power).

The Commission relies heavily on the Nevada Supreme Court's decision in *Rural Telephone Co. v. Public Utilities Commission*, 133 Nev. 387, 398 P.3d 909 (2017), but that case is largely irrelevant because the petitioner there did not file its memorandum of points and authorities within the time provided by NRS 703.373(6). Here, in contrast, Southwest Gas met the statutory deadline for its brief.

Reading the statutes to give district courts discretion to allow replies avoid the constitutional problems raised by the Legislature's attempt to control the Court's docket. *See Mangarella v. State*, 117 Nev. 130, 134-35, 17 P.3d 989, 992 (2001) ("Whenever possible, we must interpret statutes so as to avoid conflicts with the federal or state constitutions."); *State v. Connery*, 99 Nev. 342, 346, 661 P.2d 1298, 1300 (1983) (legislature's attempt to promulgate procedural rules violates separation of powers). In *Rural Telephone*, the Nevada Supreme Court sidestepped the issue of whether NRS 703.373 violates the separation of powers by recognizing that district courts have discretion over whether to accept filings in petitions from review from the Commission's decisions. 133 Nev.

at 388, 398 P.3d at 911 (noting that appellant argued that separation of powers was violated "by upholding a legislative encroachment on the courts' power to administer justice," but not addressing the merits of that argument). The Court noted that "NRS Chapter 703 does not provide for the consequences for" acts that violate the statute, so district courts have discretion as to the appropriate remedy. *Id.* at 391, 398 P.3d at 912. Here, when there is no statute prohibiting a reply – and no violation of NRS 703.373 – this Court certainly has discretion.

The Court's consideration of the reply will not cause delay and does not affect the Legislature's intent that after the Commission files its brief "the action is at issue and parties must be ready for a hearing upon 20 days' notice." NRS 703.373(7). The action *is at issue* and Southwest Gas is ready for a hearing, if the Court holds one. Southwest Gas's reply is short and focuses primarily on the important legal issues of the standard of review and the presumption of prudence. It merely corrects the Commission's misstatements of the law, which could result in reversible error. The Court should exercise its discretion to allow Southwest Gas to file a reply.

Lastly, the Court should not allow the Commission or Bureau of Consumer Protection to file a surreply. The Bureau analogizes the petition for judicial review to "the appeal process before the Nevada Supreme Court" but ignores that there, absent a cross-appeal, the appellant *does* get the last word. NRAP 28(c). In contrast to Southwest Gas's reply, a surreply *would* delay resolution of this case. *See Wright ex rel. Trust Co. of Kan. v. Abbott Labs.*, 62 F. Supp. 2d 1186, 1187 n.1 (D. Kan. 1999) ("Surreplies are disfavored . . . ."). This Court should consider the reply and expeditiously set the matter for hearing.

Dated this 6th day of September, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Abraham G. Smith*

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
JUSTIN J. HENDERSON (SBN 13,349)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

Attorneys for Petitioner

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CERTIFICATE OF SERVICE

I hereby certify that on the September 6, 2019, I served the foregoing "Motion for Leave to file Reply in Support of Petition for Review on counsel by the Court's electronic filing system to the persons and addresses listed below:

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

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

SOUTHWEST GAS CORPORATION,	)	
	)	CASE NO. A-19-791302
Petitioner,	)	
	)	
vs.	)	DEPT. NO. XIX
	)	
PUBLIC UTILITIES COMMISSION OF NEVADA,	)	**Transcript of Proceedings**
	)	
Respondent.	)	
	)	

BEFORE THE HONORABLE JOSEPH T. BONAVENTURE, SENIOR JUDGE

PETITIONER'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

TUESDAY, OCTOBER 15, 2019

APPEARANCES:

For the State: WHITNEY DIGESTI, ESQ.

For Public Utilities Commission: DEBREA TERWILLIGER, ESQ.

For Southwest Gas: DANIEL F. POLSENBERG, ESQ.

RECORDED BY: CHRISTINE ERICKSON, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording; transcript produced by transcription service.

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TUESDAY, OCTOBER 15, 2019 AT 8:55 A.M.

THE COURT: 19-791302, *Southwest Gas versus Public Utilities Commission of Nevada*. Is everybody here?

MR. POLSENBERG: Morning, Your Honor. Dan Polsenberg for Southwest Gas. Rats. For a second there, I had a chance.

MS. TERWILLIGER: Good morning, Your Honor. Debrea Terwilliger, assistant general counsel at the Public Utilities Commission.

THE COURT: All right.

MS. DIGESTI: Whitney Digesti on behalf of Nevada Attorney General's Office.

THE COURT: So, this is basically a Petition for Judicial Review. Is that correct?

MR. POLSENBERG: That's correct, Your Honor.

THE COURT: And, usually, in a Petition for Judicial Review, the judge makes a decision after briefs. So -- and the only issue here is whether or not Southwest could file a Reply. Is that right?

MR. POLSENBERG: That's it, Your Honor.

THE COURT: All right. I'll hear from you.

MR. POLSENBERG: Thank you, Your Honor. We're asking to --

THE COURT: I mean, I read the briefs and

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1 everything. I understand the statute, 703.373. It doesn't
2 specifically preclude it but it doesn't suggest it. Right?
3 MR. POLSENBERG: Right. It doesn't say either
4 way. And the Nevada Supreme Court, in a case called *Rural*
5 *Telephone Company*, --
6 THE COURT: Right.
7 MR. POLSENBERG: -- which both sides have cited,
8 sets out that 703.373 provides for both mandatory and
9 discretionary action. So, there are things that the judge
10 theoretically can't allow, such as filing the petition late
11 or filing the opening brief late. There are things the
12 judge clearly can change the time limit, such as for the
13 agency to file the record of what happened in front of the
14 agency. But it's completely silent on whether to file the
15 Reply. So, I say that's an area that the Legislature has
16 left to the discretion of the Court.
17 Now, they come in on alternative arguments and
18 said, well, they should get a Sur-Reply. And I'm -- you
19 know, we oppose that, but I'm changing our position, that's
20 fine. The more briefing there is, the --
21 THE COURT: Yeah.
22 MR. POLSENBERG: -- I think the easier for the
23 judge to decide.
24 THE COURT: I certainly think the Court would
25 certainly -- you know, just the last case I had, we didn't

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have enough issues briefed and the Supreme Court remanded it because --

MR. POLSENBERG: Right.

THE COURT: -- we didn't have -- we didn't do it right. We -- the Supreme Court wants us to make a complete record on these things. And we got a lot of reversals on those. So, I mean, if you want to argue against it, but, I mean, it's -- since she's -- and I was worried about it because Sur-Replies are really disfavored. But if he has no objection to that, I wouldn't mind everybody just do it and -- but what do you want to say?

MS. TERWILLIGER: Sure. Your Honor, Debrea Terwilliger again. I'm assistant general counsel --

THE COURT: Yeah.

MS. TERWILLIGER: -- at the Public Utilities Commission.

Our first request is that you deny --

THE COURT: Yeah.

MS. TERWILLIGER: -- the Reply. You deny their Motion and not allow the Reply. And the reason is the statute is explicit. There's three things that work against Southwest Gas as arguments. Even though the statute doesn't say that replies are allowed or disallowed, the statute is very explicit. And I'm looking at -- I'm thinking about subsection 7, which moves from 30 days after

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-- so, the respondent -- the Commission and the respondents, that's us, file our Memorandum 30 days after they filed their Memorandum. And, then, it says after we file our Reply Memorandum, the matter is at issue. And, within 20 days, we go to hearing. So --

MR. POLSENBERG: No, no, no, no.

MS. TERWILLIGER: Yes. The --

THE COURT: Well, let him -- let her finish, counsel.

MS. TERWILLIGER: Let me finish.

THE COURT: And, then, you could --

MS. TERWILLIGER: Well, within 20 days, the Court has discretion to allow for hearing.

THE COURT: Discretion. All right.

MS. TERWILLIGER: Sorry. I -- so, the matter is issue and we're ready for hearing. And, then, you take that with the legislative history of this -- of NRS 703.373, it was a specific departure from NRS 233B. And let me tell you why.

The issue, the underlying case here is a rate case. So, at the conclusion of the rate case, at the Commission, we changed rates for Southwest Gas's customers, the pot of money that's at issue with the three issues that Southwest Gas has asked for appeal of. And that pot of money continues to grow every day we go between the

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Commission's case and the Court's decision, which, if the Court reverses us, for example, that pot of money gets bigger and bigger and the money we have to go get from Southwest Gas's customers gets larger and larger. This is why the Legislature has said: Okay, we're not going to have the PUC be subject to NRS 233B, which does have more discretionary pieces to it, we're going to give them their own provision for appeals. And that provision, the *Rural Telephone* case, the Supreme Court -- the Nevada Supreme Court has said it's -- there's mandatory provisions. One of the provisions they found that is mandatory is subsection 7. That's the section that says we go from Respondent's Reply Memorandum to the matter being at issue and be ready for hearing in 20 days.

So, I think you take the combination of the statute itself, the legislative history, the *Rural Telephone* case, and I'm -- unfortunately and respectfully, I don't think there's any discretion.

The intent -- if you look at NRS 703.373, subsection 10, Your Honor, it says that this case, Commission cases, are supposed to take precedent over other civil matters, even. And the -- again, this all speaks to the practical matters that we really -- Commission cases need to be addressed as quickly as possible. They need to -- we need to adjudicate them, get them done here at this

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Court. I understand your desire for a full briefing. This is -- the three biggest -- there are three issues they're asking for appeal on. They are complicated some place where you do have discretion. You have discretion for how long of a hearing you want to hold. If you want to keep us here for a couple hours and ask us questions, I'd be more than willing to do that. You have --

THE COURT: No. I don't have time today. I got a trial in a half hour. So --

MS. TERWILLIGER: Okay. So --

MR. POLSENBERG: And we all know how long I can talk.

MS. TERWILLIGER: So --

THE COURT: You're reiterating what you said in your brief and I understand that.

MS. TERWILLIGER: Yeah.

THE COURT: But, finish up.

MS. TERWILLIGER: Yeah. So, that's my point.

THE COURT: Okay.

MS. TERWILLIGER: I think you rate the statute, the legislative history, and the *Rural Telephone* case --

THE COURT: Yeah.

MS. TERWILLIGER: -- in combination and there is no discretion for a Reply. And that -- and it also speaks to --

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THE COURT: That's what your opinion -- all right.

THE COURT: We want to make the -- move this quickly along.

THE COURT: Yeah.

MS. DIGESTI: Your Honor, may I say something?

THE COURT: Yeah.

MS. DIGESTI: Can I -- have you taken a look at *Rural*?

THE COURT: Yes. I have.

MS. DIGESTI: Okay. So, I have a copy for you if --

THE COURT: I read it. Come on.

MS. DIGESTI: Okay.

THE COURT: I don't have time for this.

MS. DIGESTI: Okay, okay.

THE COURT: Go ahead.

MS. DIGESTI: So, the specific language -- it's not our opinion. The Nevada Supreme Court specifically decided on this issue. And where opposing counsel said, when read as a whole, that it is clear that various subsections of NRS 703.373 provide for both mandatory and discretionary action. Where 703.373, 6 and 7, which is what we're talking about, contain mandatory language for filing actions, some other provisions contain discretionary language. So, the Nevada Supreme Court looked at our

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subsection that we're talking about where it says Petition and, then, Reply by respondents, and they said: Mandatory. No Reply. They did not allow for any discretion --

MR. POLSENBERG: No.

MS. DIGESTI: -- in that specific provision. The Nevada Supreme Court has addressed this exact issue and said no Reply.

THE COURT: Well, suppose in brief, the --

MR. POLSENBERG: No way on Earth did the Nevada Supreme Court say no Reply. In *Rural Telephone Company*, what they said was the Legislature says there's 30 days to do the brief and that can't be extended. And what they really said was the District Judge said it can't be extended and the District Judge did not abuse his discretion in refusing to allow an extension, avoiding the separation of powers issue. Subset -- they say subsection 7 was addressed but not this part of subsection 7.

MS. DIGESTI: But --

MR. POLSENBERG: There was an expressed --

THE COURT: All right. That's all.

MR. POLSENBERG: Thank you.

THE COURT: That's all. Opposition and Reply hasn't been filed in this case. The Motion for Leave to File the Reply in Support of the Petition for Judicial Review, I think I'm going to grant it. The Nevada Supreme

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Court, in my opinion, 42 years on the job, likes issues to be resolved on their merits. And this court surely wants to be fully briefed on the applicable standard of review regarding the underlying petition. Just in case this Court's ruling is ultimately appealed, further, the PUCN and the Bureau of Consumer Protection, they want to file a Sur-Reply and I think you should have that. And I'm going to limit, though, that Sur-Reply to 19 pages, just like the Reply. It must be filed no later than -- and I'm going to have dates here, November 1st.

Further, counsel are to submit courtesy copies to the Department 19's chambers -- because Judge Kephart is going to hear this, that are single-sided and tabbed. And I -- the hearing could be set for December 17th, 2019.

THE CLERK: Tuesday, December 17th at 9 a.m. will be the day we hear the Petition for Judicial Review.

THE COURT: Okay. Thank you.

MR. POLSENBERG: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 9:04 A.M.

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CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.

KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

REPLY IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

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The Commission wants this Court to believe that the Commission can do anything it wants and the Court is powerless to do anything about it. For example, the Commission tells the Court that it has no choice but to affirm the Commission's conclusion that Southwest Gas's property was not confiscated when the Commission refused to approve a penny of the $51,000,000 spent on software improvements, even though the Commission agrees that it "did not find that the [Challenged Work Order] costs were imprudently incurred." (AB at 45.) Everyone agreed that those improvements are benefitting Southwest Gas's customers. And nobody requested more than a 50% reduction in the cost. Yet Southwest Gas was left to shoulder the entire financial burden for those improvements. If that's not confiscation of property, it's hard to tell what is.

The Commission's brief leaves the reader in the dark about what, exactly, it expects a utility to prove in a general rate case. Until recently, the rule had always been that expenses were presumed prudent until a party produced evidence to demonstrate that the expenses were not prudent. Speculative opinions about what the utility could, in hindsight, *maybe* have done better were not enough to rebut the presumption. Now, the Commission apparently has decided that it can disapprove of expenses that it deems not to be "just and reasonable," regardless of whether there is any evidence demonstrating that an expense was unreasonable or imprudent. (AB at 42.) The Commission contends that if its confiscation of a utility's property is purportedly in furtherance of its mission of providing for "safe, economic, efficient, prudent, and reliable operation and service of public utilities," that decision is effectively unreviewable under the toothless substantial evidence standard. (AB at 3, 41, 58-59.)

The U.S. Supreme Court has repeatedly held that constitutional rights cannot be adjudicated by an agency, leaving the judiciary with only substantial evidence review. And Southwest Gas's arguments are primarily legal, subject to *de novo* review by this Court.

The Commission's argument that there has never been a presumption of prudence in general rate cases ignores the voluminous case law (including Nevada case law) recognizing such a presumption. Every treatise says the same thing. The Commission does not cite a single case or other authority holding that there is no presumption of prudence in a general rate case. Instead, it tries to persuade the Court to ignore the uniform case law, backed by the Constitution, that has developed over a century.

If the Court recognizes the presumption, as it must, and carefully reviews the Commission's brief, it will see that there is little to no *evidence* cited to support the Commission's decision. The Commission's Staff merely *questioned and speculated* about the sufficiency of Southwest Gas's explanations of the expenses at issue in this appeal. There is no evidence of imprudence or bad faith in the record to rebut the presumption of prudence. If the Commission's view is upheld, no utility will ever know what it needs to prove at a general rate proceeding. If Southwest Gas's evidence (and the express finding of no imprudence) wasn't enough, what would be?

I.

THE STANDARD OF REVIEW

The standard of review is important in this case. The Commission suggests that it is abuse of discretion or substantial evidence for all issues Southwest Gas has raised. That is incorrect. It's *de novo*.

A. The Petition for Review Raises Primarily Legal Issues that are Reviewed *De Novo*

Legal questions "are reviewed *without any deference whatsoever* to the conclusions of the agency." *Manke Truck Lines, Inc. v. Pub. Serv. Comm'n of Nev.*, 109 Nev. 1034, 1036-37, 862 P.2d 1201, 1203 (1993) (emphasis added); *see also see also O'Keefe v. Dep't of Motor Vehicles*, 134 Nev. Adv. Op. 92, 431 P.3d 350, 353 (2018) (court reviews "pure legal questions" decided by agency hearing

officer *de novo*). The question of whether the agency applied the wrong standard (such as the failure to apply a rebuttable presumption) is a legal question that this Court reviews de novo.[1] *See Staccato v. Valley Hospital*, 123 Nev. 526, 530 & n.4, 170 P.3d 503, 506 (2007).

B. <u>Constitutional Facts are Reviewed De Novo</u>

In rate-setting cases where confiscation is alleged, as it is here, facts of constitutional magnitude are reviewed *de novo*. *See Ohio Valley Water Co. v. Borough of Ben Avon*, 253 U.S. 287, 289 (1920) ("In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts . . . ."). The judiciary has the ultimate responsibility and authority "to pass upon the fact of confiscation." *Opinion of the Justices*, 106 N.E.2d 259, 263 (Mass. 1952).

The separation of powers is severely undermined by undue deference to agencies when constitutional rights are at stake. *Bixby v. Pierno*, 481 P.2d 242, 249 (Cal. 1971). "The venerable doctrine of constitutional fact evinces fundamental mistrust of the ability of agencies to judge constitutional challenges to their authority, and with good reason." Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, 94 Notre Dame L. Rev. 297, 322 (2018). To say that the agency's "findings of fact may be made conclusive where constitutional rights or liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial

[1] Even if the substantial evidence standard of review applies, it requires the Court to examine the *entire record* before the agency to ensure that "*quality and quantity* of the evidence" suffices to support factual determinations. *See Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 249, 327 P.3d 487, 490 (2014) (emphasis added).

safeguards." *Bixby*, 481 P.2d at 247. The most fundamental protection provided by the separation of powers "lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the minority." *Id.*; *see also* Redish & McCall, 94 Notre Dame L. Rev. at 322 ("[A]dministrators whose very purpose is to regulate would likely have great difficulty maintaining objectivity in deciding between the claims of fellow agency members seeking to regulate and the private actor opposing regulation."); Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 262 (1985) ("In terms of the constitutional design, the whole process of substituting administrative for judicial adjudication may be thought to suffer from a serious 'legitimacy deficit'" for which constitutional fact doctrine is the antidote). "The problem of maintaining objectivity is far greater when an external constitutional challenge to the exercise of agency authority is presented."[2] Redish & McCall, 94 Notre Dame L. Rev. at 322. If a fundamental right is at stake, "the courts have held the loss of it is sufficiently vital to the individual to compel a full and independent review." *Bixby*, 481 P.2d at 252.

This is of particular concern in Nevada, where "[t]he separation of powers doctrine is *the most important foundation* for preserving and protecting liberty by preventing the accumulation of power in any one branch of government." *Berkson v. LePome*, 126 Nev. 492, 498, 245 P.3d 560, 564 (2010) (emphasis added). The Nevada Supreme Court has "been especially prudent to keep the

[2] The inherent conflict of interest faced by a utility regulator is of real concern in this case. One of the attorneys for the Staff at the hearing on Southwest Gas's rate application is now representing the Commission itself in this appeal. Staff is supposed to be independent from the Commission. NRS 703.301(1); NRS 704.100(1)(h). Staff and the Commission are not independent if they're both represented by the same counsel. This case cries out for judicial review without deference to a conflicted regulator.

powers of the judiciary separate from those of either the legislative or the executive branches." *Id.* at 498, 245 P.3d at 565-66.[3] That is because "the Nevada Constitution embraces separation of powers to an even greater extent than then United States Constitution." *Id.* at 501 n.5, 245 P.3d at 566 n.5. So, the constitutional facts doctrine is even more important in this Court than it is in federal courts. This Court has inherent power to do whatever is necessary "'so as not to become a subordinate branch of government.'" *Id.* at 498, 245 P.3d at 564 (quoting *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 439 (2007)).

It follows, as recognized by *Ben Avon* and many other authorities, that the Court has the power and responsibility to independently determine whether to invalidate a rate that violates the Southwest Gas's constitutional rights because it is confiscatory. Substantial evidence review does not apply to a constitutional claim that is initially adjudicated by an agency. *See Verizon Commc'ns v. F.C.C.*, 535 U.S. 467, 527 (2002) ("[T]here may be a taking challenge distinct from a plain-vanilla objection to arbitrary or capricious agency action if a rate-making body were to make opportunistic changes in ratesetting methodologies just to minimize return on capital investment in a utility enterprise.").

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[3] Setting rates is a legislative function akin to passing a statute. *See City of Las Vegas v. Sw. Gas Corp.*, 90 Nev. 178, 179, 521 P.2d 1229, 1230 (1974) ("The fixing of rates is a legislative act."). And it's the responsibility of the judiciary to invalidate statutes that conflict with the constitution. *See Clean Water Coalition v. The M Resort, LLC*, 127 Nev. 301, 319, 255 P.3d 247, 259 (2011) (refusing to defer to legislature's "decision on whether a general law can be made applicable in a given case" and invalidating portion of budget legislation); *State v. Irwin*, 5 Nev. 111, 120 (1869) ("'[T]he power of determining whether a given law is repugnant to the principles of a Constitution, with which it is alleged to conflict, belongs to the judiciary, and . . . their decision is conclusive.'"). There's no reason that an unconstitutional legislative act performed by an agency should have extra protection from invalidation by the courts. In fact, there's even more reasons to invalidate an unconstitutional agency action taken under a delegation of authority than a direct action of the legislature.

C. The Constitutional Facts Doctrine is Good Law

The Commission argues that *Ben Avon* is no longer good law, but that's wrong. *Ben Avon* has never been overruled and multiple courts have held that the constitutional facts doctrine is still good law.[4] Likewise, the U.S. Supreme Court has not overruled *Crowell v. Benson*, 285 U.S. 22, 56 (1932), which held that an agency cannot be given the "final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." Nor has it overruled *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936), which stated that "to say that [agencies'] findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards." *Ben Avon*, *Crowell*, *St. Joseph Stock Yards*, and the constitutional facts doctrine have been reaffirmed repeatedly.[5] The Court has

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[4] *See, e.g.*, *Woodard v. Personnel Comm'n*, 152 Cal. Rptr. 658, 661-62 (Ct. App. 1979); *Bixby*, 481 P.2d at 247 n.4 (rejecting argument that *Ben Avon* has been overruled and noting that even Professor Davis (who is the Commission's sole authority on this topic) concedes that state courts continue to apply it); *Opinion of the Justices*, 106 N.E.2d at 262 (noting court's inability to discover "when and where" *Ben Avon* line of cases had been overruled, rejecting Professor Davis's opinion, and stating that if the *Ben Avon* line of cases are truly overruled, court "would prefer to see the death certificate"); *City of Dallas v. Stewart*, 361 S.W.3d 562, 576-77 & n.22 (Tex. 2012) (noting that the U.S. Supreme Court recently "reinvigorated the constitutional fact doctrine").

[5] *See United States v. Raddatz*, 447 U.S. 667, 683 (1980) (reaffirming "that administrative agencies cannot finally determine 'constitutional fact,'" and that the ultimate decision must be made by a court); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81-83 (1982) (reaffirming *Crowell* and *Raddatz*); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984) (reaffirming that the Court's "'duty is not limited to the elaboration of constitutional principles; [it] must also in proper cases review the evidence to make certain that those principles have been constitutionally applied,'" which requires an "'independent examination of the whole record'" (quoting *Speiser v. Randall*,

also noted that where, as here, questions of fact are mixed with questions of constitutional law, de novo review of facts is required "'in order to pass upon the Federal question.'" *Bose*, 466 U.S. at 508 n.27 (quoting *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927)).

The constitutional fact doctrine is still good law, especially in the context of administrative agency decisions, where it originated. *See* Redish & McCall, 94 Notre Dame L. Rev. at 322-23 & n.126 ("It has been incorrectly suggested that the [constitutional facts] doctrine no longer exists . . . ."); Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 Ariz. L. Rev. 289, 299 (2017) (noting that early Supreme Court decisions "establishing the constitutional fact doctrine in the administrative context" have never been overruled).

D. *Hope* Is Irrelevant Because this Appeal Does Not Deal with Valuation of Property; It Only Involves *What* Property Should Be Included in the Rate Base

The Commission argues that *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), overruled *Ben Avon*, and that after *Hope*, utility commissions can choose any "ratemaking theory" it chooses with impunity. (AB at 4-5, 46) The Commission apparently sweeps all of its decisions within the scope of "ratemaking theory."

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357 U.S. 513, 525 (1958), and *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963))); *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (citing *Crowell* and reaffirming that the Court "retains an independent constitutional duty to review factual findings where constitutional rights are at stake"). In *Carhart*, the factual findings were made by Congress (not an agency) and the Court *still* refused to defer to them. 550 U.S. at 166 ("Uncritical deference to Congress' factual findings in these cases is inappropriate."); *see also Latta v. Otter*, 771 F.3d 456, 469 (9th Cir. 2014) (quoting *Carhart* and refusing to defer to Nevada legislature's findings of fact regarding same-sex marriage).

But *Hope* dealt with a question that is not presented by this petition for review: what method a state may use to determine the *value* of property. Before *Hope*, the Court limited regulators to using the "fair value" standard for valuing property. *See Smyth v. Ames*, 169 U.S. 466, 544 (1898). *Hope* overruled *Smyth* and held that a state is not restricted to any particular valuation method. 320 U.S. at 602.

This petition for review does not involve valuation of property—it involves the complete disallowance of expenses, the imposition of a pension discount rate that is arbitrary, and the erroneous setting of a rate of return on equity. The prudent investment test is a "concept useful in determining <u>what</u> facility costs should be allowed, rather than <u>how</u> costs for specific facilities should be calculated." Robert E. Burns, et al, *The Prudent Investment Test in the 1980s*, The National Regulatory Research Institute, Apr. 1985, at 34-35 (hereinafter "Burns Report"). The U.S. Supreme Court recognized this in *Verizon Communications* by citing Justice Scalia's concurrence in *Duquesne*, which states that "'<u>all prudently incurred investment may well have to be counted</u>' to determine 'whether the government's action is confiscatory.'" 535 U.S. at 527 n.37 (quoting *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 317 (1989) (Scalia, J., concurring)) (emphasis added).

The distinction between disallowance of expenses and valuation of property is highlighted by the Nevada Supreme Court's decision in *Public Service Commission v. Ely Light & Power Co.*, 80 Nev. 312, 393 P.2d 305 (1964). In that case, the Nevada Supreme Court held that under *Hope*, the district court erred by substituting its judgment for the Commission and rejecting the use of the "original cost, less depreciation" method to determine the value of the property included in the base rate. *Ely Light*, 80 Nev. at 321-23, 393 P.2d at 310-11. Later in the opinion, the Court held that there is a "presumption of the proper exercise of judgment by the utility in matters which are particularly a function

of management" and applied the presumption to pension expenses. *Id.* at 324, 393 P.2d at 311. The Court held that the full amount of the pension expenses should have been included in the rate base. *Id.* at 329, 393 P.2d at 314 (affirming district court order "holding invalid the commission's deletion from the rate base computations of 50% of the expense of the utility's pension plans").

II.

THERE IS, AND ALWAYS HAS BEEN, A REBUTTABLE PRESUMPTION OF PRUDENCE AND GOOD FAITH

A. The Authorities Are Uniform

Southwest Gas has cited dozens of cases applying the presumption of prudence, including Nevada Supreme Court cases and decisions by the Commission. The Commission, nevertheless, argues that there is no presumption of prudence in Nevada and that the United States Supreme Court has never adopted it either. It also contends that *Ely Light* only establishes a presumption of "good faith" (which the Commission does not appear to argue is lacking here), and that "good faith" is not the same as "prudence."

But *Ely Light* doesn't use the words "good faith" or "prudence" when it defines the presumption. It says that there is a "presumption of the *proper exercise of judgment* by the utility in matters which are particularly a function of management." 80 Nev. at 311, 393 P.2d at 324 (emphasis added). The phrase "proper exercise of judgment" is virtually identical to the phrase "exercise of reasonable judgment" that Justice Brandeis used in the concurrence that authorities have uniformly treated as one of the first invocations of the presumption of prudence. *See Mo. ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Mo.*, 262 U.S. 276, 289 n.1 (1923) (Brandeis, J., concurring) ("Every investment may be assumed to have been made in the *exercise of reasonable judgment*, unless the contrary is shown." (emphasis added)); 2 Leonard Saul Goodman, THE PROCESS OF RATEMAKING 860 (1998) (citing Brandeis concurrence as original

source for presumption of prudence, which is still applied today). The Nevada Supreme Court adopted the concurrence in *Ely Light*, which is binding on this Court.

The presumption is not simply one of good faith. "Proper exercise of judgment" is a synonym for prudence.[6] As used in *Ely Light & Power*, the words "proper exercise of judgment" encompass both prudence and good faith (to the extent there is even a difference) because the presumption of the proper exercise of judgment can be rebutted with evidence "showing lack of good faith, inefficiency or improvidence." 80 Nev. at 311, 393 P.2d at 324.

The Idaho Supreme Court implicitly recognized that *Ely Light* applied a presumption of prudence and reasonableness by citing it, along with cases like *West Ohio Gas*, for the proposition that a utility establishes a "prima facie case for the reasonableness of its operating expenses to non-affiliates by showing actual incurrence." *Boise Water Corp. v. Idaho Pub. Utils. Comm'n*, 555 P.2d 163, 169 (Idaho 1976).

Like *Boise Water*, *Ely Light* cited numerous cases to support the application of a presumption of the proper exercise of judgment, including *West Ohio Gas* and *Southwestern Bell Telephone*. *Ely Light*, 80 Nev. at 324, 393 P.2d at 311-12. The majority opinion in *West Ohio Gas* expressly states that "[g]ood faith is to be presumed on the part of the managers of a business" and that "[i]n

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[6] *See Kelly-Nevils v. Detroit Receiving Hosp.*, 526 N.W.2d 15, 20 (Mich. Ct. App. 1994) ("'[P]rudent' means 'exercising good judgment or common sense' . . . ."; *Elio v. Akron Transp. Co.*, 71 N.E.2d 707, 711 (Ohio 1947) ("The Century Dictionary defines 'prudence' as 'good judgment.' Under synonyms, in the definition of 'prudence,' Webster's New International Dictionary uses the quotation 'a sane and temperate judgment.'"); *Westbrook v. Watts*, 268 S.W.2d 694, 698 (Tex. Ct. App. 1954) ("Prudence has been further defined as 'exercising sound judgment; recognized by practical wisdom.'"); ROGET'S II: THE NEW THESAURUS 359 (Office ed. 1984) (defining "prudence" as "[t]he exercise of good judgment or common sense in practical matters").

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*." 294 U.S. at 72 (emphasis added). Yet the Commission argues that these U.S. Supreme Court cases are inapplicable or don't actually apply a presumption of prudence. That's simply not borne out by a careful reading of the cases and the voluminous authorities cited by Southwest Gas unanimously disagree with the Commission.

The Commission has no real response to that authority, other than the anemic arguments that (1) out-of-state cases aren't binding, and (2) some jurisdictions have statutes or regulations governing when the presumption of prudence does and does not apply, so the presumption cannot be based in the Constitution. Of course, out-of-state and U.S. Supreme Court cases are persuasive authority (especially when they are consistent with Nevada law). *Gonzales v. State*, 131 Nev. Adv. Op. 49, 354 P.3d 654 (2015) (United States Supreme Court cases are persuasive authority); *Zahavi v. State*, 131 Nev. Adv. Op. 7, 343 P.3d 595 (2015) (considering persuasive authority from other states). And there are circumstances where the presumption of prudence doesn't apply under the common law or the Constitution.

The fact that some jurisdictions have codified the presumption of prudence and defined its scope is meaningless. Legislatures codify common law doctrines all the time. *See Edgar v. Wagner*, 101 Nev. 226, 228, n.1 699 P.2d 110, 112 n.1 (1985) ("The legislature has codified some aspects of common law immunity . . . ."). But they don't always get it right. And, if tested, some of those statutes could be held unconstitutional. The Commission cites no authority holding that any of the statutes have been held constitutional. Instead, it cites statutes and decisions that don't even involve general rate cases, but rather things like punitive damages awards, land dispositions that are "separate

and apart from the normal operations of a utility," and utility resource plans. (AB at 52 & nn. 152-53.)

B. Authority Cited by the Commission and the Commission's Previous Decisions Conclude that There is a Presumption of Prudence

Even some of the Commission's own authority supports Southwest Gas. The Commission cites the Burns Report for the proposition that the rebuttable presumption of prudence has "never been given express majority approval by the U.S. Supreme Court" and that regulators have "broad discretion for the application of the concept." (AB at 53 (citing Burns Report at 34-35)). First, the portion of the Burns Report cited by the Commission is inapplicable because it discusses valuation and *Hope*, not the question of what property should be included in the rate base. Second, and more importantly, when the Burns Report does discuss the issue of what goes into the rate base, it states, repeatedly, that "*there should exist a presumption that the investment decisions of utilities are prudent*." Burns Report, at iv (emphasis added); *id.* at 55. It notes that "[w]hen applying the prudent investment test, state commissions have taken seriously Justice Brandeis' admonition regarding prudent investments: 'Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.'" *Id.* at 55-56 (quoting *Sw. Bell Tel.*, 262 U.S. at 289 (1932) (Brandeis, J., concurring)). "Commissions have interpreted this as *requiring* a rebuttable presumption of prudence." *Id.* at 56 (emphasis added). "The presumption of prudence makes for efficient regulation in that commissions are not required, *or allowed*, to review the prudence of all utility decisions regardless of their number, importance, or result." *Id.* (emphasis added). A comprehensive treatise on utility ratemaking agrees. 2 Leonard Saul Goodman, THE PROCESS OF RATEMAKING 860 (1998) ("A legal presumption that utility management has acted prudently surrounds their investment decisions."); *see also id.* at 134 ("Regulatory agencies have only limited authority to

interfere with discretionary power of a utility management over legitimately internal affairs of a company subject to economic regulation.”).

The Burns Report states that “[i]t has been held that without ‘affirmative evidence showing management, inefficiency, or bad faith,’ an investment decision is presumed to be prudent.” Burns Report at 56 (quoting *Re Chesapeake & Potomac Tel. Co.*, 57 Pur.3d 1, 7 (D.C.P.S.C. 1964)). That language is strikingly similar to the language used in *Ely Light*. 80 Nev. at 311, 393 P.2d at 324 (“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 . . . the commission should not substitute its judgment for that of management.”). And that’s what the law has been for decades in Nevada—until the Commission decided to abandon it in this case for no reason.

In fact, the Commission’s own decisions have applied a presumption of prudence in general rate cases, which is striking in light of the Commission’s argument that no such presumption has ever existed. *See, e.g.*, *In re Application of Nev. Power Co.*, 2009 WL 1893687, at * 75 (Nev. Pub. Utils. Comm’n June 24, 2009). The Commission tries to distance itself from those decisions by claiming that *stare decisis* does not apply to agency decisions. It’s one thing for *stare decisis* not to apply—it’s quite another for the Commission to pretend that the presumption never existed and refuse to explain its dramatic change in position.

III.

THE PRESUMPTION AND STANDARD OF REVIEW ARE DISPOSITIVE

The existence of a presumption and the attendant burden of proof can be dispositive, as they are here. *See Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 190, 209 P.3d 271, 274 (2009) (answer to certified question of whether Nevada law recognizes a presumption “may . . . be determinative” of litigation in federal

court); *Lavine v. Milne*, 424 U.S. 577, 585 (1976) ("Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application."). It was legal error for the Commission to place the burden on Southwest Gas to defend its purchasing and other business practices in the absence of evidence that they were made in bad faith or imprudently. *Nev. Power*, 122 Nev. at 829 n.15, 138 P.3d at 492 n.15 ("Nevada Power's defense of its purchasing practices was contrary to the rebuttable prudence presumption framework that the PUCN proceedings should have followed.").

A. Parties Challenging Southwest Gas's Expenses Were Required to Demonstrate by a Preponderance of the Evidence that the Expenses were Imprudent

"A presumption . . . imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." NRS 47.180. "[A] presumption not only fixes the burden of going forward with evidence, but it also shifts the burden of proof." *Vancheri v. GNLV Corp.*, 105 Nev. 417, 421, 77 P.2d 366, 368 (1989). A presumption must be rebutted by a "preponderance of the evidence" before the burden shifts back to the party who originally had the burden of proof. *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 107 (2006).

Here, Staff and the Bureau needed to prove by a preponderance of the evidence that there was a "serious doubt" that Southwest Gas incurred the disallowed expenses imprudently. *See Nev. Power*, 122 Nev. at 835, 138 P.3d at 495-96 ("[T]he intervener bears the initial burden of overcoming the prudence presumption by presenting evidence that creates a serious doubt as to the prudence of the utility's expenditure. Only then will the prudence presumption be rebutted and the burden of production shifted back to the utility." (footnotes omitted)); *Construction Indus. Workers' Compensation Group v. Chalue*, 119 Nev.

348, 353, 74 P.3d 595, 598 (2003) (where statute created rebuttable presumption that marijuana was proximate cause of workers' compensation claimant, claimant had burden to establish by preponderance of the evidence that marijuana did not cause his injuries); *Psaty v. United States*, 442 F.2d 1154, 1160 (9th Cir. 1971) ("Where a presumption owes its origin, as here, to an important public policy, it should operate to fix the burden of persuasion, as well as the burden of going forward.").

B. <u>There Was No Evidence of Imprudence</u>

1. Work Orders

There is no evidence that any of the Challenged Work Order expenses for which Southwest Gas sought reimbursement were imprudent. The Commission admits as much, which is conclusive. (AB at 45 (Commission "did not find that the [Challenged Work Order] costs were imprudently incurred.")) "While the [Commission] was highly critical of some of [Southwest Gas's] . . . practices, the [Commission] stopped short of labeling those practices imprudent." *Nev. Power Co.*, 122 Nev. at 838, 138 P.3d at 497. The expenses therefore should have been approved. *Id.*

The Commission did not make a finding of imprudence because there was no actual evidence rebutting the presumption of prudence. The Commission merely relied on Staff's questioning of the expenses. That's not enough. Staff was required to "present facts, not merely opinion." Burns Report at 71. Suspicion, speculation, and criticism are not evidence. *See Gramanz v. T-Shirts & Souvenirs, Inc.*, 111 Nev. 478, 485, 894 P.2d 342, 347 (1995) (speculation is not substantial evidence); *Deiss v. S. Pac. Co.*, 56 Nev. 151, 53 P.2d 332 (1936) ("[V]erdicts cannot rest upon mere surmise, speculation, conjecture, guess, supposition, or imagination . . . ."); *In re Nielsen*, 526 B.R. 351, 361 (Bankr. D. Haw. 2015) ("[C]riticisms are not evidence, let alone expert opinion evidence."); *Neal*

v. Wilson Cnty. Bank, 263 P. 18, 19 (Colo. 1927) ("Mere suspicions and surmises are not evidence.").

The Commission says that Southwest Gas was required to prove that "the choice made by the utility was the least-cost option or the best available alternative project" and that "the project expenditures were reasonable under the circumstances. (AB at 35.) And it says that Southwest Gas was required to "produce a witness who was personally involved in or could meaningfully speak to the execution of the Challenged Work Orders." (AB at 31.)

Just this kind of second-guessing "you could have done better" is exactly what the Nevada Supreme Court refused to allow in *Nevada Power Co.* In that case, the Commission found that Nevada Power should have entered into a contract with Merrill Lynch that would have avoided significant costs in purchasing electricity. 122 Nev. at 839, 138 P.3d at 498. The Court reversed the Commission's order disallowing $180,082,532 for the failure to enter into a "Merrill Lynch" kind of agreement because there was no evidence that a "Merrill-Lynch-type transaction was an available option." *Id.*; *see also* Burns Report at 60 ("The decisions of the utility are not subject to 'Monday-morning quarterbacking.").

Here, the Commission's rationale suffers from the same fatal flaw. The Staff's testimony before the Commission was that Southwest Gas could have tried to pay less for the software or otherwise save on expenses. But Staff's witness did not explain what Southwest Gas should have done or identify any other options that were actually available to Southwest Gas. In fact, he testified that he could not conclude that the expenses were imprudent. Criticizing Southwest Gas's evidence and speculating about whether the projects could have cost less is not enough to overcome the presumption. *See id.* at 840, 138 P.3d at 499 (where staff "failed to present evidence" to support argument that

utility should have made different decisions because it had other options, Commission's finding was "speculative and unsupported by evidence in the record")

Southwest Gas's witness, in contrast, explained the basis for the decisions to pursue the software upgrades. (13 ROA 011392-11451.) It is simply false for the Commission to contend that Southwest Gas provided "no evidence" to support its expenses. And despite the Commission's insistence to the contrary, there is no requirement that Southwest Gas produce a witness with first-hand knowledge. A witness may testify based on a review of the company's books and records. *Kroll v. Incline Village Gen. Improvement Dist.*, 2014 WL 5840049, at *4 (Nev. Nov. 10, 2014) ("A review of relevant business records can be the basis for personal knowledge in affidavits.").

The only other thing the Commission relied on as justification for disallowing over $50 million in expenses is the inclusion of some expenses that Southwest Gas agreed to remove from the application. The Commission argues that the inclusion of those expenses demonstrated a comprehensive lack of oversight. But the inclusion of those expenses in an application does not demonstrate that all of the other expenses are questionable, particularly when the questioned expenses were removed. And even if it did, the Nevada Supreme Court held that a broad stroke conclusion that "'colossal management mistakes' cannot operate as a ground for denying" an entire rate increase application. *Nev. Power*, 122 Nev. at 837, 138 P.3d at 497. Evidence of mismanagement "must be specific, not diffuse; it should directly relate to the rate or service in dispute, and if no such relation can be established, it must be shown to be so extensive as to relate to the overall operation of the company." 2 Leonard Saul Goodman, THE PROCESS OF RATEMAKING 850 (1998). There is no evidence in the record to demonstrate a connection between the erroneous inclusion of expenses in a rate application and the overall operation of Southwest Gas. Moreo-

ver, employee incentive awards and the other expenses are legitimate and reasonable business expenses. Southwest Gas recognized, however, that they are the types of expense that the Commission traditionally does not allow, and Southwest Gas agreed to remove them for that reason. And the removed expenses were **less than 1%** of all of the costs.

2. Pension Costs

As for the pension costs, there is, likewise, no evidence to demonstrate that Southwest Gas's determination of the discount pension rate was imprudent. The Commission admits that Southwest Gas filed testimony on the discount rate that "addressed how the discount [was] determined and the effect of the discount rate on pension costs." (AB at 23.) Southwest Gas's witness explained that the discount rate was determined by an actuary. (*Id.*) Yet, the Commission decided to substitute its judgment for Southwest Gas's again by selecting an arbitrary discount rate and normalizing the pension costs over a three-year average. Without evidence of imprudence, the pension costs should have been approved. *See Ely Light*, 80 Nev. at 311-12, 393 P.2d at 323-24. The Commission's conclusion that normalizing expenses is a "common practice in ratemaking"[7] is not supported by any evidence. It's yet another example of the Commission substituting its judgment for Southwest Gas's. 1 Leonard Saul Goodman, THE PROCESS OF RATEMAKING 125 (1998) ("Agencies should not indulge in self-importance, personality, or reputation. An agency, for example, that suggests its depth of understanding of the regulated industry or the problems of regulation are inexpressable . . . invites judicial inquiry into whether the basis for the decision has been sufficiently revealed for judicial review to occur.").

[7] (4 ROA 002145.)

IV.

THE COMMISSION'S DECISION ON RETURN ON EQUITY WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The Commission's selection of a return on equity at the low end of its self-described "zone of reasonableness" was not supported by substantial evidence. Although the presumption of prudence does not strictly apply to return on equity, the Commission was still required to identify some evidentiary basis for its determination. There was no evidence to support the Commission's selection of a return on equity that was at the low end of every model presented to the Commission. The Commission found that Southwest Gas does not face *more* risk than the proxy group, but it did not find that Southwest Gas faces *less* risk than the proxy group. The Commission adopted the 9.25% figure without explanation. That "is not the recommended approach to such an important element of a general rate case." 1 Leonard Saul Goodman, THE PROCESS OF RATEMAKING 213 (1998) (discussing case where regulatory "made detailed findings regarding the weaknesses in the company's case for its recommended return on equity; but when it came to finding an appropriate return on equity, the department provided little justification for it, and indeed made no subsidiary findings"). At the very least, the Commission should have selected a return on equity that was closer to the middle of the returns suggested by the parties. *Id.* at 128 (noting that an "agency that is satisfied that opposing views are both well supported in the record may adopt the midpoint," but noting that "[t]here is a limit to an agency's resolving issues by striking a middle ground between opposing views" and that an agency "may indeed need to reject outright positions outrageously sated or unfounded in logic or the evidence").

CONCLUSION

The Commission's order should be vacated and the Commission should be instructed to approve all of the Challenged Work Orders, the pension expenses, and the return on equity proven by Southwest Gas.

Dated this 16th day of October, 2019.

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DISTRICT COURT

CLARK COUNTY, NEVADA

SOUTHWEST GAS CORPORATION, Petitioner, vs. PUBLIC UTILITIES COMMISSION OF NEVADA, *et al.*, Respondents.	CASE NO. A-19-791302-J DEPT. NO. 19

SUR-REPLY OF THE PUBLIC UTILITIES COMMISSION OF NEVADA IN RESPONSE TO SOUTHWEST GAS CORPORATION REPLY

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The Public Utilities Commission of Nevada ("PUCN" or "Commission"), by and through its undersigned counsel, hereby files its Sur-reply in response to the Reply in Support of Petition for Judicial Review ("Reply") that Southwest Gas Corporation ("Southwest Gas") was permitted to file with this Court.[1]

Southwest Gas has failed, both before this Court and in the underlying proceeding before the PUCN, to substantiate its claims that its constitutional rights were somehow violated by the PUCN. In its Reply, Southwest Gas attempts to use its specious constitutional claims to change the standard of review applicable to the PUCN's decision. Specifically, Southwest Gas argues that the *de novo* standard of review that applies to questions of law should also apply to the PUCN's findings of fact because "constitutional rights are at stake." In arguing that this Court should conduct a *de novo* review of the PUCN's findings of fact, Southwest Gas asks this Court to violate Nevada Revised Statutes ("NRS") 703.373(11), which explicitly provides that "[t]he court shall not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact." Southwest Gas attempts to justify its outrageous proposal by characterizing the PUCN's well-reasoned and balanced ratemaking decision as confiscatory, arguing that it amounts to a taking of Southwest Gas's property.

Based on its word alone and without any supporting evidence identified in the Certified Record, Southwest Gas would like for this Court to disregard the PUCN's findings of fact, which are supported by substantial record evidence. Not counting confidential material, the Certified Record of the underlying case consists of nearly 20,000 pages, including sworn testimony received from 36 different witnesses during the seven days of hearing. Southwest Gas wants this Court to ignore the underlying record and reweigh evidence based on a mere whisper of a taking and reference to an inaccurate, uncited $51 million figure. Southwest Gas has fallen far short of meeting the "heavy burden" for public utilities to properly claim a taking pursuant to the United States Constitution.[2]

Southwest Gas also continues to argue that it enjoys a presumption of prudence under Nevada law, without citing to any statute, regulation, or case that says so. Southwest Gas resorts to using synonyms and similar language in an effort to find a presumption where one does not exist. The

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[1] Southwest Gas filed a Motion for Leave to File a Reply. Over the opposition of the PUCN and the Bureau of Consumer Protection ("BCP"), the Court granted Southwest Gas's Motion and found that each of the Respondents, the PUCN and the BCP, may file a Sur-reply.

[2] *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S.Ct. 281, 288 (1944).

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presumption of prudence described by Southwest Gas would allow a regulated public utility to escape its fundamental obligation to justify the costs that it passes along to its captive ratepayers; application of such a presumption would be entirely inconsistent with existing statutes that require the PUCN to independently determine prudence in separate cases before a rate case is filed.

With regard to the concept of a presumption of prudence, Southwest Gas's arguments are not only wrong—they're irrelevant. The existence of a presumption of prudence was not determinative in this case. The PUCN could not have been more clear: it did not make any decision that turns on the application of a presumption of prudence. In fact, the PUCN stated that if a presumption did exist, the presumption was overcome when evidence was presented that Southwest Gas had been charging costs to the Challenged Work Orders that included gifts for employees and consultants, expensive meals and travel, inexplicable building-related leasehold improvements for software, and other unjustified or erroneous items. Knowing that a presumption of prudence would not have made a difference in this case, Southwest Gas has sought "guidance for future proceedings" regarding the presumption, which is not a justiciable issue.

When this Court applies the appropriate "substantial evidence" standard of review, it will find that the quality and quantity of the evidence fully supports upholding the challenged PUCN decision.

I. Southwest Gas's Constitutional Claims Are without Merit and Must Be Summarily Rejected.

Southwest Gas argues that constitutional rights are at stake in this case, hoping to convince this Court to adopt a *de novo* standard of review for all aspects of the PUCN's decision. However, Southwest Gas's naked assertions lack necessary elements to warrant consideration, and they certainly do not require this Court to apply a *de novo* standard of review beyond questions of law.[3] Southwest Gas relies on the 1920 U.S. Supreme Court case *Ohio Valley Water Co. v. Borough of Ben Avon*;[4] however, the *Ben Avon* holding is largely irrelevant here given that Southwest Gas has not met the heavy burden of establishing that the rates set by the PUCN are confiscatory. And, despite Southwest

[3] *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).

[4] 253 U.S. 287, 40 S.Ct. 527 (1920).

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Gas's assertions that the *Hope* case is somehow irrelevant to this case, *Hope* and subsequent related cases are entirely relevant to this appeal.

Southwest Gas also has failed to demonstrate any connection between the Constitution and the PUCN's finding that Southwest Gas does not enjoy a presumption of prudence. In the only case where a Nevada court found a presumption of prudence existed, which was subsequently nullified by the adoption of a new statute, the Supreme Court of Nevada found that the presumption of prudence was rooted in economics and not the Constitution.[5] The PUCN agrees that the issue of whether a presumption of prudence exists is a legal question that would be subject to *de novo* review if it were justiciable. However, it is not a constitutional issue, and the fact that Southwest Gas raises a legal question does not subject all of the PUCN's findings in this case to *de novo* review.[6]

Southwest Gas's attempt to expand the applicability of *de novo* review hinges on unfounded constitutional claims and red herrings that should be ignored by this Court. In total, the case before this Court is nothing more than a plain vanilla review of the PUCN's application of law to the facts set forth in the Certified Record before this Court. The standard of review applicable to all PUCN decisions should apply to the instant case.

A. Southwest Gas Has Not Met Its Heavy Burden of Demonstrating that the Net Effect of the PUCN's Order Places the Utility's Financial Integrity at Risk.

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***."[7] This "end result" test adopted by the *Hope* Court mandates that so long as the consequences of the PUCN's order permit Southwest Gas to earn a just and reasonable return, the methods used by the PUCN to arrive at the rates set in the order

[5] *Nevada Power Co. v. Pub. Util. Comm'n of Nevada*, 122 Nev. 821, 835, 138 P.3d 486, 496 (2006).

[6] It is unclear how Southwest Gas envisions this Court conducting a *de novo* review of the PUCN's findings of fact in this case. For instance, does Southwest Gas expect that this Court will hold a trial to recollect evidence and/or gather additional facts?

[7] 320 U.S. at 602, 64 S.Ct. at 288 (emphasis added).

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are "outside the scope of judicial inquiry."[8] This "end result" test has been subsequently adopted by the Nevada Supreme Court to determine whether PUCN decisions are just and reasonable.[9]

The U.S. Supreme Court in *Duquesne* took this "end result" test a step further and established a more detailed test for determining whether rates are "constitutionally objectionable." *Duquesne* mandates that Southwest Gas, in seeking to overturn the PUCN's rate order, must demonstrate that its reduced rates jeopardize the financial integrity of the company by: (1) leaving Southwest Gas with insufficient operating capital; (2) impeding its ability to raise future capital; or (3) showing the rates are inadequate to compensate current equity holders for the risk associated with their investments.[10] In fact, the *Duquesne* decision specifically faults the appellants in that case, Duquesne and Penn Power, in that neither "alleges that the total effect of the rate order arrived at … is unjust or unreasonable." The Court found that the appellants' attempts to make constitutional claims based upon a "piecemeal"[11] examination of methodologies used was flawed because "[t]he Constitution protects the utility from the net effect of the rate order on its property."[12]

Southwest Gas has not attempted in its pleadings before this Court to describe the net effect of the PUCN's Modified Order, other than to make cursory claims of confiscation or a taking largely

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[8] *Nev. Power Co. v. Public Serv. Comm'n*, 91 Nev. 816, 826, 544 P.2d 428, 435-36 (1975) (citing *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 62 S.Ct. 575 (1942), *Kansas State Corp. Comm'n v. Federal Power Comm'n*, 206 F.2d 690 (8th Cir. 1953)) (quoting *Bell Tel. Co. v. Public Serv. Comm'n*, 70 Nev. 25, 34, 253 P.2d 575, 606 (1953)).

[9] *Id.; see also, 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).

[10] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 312, 109 S.Ct. 609, 618 (1989).

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

[12] *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.").

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based upon the PUCN's decision only as to return on equity.[13] Southwest Gas did attempt to claim that the PUCN confiscated $51 million of its property related to the Challenged Work Orders,[14] but this figure has no support in the Certified Record and is entirely false. Without a record citation, to the best of the PUCN's understanding, the $51 million represents all of the costs that Southwest Gas incurred across all of its jurisdictions for the Challenged Work Orders. Southwest Gas also serves customers in California and Arizona, and at least two-thirds of that $51 million will be at issue in rate cases in those other states, meaning that Nevada customers were responsible for only about one-third of that total figure. Moreover, some of the costs associated with the Challenged Work Orders had already depreciated prior to Southwest Gas filing its rate case with the PUCN. In other words, by choosing to file its rate case when it did in Nevada, which is within Southwest Gas's control, Southwest Gas had already passed on recovery of nearly half of the total costs that it could have recovered from Nevada customers. In summary, while Southwest Gas claims that the Nevada PUCN confiscated $51 million, that figure is clearly false and unsupported by the Certified Record.

Beyond the false claims made in its Reply, Southwest Gas also ***never alleged*** a takings or confiscatory claim before the PUCN, thus never providing the PUCN with the opportunity to fully vet the net effect of its own rate order.[15] In fact, even though Southwest Gas specifically asked for reconsideration of the PUCN's Order in the underlying case, Southwest Gas never put forth an

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[13] *See* Mem. at 44:12-15 and 47:15-17. In its originally filed Memorandum, this Court should note that Southwest Gas's focus on confiscation appears to be only on the PUCN's return on equity decision. The U.S. Supreme Court has defined the phrase "so unjust as to be confiscatory" as a rate that "threaten[s] an incumbent's 'financial integrity.'" *Verizon Comms. Inc. v. Fed. Comms. Comm'n*, 535 U.S. 467, 524, 122 S.Ct. 1646, 1679 (2002) (quoting *Duquesne*, 488 U.S. at 307, 109 S.Ct. at 618). Southwest Gas has never demonstrated to this Court or to the PUCN that its financial integrity is being threatened.

[14] SWG Mem. at 1. The Court will note that there is not citation to the Certified Record for this $51 million figure.

[15] In reality, it might be hard for Southwest Gas to demonstrate that its financial integrity is threatened. Fitch, which is a ratings agency that assigns ratings regarding the health and value of publicly traded companies, issued a press release in June 2019 after the rate case was completed that affirmed Southwest Gas Holdings, Inc.'s BBB+ and Southwest Gas Corporation's A- rating. Fitch stated: "Fitch believes the ratings benefit from a relatively constructive regulatory environment. … Fitch believes [Southwest Gas's] rate order in Nevada, effective January 2019, is balanced." FitchRatings, *Fitch Affirms Southwest Gas and Sub. at 'A-' and 'BBB+'; Outlook Stable*, June 2019, *at* https://www.fitchratings.com/site/pr/10078248.

argument to the PUCN that the net effect of all of the components of the PUCN's decision amounted to a taking or confiscatory rates. In *State v. Zephyr Cove Water Co.*, the Nevada Supreme Court, in finding that the Commission had not set a just a reasonable rate, found that "[t]he record shows that the Utility has not enjoyed a reasonable rate increase in almost 20 years; has not paid its stockholders a dividend in 20 years; has consistently been unable to generate operating income sufficient to meet current and deferred expenses."[16] If able, Southwest Gas should have put forward record evidence to support a finding that the net effect of the PUCN's order is an inability for Southwest Gas to earn a reasonable return. Southwest Gas's utter failure both at the PUCN and before this Court to demonstrate that the total effect of the rate order harmed its financial integrity waives any claims Southwest Gas raises as to a taking. Certainly, Southwest Gas has not satisfied the "heavy burden" required by the U.S. Supreme Court to overturn a rate order on the basis of an unconstitutional taking.

B. The *Hope* Case is Entirely Relevant to this Appeal.

In an effort to negate the clearly-applicable end-result test set forth in *Hope*, Southwest Gas makes one of its most spurious claims yet, namely that the U.S. Supreme Court decision in *Hope* is irrelevant to this appeal. In arguing that *Hope* is irrelevant, Southwest Gas cites to absolutely no authority suggesting that takings claims based on utility ratemaking decisions are evaluated under a standard different than *Hope*. Southwest Gas argues that because *Hope* was about valuation of property, the *Hope* decision is not relevant to the question of whether confiscation of property has occurred when costs that the PUCN found to be unreasonable or unsupported were not included in rates.[17] Rather than applying the foundational principles of *Hope*, Southwest Gas argues that this

[16] *State v. Zephyr Cove Water Co.*, 94 Nev. 634, 639, 584 P.2d 698, 701 (1978). It should be noted that the standard of review applied in this case was substantial evidence. *Id.*, 94 Nev. at 638, 584 P.2d at 700. Additionally, in *Zephyr Cove*, the Nevada Supreme Court ordered the case to be remanded to Commission to set new rates. The Nevada Supreme Court reversed the district court in part because, after finding that the Commission's rates were unjust and unreasonable, it set new rates. The Court found that the district court, in setting new rates, had substituted its judgment for that of the Commission, which was not permitted under the law. *Id.*, 94 Nev. at 637, 640, 584 P.2d at 700, 702. Southwest Gas has asked this Court to vacate the PUCN's decision and instruct the PUCN to approve the Challenged Work Orders, the pension expenses, and the return on equity as pleaded by Southwest Gas. Any action by this Court to set rates by mandating that the PUCN implement all of the requests made by Southwest Gas in its initial application before the PUCN would amount to this Court substituting its judgment for that of the PUCN in setting rates and, therefore, would be unlawful.

[17] SWG Mem. at 7:13-9:5.

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Court should rely on the concepts of the "prudent investment test" as espoused in a National Regulatory Research Institute Report paper from 1985.[18]

Hope is relevant to the entirety of the PUCN's ratemaking decision.[19] As directed by *Hope*, in assessing Southwest Gas's constitutional claims, what matters for this Court is how the final rates adopted by the PUCN affect the financial health of Southwest Gas.

Southwest Gas's principle citation for the idea that *Hope* is irrelevant, the "Burns Report", does not support its contention. Southwest Gas argues that the "prudent investment" test as set forth in the Burns Report is more useful than the end-result test in *Hope*. The Burns Report, however, states:

> [T]he **end-result test of *Hope*** sets the outer boundary of a prudent investment test application. … [F]uture challenges, if any, to the prudent investment test on the grounds that the application of the test leads to a confiscatory result must be on a case-by-case basis, and according to *Hope* only the particular end result could be held to be confiscatory.[20]

So, even the Burns Report notes the relevance of *Hope* in a prudent investment test and argues that questions of confiscation are governed by the end-result test established in the *Hope* case.

C. The *Ben Avon* Case Is Irrelevant to this Appeal.

Southwest Gas asserts that the *Ben Avon* case mandates that this Court apply a *de novo* review to all aspects of the PUCN's decision because it involves "constitutional facts" related to Southwest Gas's takings claims. Southwest Gas criticizes the PUCN's citation to a treatise that refers to the doctrine espoused in *Ben Avon* as "dead" and argues that *Ben Avon* is still good law. The PUCN acknowledges that *Ben Avon* is "still followed in a minority of the states,"[21] but no Nevada court has ever cited to *Ben Avon*. The other cases that Southwest Gas relies upon, *Crowell v. Benson*[22] and *St.*

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[18] *See* Robert E. Burns, et. al., *The Prudent Investment Test in the 1980s*, THE NATIONAL REGULATORY RESEARCH INSTITUTE, Apr. 1985 ("Burns Report").

[19] The *Hope* standard clearly applies to Southwest Gas's challenge of the return on common equity established in the PUCN's order. The Nevada Supreme Court has found that "[t]he crux to every rate case involving the cost of common equity is just how one goes about conforming to the *Bluefield* and *Hope* cases." *Nevada Power Co.*, 91 Nev. at 825, 544 P.2d at 434.

[20] Burns Report at 184-85 (emphasis added).

[21] Asimow, Michael, et al., STATE AND FEDERAL ADMINISTRATIVE LAW, § 9.1.2 (West Group, 2d Ed. 1998).

[22] 285 U.S. 22, 52 S.Ct. 285 (1932).

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Joseph Stock Yards Co. v. United States,[23] have been cited once by Nevada courts, but only in a dissent (*Crowell*) or in a case where the court did not adopt a *de novo* standard of review (*St. Joseph*).[24]

The U.S. Supreme Court's three-part test in *Duquesne* for overturning a rate order is directly on point with regard to the issue that Southwest Gas has placed before this Court. In fact, based on Southwest Gas's reasoning, *Duquesne* is more relevant than *Ben Avon* because *Duquesne* involves the disallowance of costs, while *Ben Avon* addresses valuation issues. Southwest Gas claims that *Hope* is irrelevant because *Hope* addresses valuation issues and "[t]his petition for review does not involve valuation of property – it involves the complete disallowance of expenses."[25] *Duquesne* is all about the disallowance of costs, in particular the disallowance of costs associated with four nuclear generators that were canceled after a consortium of utilities had already expended funds to build the plants.[26] In *Duquesne*, the U.S. Supreme Court specifically found that the disallowance of costs associated with those four nuclear plants was not confiscatory, in part because no argument had been made that the net effect of the rates post-disallowance resulted in harm to the financial integrity of the appellant utilities.[27]

> [T]he very issue on which the *Ben Avon* and *St. Joseph* cases turned – valuation of a utility's property by a ratemaking agency need no longer be judicially reviewed in detail. Any method of valuation is permitted, provided that the final result of the ratemaking process is reasonable in the sense that the rates cover the utility's costs. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).[28]

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[23] 298 U.S. 38, 56 S.Ct. 720 (1936). In *St. Joseph*, the U.S. Supreme Court affirmed the *Ben Avon* decision but restricted its holdings significantly by giving presumptive weight to the fact findings of the agency and precluding the company from introducing evidence in court that could have been introduced at the agency hearing. STATE AND FEDERAL ADMINISTRATIVE LAW at § 9.1.2a.

[24] *Checker Inc. v. Public Serv. Comm'n*, 84 Nev. 623, 446 P.2d 871 (1968), cites another case that cites to *St. Joseph*. While due process issues were at issue in *Checker*, there is no indication from the Nevada Supreme Court's decision that a *de novo* standard of review was applied.

[25] SWG Mem. at 7:13-8:8.

[26] *Duquesne*, 488 U.S. at 302-06, 109 S.Ct. at 612-14.

[27] *Id.*, 488 U.S. at 312-15, 109 S.Ct. at 618-19.

[28] STATE AND FEDERAL ADMINISTRATIVE LAW at § 9.1.2a. Southwest Gas also argues that *Ben Avon* and its progeny are alive in that their holdings have been reaffirmed repeatedly. SWG Mem. at 6:14-15 and n.5. The cases that Southwest Gas cites, however, have nothing to do with public utility claims of confiscation of property. *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406 (1980), concerns due process issues for a suppression motion in a federal criminal trial. N. *Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858 (1992) addresses whether a section of the Bankruptcy Act of 1978 is unconstitutional. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 104 S.Ct.

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In other words, Southwest Gas's own argument that valuation makes *Hope* irrelevant undercuts its argument that *Ben Avon* is the pertinent authority upon which this Court should rely.

Southwest Gas also argues that the *Ely Light* case distinguishes pension expenses from valuation of property, but Southwest Gas misses its own mark – again. There were no constitutional issues raised regarding the disallowance of pension expenses in the *Ely Light* case, and the Court made no distinction as to the standard of review for disallowances versus valuation of property. Furthermore, the Nevada Supreme Court in *Ely Light* recognized the relevance of *Hope's* end-result test when it noted:

> [T]he end result of rate making is the more important aspect in which the Commission should be concerned. … [T]he question for determination is whether the utility is able to earn enough money to keep it in a healthy financial position, able to meet its fixed cost and pay its investors a reasonable return.[29]

D. The Presumption of Prudence Does Not Independently Raise Constitutional Issues, No Presumption of Prudence Has Ever Been Applied in Southwest Gas's Rate Cases, and the PUCN Has Not Arbitrarily Switched between Rate Methodologies.

Southwest Gas repeats arguments already made in its Memorandum that the presumption of prudence is backed by the Constitution.[30] First, the Nevada Supreme Court already decided that the presumption of prudence is not rooted in the Constitution. In *Nevada Power Co.*, the Court stated that the "[r]easoning behind granting a utility a presumption of prudence is rooted in economics."[31] Moreover, the existence or non-existence of a presumption of prudence does not raise constitutional issues that would modify the standard of review applied by this Court. As noted previously, the constitutionality of ratesetting can only be raised by examining the net effect of the rates themselves on the financial integrity of Southwest Gas and not with regard to the methods employed to arrive at those

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1949 (1984) addresses actual malice issues in a libel and slander case. Southwest Gas also heavily cites to *Bixby v. Peirno*, 481 P.2d 242 (Cal. 1971). In *Bixby*, the California court specifically found that the administrative decision did not "involve any important or fundamental right and therefore does not call for an independent judgment review" because "[t]he minority shareholders do not allege any deprivation of their right to a livelihood or a deprivation of their property." *Bixby*, 481 P.2d at 246-47. Thus, the *Bixby* court found that the trial court had properly applied a substantial evidence standard to the entire record. *Id.* at 247-48.

[29] *Ely Light*, 80 Nev. at 321, 393 P.2d at 310 (quoting Commission order).

[30] SWG Reply at 2:6-7, 3:5-13.

[31] *Nev. Power Co.*, 122 Nev. at 835, 138 P.3d at 496.

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