

Case No. 80911

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**In the Supreme Court of Nevada**

SOUTHWEST GAS CORPORATION,

Appellant,

*vs.*

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

Respondents.

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**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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**JOINT APPENDIX  
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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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1 rates.<sup>32</sup> Regardless of whether the PUCN applied a presumption of prudence in this case, Southwest  
 2 Gas was required to put forth specific allegations of financial harm to validly claim a taking.

3 Southwest Gas cites *Verizon Comms. v. FCC*, 535 U.S. 467 (2002), for the idea that switching  
 4 ratesetting methodologies between rate cases might result in a taking if the point of the switching was  
 5 to minimize returns for public utilities. The U.S. Supreme Court addressed a similar issue in  
 6 *Duquesne*.<sup>33</sup> But, in both cases, the U.S. Supreme Court found that an arbitrary switching back and  
 7 forth between methodologies did not actually occur and returned to the principle espoused in *Hope* that  
 8 the effect of the final rate, and not the methods employed to reach that rate, is key to the  
 9 constitutionality issue.<sup>34</sup>

10 Here, as in *Duquesne* and *Verizon*, a switch of ratesetting methodologies is not at issue. By  
 11 Southwest Gas's own admission, a presumption of prudence has never been applied in any of its prior  
 12 rate cases.<sup>35</sup> Importantly, Southwest Gas specifically raised the issue of a presumption of prudence  
 13 during its last rate case, in 2012, but the PUCN did not apply the presumption. Rather, the PUCN  
 14 followed multiple steps to determine whether rates were just and reasonable. "Whether a cost was  
 15 prudently incurred" was one step.<sup>36</sup> The next step was to apply the tests set forth in NRS 704.001,  
 16 which include a balancing test for shareholder and ratepayer benefits. Finally, the PUCN found that its  
 17

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18 <sup>32</sup> *Verizon*, 535 U.S. 467 at 525, 122 S.Ct. at 1679 ("Undeniably, then, the general rule is that any  
 19 question about the constitutionality of ratesetting is raised by rates, not methods ...").

20 <sup>33</sup> *Duquesne*, 488 U.S. at 315, 109 S.Ct. at 619.

21 <sup>34</sup> *Verizon*, 535 U.S. at 527-28, 122 S.Ct. at 1681 ("[T]he incumbent carriers here are just like the  
 22 electric utilities in *Duquesne* in failing to present any evidence that the decision to adopt [a specified  
 23 rate methodology] was arbitrary, opportunistic, or undertaken with a confiscatory purpose. ... Any  
 24 investor paying attention had to realize that he could not rely indefinitely on traditional ratemaking  
 25 methods but would simply have to rely on the constitutional bar against confiscatory rates.");  
 26 *Duquesne*, 488 U.S. at 315, 109 S.Ct. at 619 ("[I]t has not been shown that the rate orders as modified  
 27 by [a new law] fail to give a reasonable rate of return on equity given the risks under such a regime.  
 28 We therefore hold that [the new law's] limited effect on the rate order at issue does not result in a  
 constitutionally impermissible rate.").

<sup>35</sup> Mem. at 13; 2 CR 1385-89 (citing *In Re Nevada Power Co.*, 1986 WL 1301282, 74 PUR 4<sup>th</sup> 703  
 (Nev. PSC 1986); *In Re Sierra Pacific Power Co.*, 1988 WL 391152, 96 PUR 4<sup>th</sup> 1 (Nev. PSC 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. 1 CR 597-599, ¶¶ 61-66.

<sup>36</sup> *In Re Southwest Gas Corp.*, 2012 WL 7170426, at ¶ 45 (Nev. PUC 2012).

1 ultimate charge was to ensure that its decision resulted in just and reasonable rates in accordance with  
 2 NRS 704.040 and 704.120.<sup>37</sup> It should have been abundantly clear to Southwest Gas based on the  
 3 PUCN order in its last rate case in 2012 that the PUCN would inquire as to whether the costs in its rate  
 4 case were prudently incurred; the first step, as stated in the 2012 Southwest Gas rate case order, was  
 5 for the PUCN to ask whether a cost was prudently incurred. The PUCN has not modified its  
 6 ratemaking methodologies between Southwest Gas's cases.

7 There also is nothing to support any reliance by Southwest Gas on prior PUCN decisions  
 8 applicable to other utilities. The prior PUCN cases cited by Southwest Gas – none of which Southwest  
 9 Gas was a party to – were distinguished by the Commission in its Modified Order and found to be  
 10 irrelevant to a general rate case (the type of case at issue in this appeal), in error, or superseded.<sup>38</sup>  
 11 Moreover, “even if the [Commission] has failed to follow some of its prior decisions, the  
 12 [Commission] has not thereby abused its discretion. In Nevada, administrative agencies are not bound  
 13 by *stare decisis*.”<sup>39</sup> The Ninth Circuit has reiterated that an administrative agency should be free to  
 14 modify prior policies and actions, so long as it provides an explanation indicating the reason for the  
 15 modification.<sup>40</sup> Here, the Modified Order clearly explains why the prior PUCN decisions are  
 16 inapplicable and why a presumption of prudence was not applied to Southwest Gas's rate case.

17 Finally, the record confirms that Southwest Gas was fully aware of its obligation to justify its  
 18 costs and demonstrate prudence. During the hearing, when asked about its burden of proof, Southwest  
 19 Gas stated that it “‘has the burden of proof in every case’ to show that its proposed changes [to rates]  
 20 are just and reasonable and that it ‘absolutely’ understands that it carries the burden of justifying the  
 21 prudence of its expenditures.”<sup>41</sup> Southwest Gas's endorsement of a process that requires it to  
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23 <sup>37</sup> *Id.*

24 <sup>38</sup> 1 CR 597-599, ¶¶ 60-66.

25 <sup>39</sup> *Motor Cargo v. Public Serv. Comm'n*, 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992) (citing *Gray*  
 26 *Line Tours v. Public Serv. Comm'n*, 97 Nev. 200, 203, 626 P.2d 263, 265 (1981)); *see also Desert*  
 27 *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.”).

28 <sup>40</sup> *See Modesto Irr. Dist. v. Gutierrez*, 619 F.3d 1024, 1034 (9th Circ. 2010) (“So long as the agency  
 ‘fully explain[s] how its new construction is permissible ...,’ a previous position is ‘no obstacle’ to  
 adoption of new course.”) (citations omitted).

<sup>41</sup> 1 CR 309, ¶ 7 (quoting Transcript at 5 CR 3855-56, 5 CR 3909-10)

1 demonstrate prudence should preclude it from now making the disingenuous argument that it was not  
2 aware of what the PUCN expected it to prove.

3 **E. The Separation of Powers and Regulator Objectivity Issues Raised by Southwest Gas**  
4 **are Red Herrings Meant to Distract this Court from the Fact that Southwest Gas Has**  
5 **Not Sufficiently Set Forth Any Constitutional Claims for this Court to Adjudicate.**

6 Southwest Gas raises various separation of powers issues and suggests that regulators or  
7 administrative agencies cannot be objective when constitutional rights are at stake.<sup>42</sup> These arguments  
8 amount to nothing more than an attempt to distract the Court from conducting an appropriately-focused  
9 review of the PUCN's decision to determine whether the decision is within the framework of the law  
10 and supported by substantial evidence.<sup>43</sup> As noted above, no constitutional issues are validly raised in  
11 this appeal; applying a standard of review that looks to the substantial evidence on the record and  
12 whether the law has been followed will not undermine the judiciary's obligation to protect  
13 constitutional rights.

14 Southwest Gas's citation to *Bixby v. Pierno*<sup>44</sup> reveals the weakness of its argument. The  
15 California court in *Bixby* states that constitutional rights or liberty and property should not be at the  
16 "mercy of administrative officials" if "the evidence clearly establishes that the findings are wrong  
17 and constitutional rights have been invaded."<sup>45</sup> This Court, in reviewing the substantial evidence in  
18 the Certified Record, will conclude that this appeal does not "clearly establish" that the findings of the  
19 PUCN are wrong or that constitutional rights have been invaded. Southwest Gas also does not provide  
20 any credible evidence that the PUCN has not been a fair and impartial regulator in the underlying  
21 case.<sup>46</sup>

22 <sup>42</sup> SWG Mem. at 3:5-17.

23 <sup>43</sup> *Off. Of Nev. Att'y General's Bureau of Consumer Protection v. Pub. Utils. Comm'n of Nev.*, 126  
24 Nev. 691, 367 P.3d 746, \*5 (2010) (unpublished opinion).

25 <sup>44</sup> 481 P.2d 242 (Cal. 1971).

26 <sup>45</sup> SWG Mem. at 3:20-4:1 (quoting *Bixby*, 481 P.2d at 247).

27 <sup>46</sup> Southwest Gas claims an "inherent conflict of interest," noting that a former Regulatory Operations  
28 Staff ("Staff") attorney is now serving as Assistant General Counsel and representing the PUCN before  
this Court. SWG Mem. at 4 n.2. It should be noted that the former Staff attorney referenced, Ms.  
Terwilliger, did not join General Counsel's office until after the PUCN had issued its final order in the  
underlying proceeding. Ms. Terwilliger's former client also consented to her representation of the  
Commission in court as to any proceeding that was concluded at the Commission. Southwest Gas  
suggests that a former Staff attorney cannot serve as a member of General Counsel without interfering  
with the independence of Staff. Surely, Southwest Gas does not mean to imply that former Staff

1           Moreover, Southwest Gas’s reliance on *Berkson v. LePome*<sup>47</sup> is similarly misguided. The  
 2 *Berkson* case concerns the Nevada Legislature’s adoption of a statute that interfered with the  
 3 judiciary’s ability to address the finality of its decisions via claim and issue preclusion.<sup>48</sup> Other than  
 4 quoting various general statements regarding the importance of the separation of powers, Southwest  
 5 Gas does not put forth a coherent or reasoned explanation as to why the Nevada Supreme Court’s  
 6 decision in *Berkson* is applicable to this appeal.

7           The applicable standard of review requires that this Court uphold the PUCN’s decision if it is  
 8 based upon substantial evidence and within the framework of the law.<sup>49</sup> Substantial evidence is that  
 9 which a reasonable mind might find adequate to support a conclusion.<sup>50</sup> The Court should only set  
 10 aside the PUCN decision if it is “[a]rbitrary or capricious or characterized by abuse of discretion.”<sup>51</sup>  
 11 And, the reviewing court cannot substitute its judgement for the PUCN’s judgment as to the weight of  
 12 the evidence on a question of fact.<sup>52</sup> This Court should not dramatically deviate from this standard  
 13 based solely on Southwest Gas’s bare allegations of constitutional violations and citations to  
 14 inapplicable or distinguishable case law that, at most, holds only that an administrative agency’s  
 15 findings of fact are not entirely free from judicial review and must not clearly contradict the record  
 16 evidence. Here, application of the “substantial evidence” standard of review is consistent with the  
 17

18 \_\_\_\_\_  
 18 attorneys serving in new positions can somehow improperly influence Staff, as Southwest Gas itself  
 19 recently hired a former Staff attorney. Furthermore, once a PUCN proceeding is complete and if the  
 20 PUCN’s final order is appealed, the General Counsel’s office at the Commission represents the PUCN  
 21 in court. Staff is no longer a party in the proceeding. As such, Staff’s independence from the  
 22 Commission, which the PUCN agrees is an important function that must be safeguarded, is not at issue  
 23 in this appeal.

24 <sup>47</sup> 126 Nev. 492, 245 P.3d 560 (2010).

25 <sup>48</sup> *Id.*, 126 Nev. at 499-500, 245 P.3d at 565-67.

26 <sup>49</sup> *Nev. Power Co.*, 122 Nev. at 834, 138 P.3d at 495; *Nev. Power Co. v. Public Service Comm’n of*  
 27 *Nev.*, 105 Nev. 543, 545, 779 P.2d 531, 532 (1989). The Supreme Court of Nevada has emphasized  
 28 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.” *Nev. Power Co. v. Eighth Judicial Dist. Court of Nev.*  
*ex rel. County of Clark*, 120 Nev. 948, 957, 102 P.3d 578, 584 (2004) (citing NRS 704.040).

<sup>50</sup> *Nev. Power Co.*, 122 Nev. at 834, 138 P.3d at 495.

<sup>51</sup> NRS 233B.135(3)(f); NRS 703.373(6)(f).

<sup>52</sup> NRS 233B.135(3); NRS 703.373(6).

1 cases cited by Southwest Gas. No one is arguing that the PUCN’s findings of fact should not be  
2 subject to *any* judicial review.

3 **II. A Presumption of Prudence Does Not Exist in Nevada Law, and Even If It Did Exist,**  
4 **the PUCN’s Finding that No Presumption Exists is Not Determinative of the Legality**  
5 **of Its Order.**

6 Southwest Gas cites to no Nevada statute or PUCN regulation that sets forth a presumption of  
7 prudence. The only time the Nevada Supreme Court definitively found that a presumption of prudence  
8 existed, in *Nevada Power Co. v. Pub. Util. Comm’n of Nevada*, 122 Nev. 821, 138 P.3d 486 (2006),  
9 the Court limited its finding to a presumption of prudence in deferred cases, and the Nevada  
10 Legislature subsequently adopted a statute that found no such presumption exists in deferred  
11 proceedings.<sup>53</sup>

12 In sponsoring the legislation that nullified the findings of the Nevada Supreme Court in *Nevada*  
13 *Power Co.*, Assemblywoman Buckley stated, “There is no presumption favoring a public utility when  
14 it files a rate change. We do not burden Nevada consumers for mistakes.”<sup>54</sup> Deferred accounting  
15 proceedings like the one at issue in *Nevada Power Co.* largely concern recovery in rates of pass-  
16 through fuel costs; in other words, public utilities do not earn a return on the fuel costs that they pass  
17 on to their customers via the rates approved in deferred accounting proceedings. In contrast, public  
18 utilities do earn a return on and of the rate base expenses that are approved in a general rate case. So,  
19 had the PUCN approved the costs associated with the Challenged Work Orders, Southwest Gas would  
20 have earned a return on and of those expenses. Given that the Nevada Legislature found that  
21 ratepayers should not be burdened with the utility’s mistakes for pass-through fuel costs, on which  
22 utilities do not earn a return, it is safe to conclude that the Legislature did not intend for a presumption  
23

24 \_\_\_\_\_  
25 <sup>53</sup> *Nevada Power Co.*, 122 Nev. at 834-36, 138 P.3d at 495-98 (finding that an electric utility enjoys a  
26 presumption that the expenses reflected in a deferred energy accounting application were prudently  
27 incurred) (citations omitted); NRS 704.110(9)(d) (reflecting that this section was revised to state that  
the deferred energy accounting statutes provide that no presumption of prudence exists and “the public  
utility has the burden of proving reasonableness and prudence in the proceeding.”).

28 <sup>54</sup> Minutes of the Meeting of the Assembly Committee on Commerce and Labor, March 7, 2007 at 8,  
A.B. 7, 2007 Leg., 74<sup>th</sup> Sess., at  
<https://www.leg.state.nv.us/Session/74th2007/Minutes/Assembly/CMC/Final/454.pdf>. CR 000592-  
000593, ¶ 48.

1 of prudence to exist in favor of the utility for all rate base expenses in a rate case for which it gets to  
2 earn a return.<sup>55</sup>

3 These facts alone should compel this Court to determine that a presumption of prudence does  
4 not exist in Nevada. No statute or regulation exists establishing a presumption of prudence. The only  
5 Nevada case definitively finding such a presumption was limited to deferred accounting proceedings  
6 and was subsequently nullified by the Legislative. But, if that is not enough, there is even more  
7 evidence against the existence of a presumption.

8 For one, a presumption of prudence is directly contrary to existing statutes and regulations.  
9 The Legislature has created an integrated resource planning (“IRP”) construct, wherein a PUCN  
10 finding accepting a utility’s plan to build or acquire certain infrastructure deems any facility  
11 investment contained in that plan as “prudent.”<sup>56</sup> Resource plans are filed for specific projects before  
12 those projects’ costs are recovered through rates set in a rate case. If a presumption of prudence  
13 already applied to all utilities in Nevada, which is what Southwest Gas is arguing, there would be no  
14 need to determine prudence in a resource plan before a rate case is file. In fact, if the utility is entitled  
15 to a presumption of prudence before it ever files its rate case, then all of its investments would already  
16 be deemed prudent automatically, even without an IRP filing. If a presumption of prudence exists, as  
17 Southwest Gas insists, then the existing IRP statutes have no purpose or meaning.

18 Moreover, it is clear that the Legislature and the PUCN both know how to write a rebuttable  
19 presumption into law if they would like for one to exist. NRS 704.805(2) includes a rebuttable  
20 presumption related to theft or damage of public utility property. NAC 704.582(4) provides a  
21 rebuttable presumption to certain water utilities when they utilize the range of reasonable returns  
22 developed by the Commission’s Regulatory Operations Staff for return on equity. Neither the  
23 Legislature nor the Commission have adopted a rebuttable presumption in statute or regulation for  
24 public utilities in rate cases.

25 Without Nevada statutes, Nevada regulations, or Nevada case law providing for a presumption,  
26 and in the face of nullifying existing statutory constructs in this State, Southwest Gas still wants this

27 \_\_\_\_\_  
28 <sup>55</sup> 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.

<sup>56</sup> See, e.g., NRS 704.110(13), NRS 704.661(6).

1 Court to find that a presumption exists because (1) older U.S. Supreme Court cases that do not  
 2 expressly state that a presumption of prudence exists but that use similar language to a presumption  
 3 have been cited in other jurisdictions to stand for such a presumption; (2) an old Nevada Supreme  
 4 Court case, which also does not expressly state that a presumption of prudence exists and also uses  
 5 similar or synonymous language, has been cited by Idaho courts to stand for a presumption; and  
 6 (3) secondary sources seemingly compel adoption of a presumption of prudence.

7 The PUCN's Memorandum painstakingly addressed why a correct reading of the U.S. Supreme  
 8 Court cases, *Sw. Bell Tel. Co.*<sup>57</sup> and *W. Ohio Gas*,<sup>58</sup> and the Nevada Supreme Court *Ely Light* case,  
 9 stand for the proposition that a state commission must base its findings on the evidentiary record.<sup>59</sup>  
 10 Specifically, *Ely Light* indicates that where the costs actually incurred by a utility are found to be  
 11 reasonable via the evidence considered, then without contrary evidence of an abuse of discretion, a  
 12 showing of a lack of good faith, inefficiency, or improvidence, the PUCN should not substitute its  
 13 judgment for that of management of the utility.<sup>60</sup> In other words, if a cost is reasonable and actually  
 14 incurred by a utility, a regulatory commission cannot arbitrarily disallow a cost simply because it  
 15 disagrees with the decision to incur the cost – a regulatory body must base its decision on the  
 16 evidentiary record. Contrary to what Southwest Gas would have this Court believe, the *Ely Light*  
 17  
 18

19 \_\_\_\_\_  
 20 <sup>57</sup> *Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 43 S.Ct.544 (1923).

21 <sup>58</sup> *W. Ohio Gas Co. v. Pub. Util. Comm'n of Ohio*, 294, U.S. 63, 72, 55 S. Ct. 316, 321 (1935).

22 <sup>59</sup> PUCN Mem. at 45-48. *Washington Gas Light Co v. Public Service Comm'n of District of*  
 23 *Columbia*, 450 A.2d 1187, 1225 (D.C. Ct. App. 1982) (noting that the *W. Ohio Gas* case stands for the  
 24 proposition that the “commission’s disallowance of certain advertising expenses as business expenses  
 25 chargeable to ratepayers was wrong where the commission’s action had **no basis** in evidence, **either**  
 26 **direct or substantial.**”) (emphasis in original).

27 <sup>60</sup> Southwest Gas states that *Ely Light* “says there is a ‘presumption of the proper exercise of judgment  
 28 by the utility in matters which are particularly a function of management.’” SWG Mem. at 9:17-20  
 (quoting *Ely Light*, 80 Nev. at 311, 393 P.2d at 324) (emphasis in SWG Mem.). But that language is  
 not the actual finding of the Court. The language preceding this quoted sentence states that “[w]e find  
 also many references, in turn, to the presumption of the proper ...” *Ely Light*, 80 Nev. at 311, 393  
 P.2d at 324 (emphasis noting missing language in SWG Reply). The Court was merely noting  
 statements in the record. The actual finding of the Court is: “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).

1 Court did not find that a utility’s incurrence of a cost, in and of itself and in the absence of other  
2 evidence, entitles the utility to a finding of prudence or a presumption of prudence.

3 Southwest Gas tries to use a secondary source, the Burns Report, to reach a conclusion that a  
4 presumption of prudence exists.<sup>61</sup> First, the Burns Report is in no way binding on this Court.  
5 Southwest Gas cites the report for its argument that “there *should exist* a presumption that the  
6 investment decisions of utilities are prudent.”<sup>62</sup> The Burns Report does not say the presumption exists;  
7 it says it “should exist.” Second, Southwest Gas attacks the PUCN’s citation to the Burns Report in its  
8 Memorandum with the same tired argument, fully rebutted above, that *Hope* is irrelevant. Because of  
9 the *Hope* case, the Burns Report found limited applicability of the prudent investment standard.<sup>63</sup>

10 Southwest Gas also wants this Court to believe that the presumption of prudence is dispositive  
11 and its existence should, therefore, determine whether the PUCN committed a legal error.<sup>64</sup> As  
12 repeatedly discussed, there can be no legal error from the PUCN not applying a presumption of  
13 prudence because no statute, regulation, or case directs the PUCN to apply a presumption. Moreover,  
14 the PUCN’s decision did not turn on whether the presumption of prudence exists because, even if a  
15 presumption existed, it was overcome. The PUCN Modified Order found:

16 [B]ased on the evidence presented, there is no standard – presumed, rebuttable, or otherwise –  
17 in the laws of any jurisdiction that would have been able to cure [Southwest Gas’s] consistent  
18 failure to provide any evidence that the investments related to the Challenged Work Orders  
19 were prudently incurred and were the product of reasonable management practices. Ultimately,  
20 [Southwest Gas’s] discussion of a rebuttable presumption of prudence is irrelevant because any  
21 such presumption was clearly rebutted during these proceedings when the Challenged Work  
22 Orders were challenged by the other parties to the proceeding. Once challenged, [Southwest  
23 Gas] failed to provide the substantial evidence necessary for the Commission to allow recovery  
24 of the costs associated with these projects.<sup>65</sup>

25 <sup>61</sup> SWG Mem. at 12:3-13:22.

26 <sup>62</sup> SWG Mem. at 12:12-15 (quoting the Burns Report) (emphasis added).

27 <sup>63</sup> The Burns Report notes that the prudent investment standard (which purportedly encompasses a  
28 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.” Burns Report at 34-35.

<sup>64</sup> SWG Mem. at 13:24-14:9.

<sup>65</sup> 1 CR at 493, ¶ 622.

1 The PUCN decision aligns with Nevada Supreme Court precedent that looks to the substantial  
 2 evidence in the record, regardless of whether any presumption is appropriately applied.<sup>66</sup> Evidence  
 3 was presented to the PUCN that created serious doubt as to the prudence of the costs included in the  
 4 Challenged Work Orders. Moreover, the record contains evidence that Southwest Gas was unable or  
 5 unwilling to justify, or even competently discuss, the disallowed expenses when asked about them.<sup>67</sup>

6 **III. The Record Illuminates the Absurdity of Applying a Presumption of Prudence.**

7 Application of a presumption of prudence would lead to absurd results, basically permitting  
 8 and, in fact, encouraging, Southwest Gas to file as little information as possible.<sup>68</sup> Starting with the  
 9 Challenged Work Orders, the entire scope of the information provided by Southwest Gas in its initial  
 10 application regarding the Challenged Work Orders can be found in the attached Exhibit A.<sup>69</sup> As  
 11 Exhibit A demonstrates, the support for the Challenged Work Orders is limited to a mention of an  
 12 exhibit in testimony without any further explanation, and the exhibit referenced in testimony, Exhibit  
 13 No. RLC-4, merely provides a very brief description of each of the work orders. If this Court were to  
 14 find that Southwest Gas enjoys a presumption of prudence, ratepayers would depend entirely on the  
 15 other parties to the proceeding to overcome the presumption and to find errors, mistakes, or  
 16 unreasonable or imprudent behavior on the part of the utility, even while Southwest Gas does nothing  
 17  
 18

19 \_\_\_\_\_  
 20 <sup>66</sup> *Nev. Power Co.*, 122 Nev. at 824, 138 P.3d at 488.

21 <sup>67</sup> *See, e.g.*, PUCN Mem. at 23:17-24:25, 28:16-31:3.

22 <sup>68</sup> *In re: Petition of Mississippi Power Co. for Finding of Prudence in Connection with the Kemper*  
 23 *County Integrated Gasification Combined Cycle Generating Facility*, Order, 2013 WL 6044209, at \*2-  
 24 \*3 (2013) (“[I]t stands to reason that an initial filing for prudency would contain an overview of such  
 25 processes and responses related to the prominent aspects of the construction project ... the  
 26 Commission finds that simply demonstrating that costs were incurred is insufficient to establish a  
 27 prima facie case for prudency which would shift the burden of production to the intervenors.”). *See*  
 28 *also Coalition of Cities for Affordable Util. Rates v. Pub. Util. Comm’n of Texas*, 798 S.W.2d 560  
 (Tex. 1990).

<sup>69</sup> Exhibit A to this pleading includes only the excerpt to Exhibit No. RLC-4 that is relevant to the  
 Challenged Work Orders. The last page of Exhibit A, which is the brief summary of the Challenged  
 Work Orders, was not even included in Southwest Gas’s initial application. As cross examination at  
 hearing illuminated, the descriptions of the Challenged Work Orders were left out of direct testimony.  
 5 CR 3852:12-18. Southwest Gas states this omission was inadvertent, but their failure to file even the  
 briefest of descriptions about the Challenged Work Orders demonstrates the inherent risks for  
 ratepayers of the application of a presumption of prudency.

1 more than file a skeletal spreadsheet with numbers and one-sentence explanations of the projects in its  
2 application.<sup>70</sup>

3 Similar absurd results would occur from applying a presumption of prudence to pension  
4 expenses. As explained in the PUCN Memorandum, Southwest Gas proposed a change to the discount  
5 rate for its pension expenses.<sup>71</sup> The discount rate was changed based upon a recommendation of the  
6 actuary, but the Southwest Gas witness supporting the change to the discount rate could not explain to  
7 the PUCN what, if any, input management had in accepting or modifying the actuary's  
8 recommendation as to the discount rate. Despite repeated questioning, the witness failed to provide  
9 any information clarifying whether the management of Southwest Gas exercised *any discretion* on a  
10 change to the discount rate that was going to result in increased costs for ratepayers or whether  
11 Southwest Gas's management just took the actuary's word for it. If Southwest Gas's envisioned  
12 presumption of prudence had been applied, ratepayers would be on the hook for a change to the  
13 discount rate that resulted in higher rates<sup>72</sup> without any evidence from Southwest Gas that management  
14 conducted prudent and reasonable oversight of the actuary in making a decision on the discount rate.  
15 Southwest Gas's utter failure to make a case before the Commission is not a good reason to find that a  
16 presumption of prudence exists.

#### 17 **IV. Conclusion.**

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

---

21 <sup>70</sup> Southwest Gas states that parties challenging Southwest Gas's expenses were required to  
22 demonstrate by a preponderance of the evidence that the expenses were imprudent. SWG Mem. at  
23 14:10-19. The statute that Southwest Gas cites, NRS 47.180, exemplifies the problem with applying a  
24 presumption of prudence in this case without a rulemaking or any other proceeding to determine in  
25 advance of a contested proceeding how the presumption would work in PUCN cases, including what it  
26 would apply to, how it is overcome, etc. Chapter 47 of the NRS governs rulings, admissibility, and  
presumptions before the courts of the State and magistrates. This chapter does not apply to the PUCN.  
There are no statutes or regulations that govern how presumptions of prudence would be treated by the  
Commission.

27 <sup>71</sup> PUCN Mem. at 23:10-26:9. Regarding a separate pension-related issue, Southwest Gas tries to state  
28 that the Certified Record does not support the notion that normalization of expenses is a common  
utility practice. Southwest Gas's own testimony belies this unsupported assertion. 10 CR 8128-8129  
(noting two separate items for which Southwest Gas is seeking to normalize expenses).

<sup>72</sup> The change to the discount rate would have resulted in a \$4 million increase. 1 CR 618, ¶ 122.



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**AFFIRMATION**

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

The undersigned does hereby affirm that the preceding document, **SUR-REPLY OF THE PUBLIC UTILITIES COMMISSION OF NEVADA IN RESPONSE TO SOUTHWEST GAS CORPORATION REPLY**, filed in Case No. A-19-791302-J, does not contain the personal information of any person.

Dated the 1st day of November, 2019.

PUBLIC UTILITIES COMMISSION OF NEVADA

By:           /s/ Debra M. Terwilliger            
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Public Utilities Commission of Nevada  
1150 E. William Street  
Carson City, NV 89701-3109

# EXHIBIT A



IN THE MATTER OF  
SOUTHWEST GAS CORPORATION  
DOCKET NO. 18-05\_\_\_\_

PREPARED DIRECT TESTIMONY  
OF  
RANDI L. CUNNINGHAM

ON BEHALF OF  
SOUTHWEST GAS CORPORATION

May 25, 2018

005014

005014

1 D&O insurance expense is necessary to attract and retain directors and  
 2 officers, and is a required and reasonable operating expense for any publicly  
 3 traded company, and the full amount should be included in rates.

4 **Q. 45 Are there any Statement P items related to adjustments the Company has  
 5 not made in this proceeding?**

6 **A. 45** Yes. The Company did not propose adjustments for employee relocation, Energy  
 7 Efficient Technology Department (EETD), rent annualizations and landscaping.  
 8 The Company no longer purchases employee homes as part of an employee  
 9 relocation package, and no longer has an EETD department. The Company  
 10 proposes to discontinue making annualizations for Paiute rent or Laughlin rent in  
 11 every GRC, and will only propose an adjustment if the amount is material. Finally,  
 12 the rate base related to the landscaping adjustment is near the end of its life, the  
 13 adjustment is immaterial, and the area in question has been re-landscaped with  
 14 desert landscaping.

15 **VIII. COMPLIANCE ITEMS**

16 **A. Master Data Request No. 106**

17 **Q. 46 Please describe the compliance item required by the Order in Consolidated  
 18 Docket Nos. 12-04005 and 12-02019 related to MDR 106.**

19 **A. 46** The Company and Staff were directed to meet prior to the filing of the Company's  
 20 next general rate case proceeding to determine the proper scope of testimony  
 21 necessary to support the work orders produced in response to MDR 106.

22 **Q. 47 Did Southwest Gas meet with Staff to discuss these matters?**

23 **A. 47** Yes. Southwest Gas met with Staff March 12, 2018 and April 20, 2018 and  
 24 discussed the scope of work orders referenced in MDR 106 that should be  
 25 addressed in testimony. The Company and Staff agreed that non-GIR project  
 26 work orders in excess of \$1 million should be identified and summarized.

005015

1 **Q. 48 What about the Company's GIR projects?**

2 A. 48 The Company's GIR projects have already been evaluated and approved by the  
3 Commission in various dockets. Southwest Gas and Staff did not believe that it  
4 was necessary to identify and summarize the GIR projects through testimony  
5 addressing MDR 106 because the GIR projects have already been identified,  
6 evaluated and approved in various regulatory asset and GIR dockets and  
7 because the GIR regulations separately require Southwest Gas to submit  
8 evidence in this GRC in support of the recorded costs for each GIR project.  
9 Company witness Erin E. Potokar provides testimony and support for the  
10 Company's GIR projects.

11 **Q. 49 Are you providing support for projects over \$1 million that are identified in**  
12 **MDR 106?**

13 A. 49 Yes, I am providing support for all non-GIR projects over \$1 million that are  
14 identified in MDR 106. Exhibit No. \_\_\_(RLC-4) provides a description, work order  
15 number, amount, and brief project summary for each item over \$1 million placed  
16 in service since the last GRC. There are thirty-five items in Southern Nevada,  
17 eleven items for Northern Nevada, and nine items for system allocable. Of these  
18 items, nine in Southern Nevada and five in Northern Nevada are blanket work  
19 orders.

20 **Q. 50 Please describe the purpose of blanket work orders.**

21 A. 50 Blanket Work Authorization (WA) numbers were established to efficiently capture  
22 the cost of a large number of small main, service and meter transactions into  
23 blanket work orders. Southwest Gas has a series of Blanket WA numbers for  
24 each district that are used to capture the following types of charges: 1) new main  
25 installations less than 100 feet; 2) new service installations; 3) new meter  
26 installations; 4) franchise-related main replacements less than 100 feet; 5)  
27 franchise related service replacements: 6) regular replacements less than 100



## **OUTWEST GAS CORPORATION**

October 26, 2018

Ms. Trisha Osborne  
 Assistant Commission Secretary  
 Public Utilities Commission of Nevada  
 1150 East William Street  
 Carson City, NV 89701-3109

Re: 18-05031  
 Errata to the Prepared Direct Testimony of Randi L. Cunningham

Dear Ms. Osborne:

During Company witness Randi L. Cunningham's live Direct/Certification Testimony October 23 in the above-referenced proceeding, the Company discovered that an incomplete version of Exhibit No.\_\_(RLC-4) was attached to the Prepared Direct Testimony of Randi L. Cunningham. Specifically, the version of Exhibit No.\_\_(RLC-4) that was attached to the Prepared Direct Testimony of Randi L. Cunningham inadvertently omitted pages 20 and 21. This was further discussed during Ms. Cunningham's live Rebuttal Testimony on October 25.

Please refer to the enclosed Errata to Exhibit No.\_\_(RLC-4) which aligns with Q&A 49 of Ms. Cunningham's Prepared Direct Testimony. This Errata provides a complete Exhibit No.\_\_(RLC-4) and includes the pages 20 and 21 that were inadvertently omitted. No other changes were made to Ms. Cunningham's testimony or Exhibit No.\_\_(RLC-4) other than the inclusion of pages 20 and 21 referenced herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Amy L. Timperley". The signature is stylized and somewhat cursive.

Amy L. Timperley  
 Director/Regulation & Energy Efficiency

Enclosures

005018

**SOUTHWEST GAS CORPORATION  
SYSTEM ALLOCABLE  
WORK ORDERS >\$100K IDENTIFIED IN MASTER DATA REQUEST 106  
CLOSED TO PLANT JUNE 2012 THROUGH JANUARY 2018**

Line No.	Description (a)	Work Order (b)	Total Amount (c)	Allocation to Southern Nevada (d)	Allocation to Northern Nevada (e)	Project Summary (f)	Line No.
1	Work Orders >\$100K and <\$1MM After Allocation	Various [1]	\$ 71,712,528	\$ 20,175,422	\$ 1,181,420	[1]	1
2	Work Orders > \$1MM After Allocation Financial Applications Replacement	0061W0001059	\$ 18,146,654	5,105,334	298,955	Costs associated with the financial systems modernization program, which replaced the 1980s vintage General Ledger and certain related applications.	2
3	Corp Headquarter Bldg A&B	0070W0001395	16,852,343	4,684,928	274,337	Purchase of Corporate Headquarters Buildings A & B, land and other closing costs. These buildings were previously leased	3
4	FOMS Phase 1 - Customer Service	0061W0001001	13,313,529	3,745,595	219,332	Development and implementation of the Field Operations Management System (FOMS) - FOMS Phase I - Customer Service module that replaces the current Mobile Service application.	4
5	FOMS Phase 2 - Work Mgmt	0061W0000511	9,786,464	2,753,299	161,226	Development and implementation of the Field Operations Management System (FOMS) - FOMS Phase II - Work Management replaces the current WMS application.	5
7	GIS Mapping Migration Project	0061W0000888	6,530,306	1,837,220	107,583	Implement a formal GIS-based mapping system to provide a more structured environment for the management of spatial reference and attribute data replacing only current functionality provided by the production EMRS system. The scope of this effort includes the purchase of software licenses and the engagement of consultants to assist with the implementation activities.	7
8	Subtotal - Work Orders > \$1MM After Allocation [2]		\$ 64,429,296	\$ 18,126,375	\$ 1,061,433		8
9	Work Orders >\$100K - Total	Various	\$ 136,141,824	\$ 38,301,797	\$ 2,242,853		9

[1] Please refer to MDR-01-106 Attachment 1 for work orders >\$100K and <\$1MM after allocation to Nevada.

[2] Sum of lines 1 through 5, MDR-01-106 Attachment 1.

005018

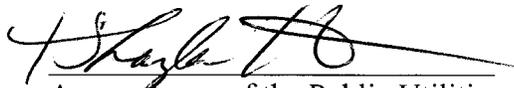
**CERTIFICATE OF SERVICE**

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 **SUR-REPLY OF THE PUBLIC UTILITIES COMMISSION OF NEVADA IN RESPONSE TO SOUTHWEST GAS CORPORATION REPLY** in Case No., A-19-791302-J via the 8<sup>th</sup> 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 1<sup>st</sup> day of November, 2019

  
An employee of the Public Utilities  
Commission of Nevada

Public Utilities Commission of Nevada  
1150 E. William Street  
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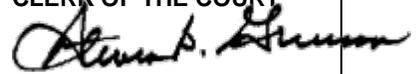
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*Attorneys for the State of Nevada*

**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  
SUR-REPLY TO SOUTHWEST GAS' REPLY IN SUPPORT  
OF THE PETITION FOR JUDICIAL REVIEW**

005020

005020

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

This case is about whether the Public Utility Commission of Nevada (“Commission” or “PUCN”) was supposed to apply a presumption of prudence to Southwest Gas (“SWG” or “Petitioner”) in the underlying general rate case. Assuming the Commission did not apply the presumption, the Commission did not err by not applying such a presumption because no such standard exists in Nevada law for general rate cases. SWG begins its Reply by stating that “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. Reply at 1:1-2. This statement is wholly false, as the Commission, throughout this entire case, has only done what it is designed to do – supervise and regulate the operation and maintenance of public utilities. *Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada ex rel. Cty. of Clark*, 120 Nev. 948, 956, 102 P.3d 578, 584 (2004).

If we uncover the guise of SWG’s dramatic narrative that the Commission confiscated its property, we can see that this case actually stems from SWG not being happy with the Commission’s subject decision (“Order”) in the underlying general rate case because it did not obtain its desired result, so it appealed the decision. It is important to keep in mind while reading these pleadings that SWG’s desired result includes having ratepayers pay for expenses such as massages, bartending costs, and golf memberships. 8 Certified Record (“CR”) 006475:21-006476:1, 006469:23-24.

SWG’s Petition is full of grand allegations supported by no concrete examples or analysis to support its conclusion. It is clear to the Bureau of Consumer Protection (“BCP”) what Petitioner is attempting to do – it is attempting to get this Court to hold that there is a presumption of prudence in general rate cases and that the standard of review for petitions is *de novo* on both law and facts in order to make it as easy as possible for SWG to get their desired result. To attain this end, SWG sought the path of least resistance to invoke constitutional issues when none exist. That is, Petitioner is betting that the mere mention of constitutional violations will scare this Court into thinking that the questions

1 of fact need to be reviewed anew based on a presumption that does not apply in general  
2 rate cases. The Petitioner even conspicuously leaves out clearly applicable state law on  
3 these issues and instead cites to inapplicable and nonbinding cases to try to lump the issues  
4 in this case together into one confusing mess.

5 In this Sur-reply, the BCP will untangle the snarl to show that this matter is actually  
6 quite simple and that the law and facts in this case provide that the Commission's Order  
7 should be affirmed. Specifically, SWG claims that a presumption of prudence has always  
8 been and should always be applied in general rate cases such as the underlying matter.  
9 SWG argues that it follows that because a presumption was not applied, they were caught  
10 off guard, which is what led to them not getting everything they asked for. It then claims  
11 that the alleged failure to apply the presumption deemed the Commission's Order  
12 confiscatory, invoking a blanket *de novo* standard of review mentioned only in *Ohio Valley*  
13 *Water Co. v. Borough of Ben Avon*, 253 U.S. 287 (1920), which applies to Fourteenth  
14 Amendment confiscation claims. Fortunately, this meandering and inaccurate logic can be  
15 stymied because Nevada does not apply a presumption of prudence in general rate cases.  
16 It follows that because no presumption applies, SWG's constitutional claims necessarily  
17 fail and the applicable standard of review is what Nevada statutory and case law clearly  
18 state: petitions for review from utility matters are to be reviewed under the substantial  
19 evidence standard. As has been shown, the Commission's Order is supported by  
20 substantial evidence, therefore, the Order should be affirmed.

## 21 II. ARGUMENT

### 22 A. There is No Presumption of Prudence in General Rate Cases

23 In the Reply, Petitioner ignores Nevada law that provides that there is no  
24 presumption of prudence in Nevada and instead states that "Staff and the Bureau needed  
25 to prove by a preponderance of the evidence that there was a 'serious doubt' that [SWG]  
26 incurred the disallowed expenses imprudently." Reply at 14: 20-21. As set forth in BCP  
27 and the PUCN's Oppositions, this argument is wholly contrary to applicable law.  
28 Specifically, 1) Nevada's statutory scheme governing rate cases (NRS and NAC 703 and

1 704) expressly provide that the utility has the burden of proof in rate cases; 2) no Nevada  
2 case has ever held that a presumption of prudence must be applied in general rate cases;  
3 and 3) the United States Supreme Court does not hold that a presumption must be applied.  
4 The following addresses each point in turn.

5 1. Applying a Presumption of Prudence Directly Conflicts with Nevada's  
6 Statutory Scheme Governing General Rate Cases

7 First, the statutory scheme governing utility rate cases is riddled with examples  
8 demonstrating that no presumption applies to utilities in general rate cases, including  
9 SWG. For example, NRS 704.040(1) and (2) tasks utilities with providing service charges  
10 that are just and reasonable while prohibiting unjust and unreasonable charges. NAC  
11 703.2231 expressly provides that when a utility applies for a rate adjustment, the utility  
12 must "sustain the burden of proof of establishing that proposed changes are just and  
13 reasonable and not unduly discriminatory or preferential." NRS 704, generally, provides a  
14 construct in which the utility must present its plans as evidence to the Commission and  
15 the Commission is to determine whether these plans warrant approval. *See*, for example,  
16 NRS 704.110. NRS 703.150 and NRS 704.001 provides that the purpose of the PUCN is to  
17 supervise and regulate the operation and maintenance of public utilities, including  
18 "provid[ing] for the safe, economic, efficient, prudent, and reliable operation and service of  
19 public utilities." The Nevada Supreme Court has described the PUCN's power as "plenary."  
20 *Nev. Power Co.* 120 Nev. at 957.

21 Thus, it is clear to see that the statutory scheme regulating public utilities puts the  
22 burden of proof on the public utility to show that its rates are just and reasonable and any  
23 change to the rates are also just and reasonable. Not to mention that this burden of proof  
24 has been applied in Nevada public utility cases for almost four decades. *See* BCP Opposition  
25 at 8:17-9:21. This burden placement (or lack of presumption) in the statutory scheme  
26 comports with common sense. A public utility such as SWG, has a captured set of  
27 customers who have little to no reasonable alternatives for necessary utility services. Thus,  
28 when a gas utility such as SWG desires to increase the customers' rates, it has the burden

1 of showing the Commission why the general population in Nevada should bear a rate  
2 increase. Otherwise, utilities would effectively be permitted to spend money as it sees fit,  
3 be presumed to have acted prudently, not be required to provide evidence of its decision-  
4 making process, and then require Nevada ratepayers to foot the bill. This practice is  
5 backwards, illogical, and potentially detrimental to Nevada ratepayers. Therefore, the  
6 current standard having the utility company bear the initial burden to put on its case must  
7 be maintained in order to sustain substantial justice in rate cases and to prevent the  
8 current statutory scheme from being rendered meaningless.

9           2. No Nevada Case has Held that Public Utilities are Entitled to a  
10           Presumption of Prudence in General Rate Cases

11           As provided in detail in BCP and PUCN's Oppositions, Petitioner is misinformed on  
12 the law when it states that Nevada cases have held that a presumption of prudence must  
13 apply in general rate cases in Nevada.

14           First, Petitioner's claim that, pursuant to *Nevada Power Co. v. Pub. Utilities*  
15 *Comm'n of Nevada*, 122 Nev. 821, 833, 138 P.3d 486, 494 (2006), a presumption of prudence  
16 must be applied in Nevada is simply wrong. *Nevada Power* does not apply in the context  
17 of a general rate case. Rather, *Nevada Power* is expressly limited to deferred accounting  
18 cases, a unique subset of energy cases wherein an energy company must purchase power  
19 on the wholesale market for more than it can charge customers. These types of cases  
20 encompass unique circumstances that require unique policies and law to adequately  
21 address. Put simply, the holding in *Nevada Power* does not extend to general rate cases.  
22 Further, the ruling in *Nevada Power* was expressly overturned by AB 7, codified in NRS  
23 704.110, which stated that no presumption applies in deferred accounting cases. Thus,  
24 *Nevada Power* is wholly inapplicable to the issue herein and should be rejected as binding  
25 or persuasive authority on the issue of presumption.

26           Second, Petitioner's claim that the Nevada Supreme Court adopted a presumption  
27 of prudence in general rate cases in *Public Service Commission v. Ely Light & Power Co.*,  
28 80 Nev. 312, 393 P.2d 305 (1964) is incorrect. *Ely Light* does not hold that a presumption

1 must be applied. Rather, *Ely Light* provides a series of conditions that the utility must  
2 meet in order for the Commission to deem that the utility has exercised proper judgment:

3           In the absence of an abuse of discretion on the part of the utility  
4           and in the **absence of showing lack of good faith,**  
5           **inefficiency or improvidence, and if the amounts in**  
6           **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.

7  
8 *See Ely Light* at 324, 393 P.2d 305, 311 (emphasis added).

9           To say that *Ely Light* holds that a presumption of prudence must be applied is to  
10 completely leave out the language leading up to the phrase “the commission should not  
11 substitute its judgment for that of management.” In reality, it is only when the costs are  
12 found to be reasonable, and not made with an abuse of discretion, lack of good faith,  
13 inefficiency, or improvidence that the Commission should not substitute its judgment for  
14 that of management’s. That is quite a long list of conditions that the utility has the burden  
15 of showing and that SWG conveniently left out of its argument relating to *Ely Light*. In  
16 other words, the above language in *Ely Light* is silent on how to ascertain whether the  
17 amounts in question meet the requirements listed; it only states that if it is ascertained  
18 that the requirements are met, the Commission cannot then substitute its judgment for  
19 that of management. The bottom line is that *Ely Light* does not address who has the initial  
20 burden and in fact provides nothing in terms of order of procedure or burden shifting. *Ely*  
21 *Light* only provides that the commission should not arbitrarily disallow a request when no  
22 evidence exists to indicate unreasonable or imprudent judgment by the company. Certainly  
23 SWG’s misinterpretation of *Ely Light* should not be grounds for a decision that would alter  
24 the way all general rate cases run in Nevada, especially when that decision would conflict  
25 with state laws and regulations.

26           Moreover, SWG’s citation to the Idaho case *Boise Water Corp. v. Idaho Pub. Utils.*  
27 *Comm’n*, 555 P.2d 163, 169 (Idaho 1976) to hold that other cases cite to *Ely Light* to hold  
28 that a presumption exists should be discarded as inaccurate and irrelevant. First, *Boise*

1 *Water* is an Idaho case and not binding on this Court. Further, a review of this case shows  
2 that the *Boise Water* Court cites to *Ely Light*, not to support a holding, but rather to  
3 summarize the utility's argument in that case. Specifically, the Court held that "the  
4 Company asserts that the Commission was without power to find the operating expenses  
5 unreasonable without finding 'specific' ledger items wasteful, inefficient or expended in bad  
6 faith on the basis of competent evidence." *Boise Water* 555 P.2d at 171. Moreover, the *Boise*  
7 *Water* Court goes on to clarify that the cases cited did not have "competent evidence of  
8 unreasonable expenditures." In other words, not only does *Boise Water* cite to *Ely Light*  
9 only to provide the utility's argument, but it also does not claim that *Ely Light* holds that  
10 there is a presumption of prudence. Rather, it holds the commission should only deem an  
11 expenditure unreasonable if based on competent evidence, which is precisely what the  
12 Commission did in the instant matter. *Id.* Therefore, this case should be disregarded  
13 insofar as SWG claims that it in any way supports the notion that *Ely Light* holds that a  
14 presumption of prudence is applied in general rate cases.

15 Additionally, it should be noted that any argument SWG makes relating to a  
16 presumption of prudence existing because PUCN has applied a presumption before in rate  
17 cases is without merit. Administrative agencies such as SWG are not bound by *stare*  
18 *decisis*, and thus, a method the Commission uses or a decision the Commission comes to in  
19 one case has no binding effect on future cases. *See State, Dep't of Taxation v. Chrysler*  
20 *Group, LLC*, 129 Nev.274, 279, 300 P.3d 713, 717 at n.3 (2013) (citing *Motor Cargo v. Public*  
21 *Service Comm'n*, 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992)); *see also Desert Irrigation,*  
22 *Ltd. V. State of Nevada*, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997) ("[N]o binding effect  
23 is given to prior administrative determinations.").

24 3. Non-Binding U.S. Supreme Court Cases Have Not and Cannot Decide on  
25 the Issue of Presumption

26 Lastly, Petitioner's claim that a presumption of prudence must be applied pursuant  
27 to *Mo. ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Mo.*, 262 U.S. 276, 289 n.1 (1923)  
28 and *W. Ohio Gas Co. v. Pub. Utilities Comm'n of Ohio*, 294 U.S. 63, 55 S. Ct. 316, 79 L. Ed.

1 761 (1935). Reply at 10:16-11:7. Petitioner's claim regarding these cases is without merit  
2 because these cases do not hold a presumption of prudence must be applied in general rate  
3 cases.

4 First, SWG cites to Justice Brandeis's concurrence in *Sw. Bell Tel. Co.* to claim that  
5 the U.S. Supreme Court held that a presumption of prudence must be applied. The  
6 concurring opinion reads:

7 The term 'prudent investment' is not used in a critical sense.  
8 There should not be excluded, from the finding of the base,  
9 investments which, under ordinary circumstances, would be  
10 deemed reasonable. The term is applied for the purpose of  
11 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.

12 *Sw. Bell Tel.*, 262 U.S. at 289.

13 This concurrence is not the holding of the majority opinion; it is the concurrence,  
14 which is not binding law. Moreover, Brandeis's concurrence was not intended to be an  
15 adoption of a presumption of prudence (i.e. shifting the burden from the utility to an  
16 adverse party having to initially show imprudence with evidence). Rather, the concurrence  
17 was intended to shift the inquiry from a fair market valuation analysis to historical costs  
18 analysis. *Sw. Bell Tel.*, 262 U.S. at 290. A shifting of the burden of proof is a drastic  
19 procedural change while a shifting of the focus of an inquiry is an incremental change that  
20 does not change which party has the burden of proof. This distinction is critical.

21 Further, the U.S. Supreme Court referenced Brandeis's view in *FPC v. Hope Natural*  
22 *Gas Co.*, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944) by holding that a regulator is not  
23 bound by any single formula in determining rates. *Hope*, 320 U.S. at 602. Notably, the  
24 *Hope* Court did not adopt a presumption of prudence for historically incurred costs. *Id.*  
25 Further, the language in the *Sw. Bell Tel.* concurrence does not provide that there is a  
26 presumption of prudence. Instead, it states that an investment is presumed to be made  
27 with reasonable judgment unless evidence to the contrary is provided. This assumption  
28 that investments are not made in bad faith is a far cry from who has the burden of proof in

1 a general rate case. That is, the Commission can assume that SWG did not act in bad faith  
2 in making their business decisions and still require them to carry the burden of showing  
3 why the utility's expenses warrant a rate increase. Again, just like in *Ely Light*, there is  
4 no language that indicates the procedural order used to determine if the investments were  
5 made with reasonable or unreasonable judgment.

6 Similarly, SWG claims that in *W. Ohio Gas Co. v. Pub. Util. Comm 'n of Ohio*, 294,  
7 U.S. 63, 72, 55 S. Ct. 316,321, 79 L. Ed. 761 (1935), the language “[g]ood faith is to be  
8 presumed on the part of the managers of a business” and that “[i]n the absence of a showing  
9 of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the  
10 measure of *a prudent outlay*” is a holding that a presumption of prudence must be applied.  
11 *W. Ohio Gas*, 294 U.S. at 72.

12 In *W. Ohio Gas*, the cited statement in no way provides that the United States  
13 Supreme Court has mandated a presumption of prudence in rate cases. In *W. Ohio Gas*,  
14 the Commission had cut down the recoverable amount of expenses the utility could recover  
15 without any direct or circumstantial evidence for why it did so, only stating that the utility's  
16 request was “unnecessary and wasteful.” *Id.* at 71. In response, the U.S. Supreme Court  
17 held that it should be presumed that the utility acted in good faith (not with prudence), but  
18 did not mention who had the burden of proof to show whether there was an absence or  
19 presence of inefficiency or improvidence. Rather, it could be inferred from the *W. Ohio Gas*  
20 language that once the utility provides evidence that demonstrates that costs were  
21 reasonably incurred, the commission cannot arbitrarily claim that the expenses were  
22 imprudent. The Commission must base any such claim on substantial evidence, which is  
23 exactly how the laws and regulations are written in Nevada. To hold otherwise would be  
24 to say that the Commission can simply file their costs with the Commission and the  
25 Commission must take the costs at face value and increase the utility rates In Nevada as  
26 per the request, no questions asked.

27 SWG's claim that because *Ely Light* cited to these two cases means that the Nevada  
28 Supreme Court has adopted a presumption of prudence is nonsensical because these two

1 cases do not hold that such a presumption must be applied. In fact, *Ely Light's* conditional  
2 language leading up to the statement that the commission should not substitute its  
3 judgment for that of management shows that these Supreme Court cases are not  
4 interpreted as a burden of proof holding, and instead stand for the notion that a commission  
5 cannot arbitrarily reject a utility's requests without any evidentiary support for its  
6 decision. The element of arbitrary action by the Commission is what gets the case into the  
7 territory of unconstitutional confiscation, but a case that is supported by substantial and  
8 competent evidence would not qualify as arbitrary pursuant to *W. Ohio Gas*.

9 The common thread between *Sw. Bell Tel* concurrence and *W. Ohio Gas* is that they  
10 discuss what has to be shown in a utility rate case, not who has the burden to prove it and  
11 in what order. As the Supreme Court cases cited to by SWG do not hold that a presumption  
12 of prudence must be adopted by state utility commissions, and because no Nevada State  
13 Court of law has ever provided such a holding, SWG's claim that a presumption of prudence  
14 should have been applied in the underlying matter necessarily fails.

15 **B. The Applicable Standard of Review in This Matter is Substantial**  
16 **Evidence**

17 Petitioner's claim that the *de novo* standard of review should be applied to this entire  
18 case. Petitioner is incorrect because 1) a blanket *de novo* standard is in direct conflict with  
19 Nevada binding authority; and 2) the United States Supreme Court case cited to by  
20 Petitioner is inapplicable.

21 1. Nevada Law Clearly Provides that a Commission's Decision Should be  
22 Upheld if it is Supported by Substantial Evidence

23 Nevada Revised Statutes ("NRS") 703.373(11) provides the standard of review of  
24 Commission decisions and states that "the decision may be affirmed, or set aside, in whole  
25 or in part, if the substantial rights of the petitioner have been prejudiced because the  
26 decision by the Commission is: (a) In violation of constitutional or statutory provisions; (b)  
27 In excess of the statutory authority of the Commission; (c) Made upon unlawful procedure;  
28 (d) Affected by other error of law; (e) Clearly erroneous in view of the reliable, probative

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1 and substantial evidence on the whole record; or (f) Arbitrary or capricious or  
2 characterized by abuse of discretion. NRS 703.373(11). Further, NRS 703.373(11) provides  
3 that the Court “shall not substitute its judgment for that of the Commission as to the weight  
4 of evidence on questions of fact.”

5 The district court reviews a PUCN decision for legal error or abuse of discretion.  
6 *Nevada Power Co. v. Dist. Ct.*, 120 Nev. 948, 958, 102 P.3d 578, 585 (2004); NRS 703.373(6).  
7 A PUCN decision that is “within the framework of the law” and based on substantial  
8 evidence in the record must be upheld. *Silver Lake Water v. Public Serv. Comm'n*, 107 Nev.  
9 951, 954, 823 P.2d 266, 268 (1991) (quoting *Nevada Power v. Public Service Commission*,  
10 105 Nev. 543, 545, 779 P.2d 531, 532 (1989) ). Substantial evidence is defined as that which  
11 a reasonable mind might accept as adequate to support a conclusion. *State, Emp. Security*  
12 *v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting *Richardson v. Perales*,  
13 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) ). In reviewing a PUCN decision  
14 for substantial evidence, the appellate court may not reweigh the evidence or substitute its  
15 judgment for that of the PUCN on factual questions. NRS 703.373(6). The Court is to  
16 review questions of law *de novo*. *State Farm Mut. v. Comm'r of Ins.*, 114 Nev. 535, 539, 958  
17 P.2d 733, 735 (1998).

18 Thus, the correct standard of review is to separate this analysis into two parts: 1)  
19 review the decisions of the Commission to determine if they were supported by substantial  
20 evidence; and 2) review the question of whether there is a presumption of prudence in  
21 general rate cases *de novo*. To apply a *de novo* review to the entire matter would be to  
22 adopt Petitioner’s strategic misrepresentation of the standard of review that directly  
23 conflicts with the clear standard of review authority.

## 24 2. Ben Avon Does Not Apply to This Case

25 To support its assertion that both the law and facts are to be reviewed *de novo*,  
26 Petitioner cites solely to *Ohio Valley Water Co. v. Borough of Ben Avon*, 253 U.S. 287 (1920),  
27 a Supreme Court case from 1920, to hold that, because Petitioner claimed confiscation of  
28 property, the standard of review is *de novo* as to both law and facts.

1           However, subsequent United States Supreme Court cases provided a standard for  
 2 what a utility company must do in order to properly claim confiscation of property in a  
 3 utility's case. Specifically, in *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314, 109 S. Ct.  
 4 609, 619, 102 L. Ed. 2d 646 (1989), the United States provided that the methods of  
 5 ratemaking are not subject to constitutional attack without justification.

6           "We stated in *Permian Basin* that the commission 'must be  
 7 free, within the limitations imposed by pertinent  
 8 constitutional and statutory commands, to devise methods of  
 9 regulation capable of equitably reconciling diverse and  
 10 conflicting interests.' 390 U.S. at 767, 88 S.Ct., at 1360  
 11 (emphasis added)...an otherwise reasonable rate is not subject  
 12 to constitutional attack by questioning the theoretical  
 consistency of the method that produced it. 'It is not theory, but  
 the impact of the rate order which counts.' *Hope*, 320 U.S., at  
 602, 64 S.Ct., at 288. 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.

13 *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314, 109 S. Ct. 609, 619, 102 L. Ed. 2d 646  
 14 (1989)

15           The *Duquesne* Court then established a test for determining whether a rate was  
 16 constitutionally objectionable: A utility claiming a constitutional objection must  
 17 demonstrate that the reduced rate jeopardized the financial integrity of the company by:  
 18 (1) leaving the company with insufficient operating capital; (2) impeding its ability to raise  
 19 future capital; or (3) showing the rates are inadequate to compensate current equity holders  
 20 for the risk associated with their investments, a utility cannot simply claim that there is a  
 21 constitutional issue in a ratemaking case. *Duquesne*, 488 U.S. at 312.

22           In this case, SWG never even attempted to satisfy the *Duquesne* test in front of the  
 23 PUCN or in its Petition before this Court. Rather, it simply alleged confiscation without  
 24 providing any evidence of confiscation, let alone evidence to satisfy the *Duquesne* test, and  
 25 then now attempts to invoke the *Ben Avon* standard of review. A utility is prohibited per  
 26 *Duquesne* from alleging a confiscation argument without providing evidence regarding the  
 27 company's resulting financial integrity. Otherwise, utility companies would claim  
 28 confiscation in every rate case appeal in order to get a *de novo* standard of review. SWG's

1 utter failure to show how the Order jeopardized the financial integrity of the company  
 2 estops SWG from claiming confiscation in this case. Therefore, *Ben Avon's de novo*  
 3 standard of review does not apply to this case. Instead, the clear law in Nevada on standard  
 4 of review in utility cases, substantial evidence, applies.

### 5 C. The Commission's Order is Supported by Substantial Evidence

6 Without going into great detail because of the limited space in this sur-reply, and  
 7 because the PUCN did an excellent job of providing the substantial evidence replied upon  
 8 in its Opposition (*See* PUCN Opposition at pp. 9-40), the following provides an overview of  
 9 the substantial evidence used by the Commission to justify its Order, to be used as a  
 10 reminder to this Court that no error occurred and the Order of the Commission should be  
 11 affirmed.

#### 12 1. The PUCN's Return on Equity Complies with the Applicable Standard and 13 is Based on Substantial Evidence

14 The Nevada Supreme Court has found that "[t]he crux to every rate case involving  
 15 the cost of common equity is just how one goes about conforming to the *Bluefield* and *Hope*  
 16 cases." *Nevada Power Co. v. Pub. Serv. Comm'n*, 91 Nev. at 825, 544 P.2d at 434. In  
 17 *Bluefield*, the U.S. Supreme Court provided:

18 A public utility is entitled to such rates as will permit it to earn  
 19 a return on the value of the property which it employs for the  
 20 convenience of the public equal to that generally being made  
 21 at the same time and in the same general part of the country  
 22 on investments in other business undertakings which are  
 23 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.

24 *Bluefield Waterworks & Improvement Co. v. West Va. Pub. Serv. Comm'n* 262 U.S. 679, 692-  
 25 693 (2013).

26 *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 609 (1944)  
 27 provides that the return on equity should be commensurate with the returns of investments  
 28 in other enterprises having corresponding risks and be sufficient enough to ensure

1 confidence in the financial integrity of the utility such that the utility can maintain its credit  
2 and attract capital. *Id.* at 603.

3 In complying with the *Bluefield* and *Hope* standards per the Nevada Supreme Court,  
4 the PUCN specifies a percentage range for return on equity based on an approved range of  
5 reasonableness. In this case, the Certified Record provided that the range of  
6 reasonableness in this case was 9.10 and 9.70 and each party submitted their range of  
7 reasonableness. CR at 368-370. Next, the PUCN reviewed the evidence provided by the  
8 parties' experts and considered (1) the results of each expert's evaluation of various return  
9 on equity models; (2) the experts' judgement in assessing macroeconomic conditions, capital  
10 markets, SWG's particular circumstances (e.g., capital structure, risk profile, and  
11 regulatory environment); and (3) each expert's critique of other experts' analyses. *Id.* at  
12 367. In terms of evaluating the evidence presented on return on equity, the PUCN focused  
13 on the return on equity model analyses; macroeconomic conditions; and SWG's risk relative  
14 to the proxy group companies. *See* PUCN Opposition at 11-12.

15 Ultimately, the PUCN found that SWG's arguments on each of these three factors  
16 was not convincing. *Id.* at 12-13. In response to SWG's motion for reconsideration, PUCN  
17 noted that the rate of return of equity in the Order, 9.25, fell within the range of  
18 reasonableness of several of the experts' testimonies, was based on the evidence provided  
19 by the parties to the Commission, and was commensurate with returns in other enterprises  
20 carrying similar risks. 1 CR at 612-614. As the Commission's Order on the return on equity  
21 was based on substantial record evidence, the Order should be affirmed.

22 2. The PUCN's Determination Regarding Pension Expenses was Based on  
23 Substantial Evidence

24 SWG also challenged two of the Commission's decisions relating to pension expenses  
25 1) the 2018 discount rate that is used to determine pension expenses and (2) normalization  
26 of Southwest Gas's pension expenses over a three-year period. SWG's Petition at 45-46.

27 In the underlying hearing, SWG proposed an \$11.7-million increase in pension costs.  
28 1 CR at 433. SWG stated, and PUCN agreed, that pension costs have fluctuated since 2011.

1 *Id.* at 432. SWG proposed using a pension tracker to address the volatility. *Id.* at 435.  
2 Other parties in the proceeding raised concerns about the pension tracker. *Id.* at 433. For  
3 example, the BCP contended that a pension tracker does not provide SWG with an  
4 incentive to control pension costs. *Id.* The Commission ultimately agreed with the other  
5 parties and determined that normalizing pension expenses over a three year period is the  
6 appropriate way to address the volatility. *Id.* 436-437.

7 In its Reply, SWG claims that based on the presumption of prudence, SWG's pension  
8 expenses should have been approved. Reply at 20:15-16. However, the presumption of  
9 prudence, even if it did exist, would not apply to this scenario. In theory, the presumption  
10 would apply to management's decision-making process in regards to incurring the pension  
11 expenses, not the methodology the company uses to address the volatility of the expense.  
12 The Commission and parties inquiring into the appropriate method and reviewing other  
13 proffered methods for addressing pension expense volatility is well within the scope of the  
14 PUCN's plenary power. In fact, the purpose of the hearing in the underlying matter is  
15 precisely this – to present evidence and expert testimony regarding why the increase should  
16 be made based on its methods and calculations. Otherwise, why would there need to be  
17 discovery and a hearing in the first place?

18 Moreover, not that it makes a difference because a presumption of prudence does not  
19 exist in Nevada, but the manner in which the evidence unfolded shows that the  
20 Commission did not fail to apply a presumption. The Commission reviewed evidence on  
21 SWG's method, heard evidence on other methods, and determined based on evidence<sup>1</sup> that  
22 SWG's method was not reasonable. This is precisely what *Ely Light* proposed – the  
23 Commission will not substitute its judgment as long as the expenses incurred are  
24 reasonable. Here, evidence provided that the expenses were not. As the Commission's  
25 decision on pension expenses discount rate was a result of clear evidence presented in the

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<sup>1</sup> 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.”).

1 underlying case and based on substantial evidence that the method proposed by SWG was  
2 not reasonable, the decision in no way relates to a presumption of prudence. The  
3 normalization of pension expenses was raised as an issue by Staff, and PUCN based its  
4 decision on evidence presented by all parties with the purpose of determining what was  
5 just and reasonable for SWG and the ratepayers.

6 3. The Commission's Finding that Regarding SWG's Work Orders was  
7 Supported by Substantial Evidence

8 The final issue on appeal involves PUCN's decision to disallow the costs associated  
9 with the projects in the Challenged Work Orders. CR at 2601:16-19. These Work Orders  
10 were in question in the first place as a result of a routine audit that takes place during rate  
11 cases. 5 CR at 3614:9-20. The events leading up to this decision show that the Commission  
12 gave SWG ample opportunity to show that the costs were reasonable and prudently  
13 incurred. Specifically, in SWG's initial application, the evidence presented to support the  
14 Challenged Work Orders was the prepared direct testimony of a SWG witness. 1 CR at 494.  
15 During discovery and at the hearing, it was revealed that this witness was not involved in  
16 the execution of any of the projects included in the Challenged Work Orders, did not review  
17 any of the charges made to the Challenged Work Orders, and did not possess any personal  
18 knowledge to support the underlying cost data included in the work orders. PUCN  
19 Opposition at 28:7-11. Further, the witness was not able to provide any information about  
20 why SWG made the decision to incur the costs associated with the software projects. 1 CR  
21 at 494.

22 Staff then tried to work with SWG to get information regarding the Challenged Work  
23 Orders, including issuing numerous data requests, and having discussions with SWG  
24 employees. 5 CR at 3690:19-3691:3. In other words, the PUCN was trying to find evidence  
25 to show that the costs were just and reasonable but could not. *Id.* At the conclusion of the  
26 discovery process, SWG had provided the following to support the Challenged Work Orders:  
27 the names of and budgets for the projects; invoices or estimates for purchases made; the  
28 name and/or signature of the employee or consultant authorizing the expenditures; memos

1 identifying individuals in charge of various projects; and organizational charts for the  
2 projects. 4 CR at 2601:19-23. What was missing was any evidence that the projects'  
3 authorized budgets and expenditures were prudent investments, the least-cost option, the  
4 best available alternative project, or reasonable under the circumstances. *Id.* at 2601:23-  
5 25. Further, PUCN did not provide any rebuttal testimony addressing Staff's issues with  
6 the Challenged Work Orders, despite learning of the concerns with the Orders during the  
7 discovery process. CR at 3214:9-25.

8 In claiming that the Commission's decision on the Challenged Work Orders was  
9 incorrect, SWG only states that the Commission cannot provide evidence that the expenses  
10 were imprudent. Reply at 15: 10-11. However, PUCN points to evidence that the expenses  
11 were imprudent through Staff and its experts. 4 CR at 2601. Additionally, many of the  
12 expenses included in the Challenged Work Orders were prima facie unreasonable,  
13 including massages, tenant improvements, wireless speaker systems, golf memberships,  
14 etc. PUCN Opposition at 31:22-33:8. To say that the PUCN had no authority to hold that  
15 these sorts of expenses were imprudent would lead to absurd results. The PUCN has the  
16 authority and responsibility to review SWG's evidence and listen to all the evidence and  
17 testimony provided at the hearing to determine whether and which expenses are and are  
18 not reasonable. SWG did precisely this when it determined that the Challenged Work  
19 Orders were not reasonable.

20 Further, to the extent that SWG essentially stonewalled Staff during the entire  
21 discovery process in the rate case, SWG should be estopped from now claiming that the  
22 Commission did not give them the presumption of prudence. The Commission and Staff  
23 attempted to work with SWG, believing that they had a reason for the expenses. But SWG  
24 refused or otherwise failed to respond to Staff's repeated inquiries regarding the decision-  
25 making process relating to the expenses incurred, and then turned around and claimed  
26 that the Commission's decision was improper because there was no evidence. If SWG were  
27 to prevail on this argument, the Court would be condoning a stonewalling strategy. The  
28 party seeking the change cannot refuse to participate in the process and then claim that it

1 should have received what it asked for. Such a conclusion would make the entire rate case  
 2 process utterly useless. Pursuant to NAC 2231, SWG was required to “sustain the burden  
 3 of proof of establishing that its proposed changes are just and reasonable...and the  
 4 applicant must ensure that the material it relied upon is of such composition, scope and  
 5 format that it would serve as its complete case if the matter is set for hearing.” SWG failed  
 6 to meet this burden and instead only provided evidence of “a systematic lack of  
 7 accountability, oversight and prudent management.” 1 CR at 493.

8 **D. Assuming *Arguendo* that a Presumption Should have been Applied,**  
 9 **the Proper Course of Action Would Not be to Grant Petitioner’s**  
 10 **Requested Relief**

11 In its Petition and Reply, the Commission requests the remedy by this Court of not  
 12 only vacating the Commission’s order, but also approving all of the Challenged Work  
 13 Orders, pension expenses, and the return on equity proposed by SWG. Reply at 20: 2-4.

14 This remedy would be in direct violation of the Nevada law pursuant to  
 15 NRS 703.373(11) and *State v. Zephyr Cove Water Co.*, 94 Nev. 634, 584 P.2d 698 (1978).  
 16 While BCP strongly believes that SWG’s arguments fail and the Commission’s Order  
 17 should be affirmed, BCP wants to make clear that it would be improper to approve SWG’s  
 18 request in the event this Court did not want to affirm the Commission’s Order. NRS  
 19 703.373(11) provides, in relevant part:

20 The court shall not substitute its judgment for that of the  
 21 Commission as to the weight of the evidence on questions of  
 22 fact. The court may affirm the decision of the Commission or  
 23 set it aside in whole or in part...

24 NRS 703.373(11).

25 Pursuant to *Zephyr*, the proper remedy in an appeal from the Commission’s order is  
 26 to remand the case back to the Commission directing the commission regarding the law.  
 27 In *Zephyr*, the utility petitioned for review from the Commission’s decision in a rate case.  
 28 The judge who heard the petition on review ordered that the Utility was “entitled to a rate  
 structure which would generate revenues of \$52,155.” 94 Nev. at 635. The judge in hearing  
 the petition determined that a reasonable rate of return was 8%. *Id.* In response, the

1 Nevada Supreme Court set aside this order, holding that the court upon petition for review  
2 is not statutorily authorized to order the rate in the underlying case. *Id.*

3           The overriding limitation upon the court's function in the  
4 review of an administrative agency's determination is that  
5 “neither the trial court, nor this court, (may) substitute its  
6 judgment for the administrator's determination.” *North Las*  
7 *Vegas v. Public Serv. Comm'n*, 83 Nev. 278, 281, 429 P.2d 66,  
8 68 (1967). Review of the district court's findings reveals that  
9 the court did, indeed, “substitute its judgment” for that of the  
10 Commission.

11 *State v. Zephyr Cove Water Co.*, 94 Nev. at 637.

12           Here, if this Court were to somehow hold that a presumption of prudence applies,  
13 instead of concluding that that means that SWG’s requests should be ordered, the  
14 Commission, pursuant to *Zephyr*, should remand this matter back to the Commission  
15 directing the Commission to apply the presumption of prudence.

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1 III. CONCLUSION

2 The law and facts in this case provide that the Commission’s Order should be  
3 affirmed. Nevada does not apply a presumption of prudence in general rate cases, and in  
4 fact, NRS and NAC 703 and 704 repeatedly provide that the utility requesting a rate  
5 increase has the burden of proving its case. SWG’s constitutional claims necessarily fail  
6 because no presumption applies and because SWG provided no evidence that the  
7 Commission’s Order amounted to a confiscation. The applicable standard of review in  
8 utility cases on factual issues in Nevada is whether the Commission’s decision was  
9 supported by substantial evidence. In the underlying case, the Commission’s clearly  
10 applied the appropriate laws and standards, and based its decision on substantial evidence  
11 in the record. As a result, the Commission’s Order should be affirmed.

12 Respectfully submitted this 1st day of November 2019.

13  
14 AARON D. FORD  
Attorney General

15 ERNEST D. FIGUEROA  
16 Consumer Advocate

17 By: /s/ WHITNEY F. DIGESTI  
18 WHITNEY F. DIGESTI (NSBN 13012)  
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21 *Attorneys for the State of Nevada*

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**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 1st day of November, 2019, I served the foregoing BUREAU OF CONSUMER PROTECTION'S SUR-REPLY TO SOUTHWEST GAS' REPLY IN SUPPORT OF THE PETITION FOR JUDICIAL REVIEW via the Court's electronic filing system to:

DANIEL F. POLSENBERG  
JOEL D. HENRIOD  
JUSTIN J. HENDERSON  
ABRAHAM G. SMITH  
LEWIS ROCA ROTHGERBER CHRISTIE  
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Las Vegas, Nevada 89169-5996  
*Attorneys for Petitioner*

Garrett Weir  
Debra M. Terwilliger  
PUBLIC UTILITIES COMMISSION  
OF NEVADA  
1150 E. William Street  
Carson City, Nevada 89701

/s/ Vivian Barrera-Monroy  
An Employee of the  
Office of the Attorney General  
State of Nevada

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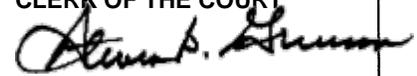
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Steven D. Grierson  
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1 **NEOJ**  
2 DANIEL F. POLSENBERG (SBN 2376)  
3 JOEL D. HENRIOD (SBN 8492)  
4 JUSTIN J. HENDERSON (SBN 13,349)  
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14 ASmith@LRRC.com

15 *Attorneys for Petitioner Southwest Gas Corporation*

16  
17 DISTRICT COURT  
18 CLARK COUNTY, NEVADA

19 SOUTHWEST GAS CORPORATION,  
20  
21 Petitioner,  
22  
23 *us.*  
24 PUBLIC UTILITIES COMMISSION  
25 OF NEVADA,  
26  
27 Respondent.

Case No.: A-19-791302-J

Dep't No.: 19

**NOTICE OF ENTRY OF ORDER  
GRANTING "MOTION FOR LEAVE TO  
FILE REPLY IN SUPPORT OF  
PETITION FOR JUDICIAL REVIEW"**

28 Please take notice that an Order Granting Motion for Leave to File Reply  
in Support of Petition for Judicial Review was entered on November 11, 2019.  
A true and correct copy is attached.  
Dated this 14<sup>th</sup> day of November, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ Abraham G. Smith

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

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**CERTIFICATE OF SERVICE**

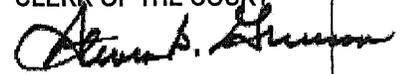
I certify that on November 14, 2019, I served the foregoing Notice of Entry of Order Granting Motion for Leave to File Reply in Support of Petition for Judicial Review through the Court’s electronic filing system upon all parties on the master e-file and serve list.

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

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1 OGM  
 2 DANIEL F. POLSENBERG (SBN 2376)  
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Attorneys for Petitioner Southwest Gas Corporation

DISTRICT COURT  
CLARK COUNTY, NEVADA

SOUTHWEST GAS CORPORATION,

Case No.: A-19-791302-J

Petitioner,

Dep't No.: 19

vs.

**ORDER GRANTING "MOTION FOR  
LEAVE TO FILE  
REPLY IN SUPPORT OF PETITION  
FOR JUDICIAL REVIEW"**

PUBLIC UTILITIES COMMISSION  
OF NEVADA, *et al.*,

Respondents.

On October 15, 2019, this Court heard petitioner Southwest Gas Corporation's request for leave to file its reply in support of the petition for judicial review. Petitioner Southwest Gas Corporation and respondents, the Public Utilities Commission of Nevada and the Bureau of Consumer Protection, were present at the October 15, 2019, hearing. Having considered the briefs, oral argument, and the record before the Court, the Court orders as follows:

ORDERED that petitioner's "Motion for Leave to File Reply in Support of Petition for Judicial Review" is GRANTED. The reply attached as Exhibit A to the motion shall be filed.

Further ORDERED that each of the respondents, the Public Utilities Commission of Nevada and the Bureau of Consumer Protection, shall be permitted

1 to file a sur-reply, which shall be limited to 19 pages and filed on or before No-  
2 vember 1, 2019, with tabbed courtesy copies to be provided to the Court.

3 Further ORDERED that the petition for judicial review is set for argument  
4 on December 17, 2019, at 9:00 a.m.

5 Dated this 17th day of November, 2019.

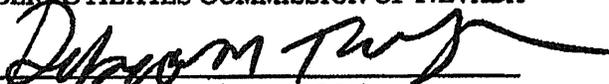
6  
7 Walter K. K...  
8 DISTRICT COURT JUDGE 

9 Respectfully submitted by:  
10 LEWIS ROCA ROTHGERBER CHRISTIE LLP

11 By:   
12 DANIEL F. POLSENBERG (SBN 2376)  
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19 *Attorneys for Petitioner Southwest Gas Corporation*

20 Approved as to form and content by:  
21 PUBLIC UTILITIES COMMISSION OF NEVADA

22 By:   
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28 ATTORNEY GENERAL'S BUREAU OF CONSUMER PROTECTION

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34 *Attorneys for Respondent the Attorney General's Bureau of Consumer Protec-  
35 tion*

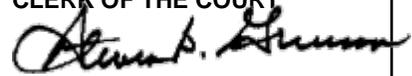
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**CONFILE**

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Tel: (702) 684-6132  
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Attorneys for: *Public Utilities Commission of Nevada*

**IN THE EIGHT JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF CLARK**

SOUTHWEST GAS CORPORATION, )

Petitioner, )

vs. )

PUBLIC UTILITIES COMMISSION OF )  
NEVADA, *et al.*, )

Respondents. )

CASE NO. A-19-791302-J

DEPT. NO. 19

**RESPONDENT'S NOTICE OF FILING OF  
PETITION FOR WRIT OF MANDAMUS OR,  
ALTERNATIVELY, PROHIBITION**

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

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1 TO: The Eighth Judicial Court, Department No. 19, Clark County, Nevada, the Honorable  
2 Joseph T. Bonaventure, District Judge, and the Honorable William D. Kephart, District Judge; and

3 To: Southwest Gas Corporation, a Delaware Corporation, and its attorneys of record:

4 PLEASE TAKE NOTICE that on the 9<sup>th</sup> day of December, 2019, the Public Utilities  
5 Commission of Nevada filed with the Nevada Supreme Court its Petition for a Writ of Mandamus or,  
6 Alternatively, Prohibition relating to the Eight Judicial District Court Case No. A-19-791302-J entitled  
7 *Southwest Gas Corporation, Petitioner, vs. Public Utilities Commission of Nevada, et al.,*  
8 *Respondents.*

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

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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 9<sup>th</sup> day of December, 2019, I served a true and correct copy of the foregoing **RESPONDENT'S NOTICE OF FILING OF PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION** using the Court's CM/ECF electronic service system to the following:

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*Attorneys for Southwest Gas Corporation*

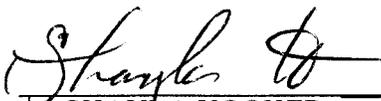
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Office of the Attorney General  
Bureau of Consumer Protection  
100 N. Carson Street  
Carson City, Nevada 89701  
*Attorneys for the Nevada Attorney General's Bureau of Consumer Protection*

And by depositing a copy in state mail to:

The Honorable Joseph T. Bonaventure  
330 South Third Street  
Las Vegas, Nevada 89101

The Honorable William D. Kephart  
Department No. 19  
Eighth Judicial District Court  
200 Lewis Avenue  
Las Vegas, Nevada 89155

DATED this 9<sup>th</sup> day of December, 2019.

  
SHAYLA HOOKER

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

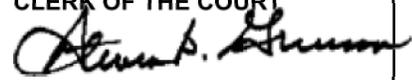
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**MSTAY**

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Attorneys for: *Public Utilities Commission of Nevada*

**IN THE EIGHT JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF CLARK**

SOUTHWEST GAS CORPORATION, )

Petitioner, )

vs. )

PUBLIC UTILITIES COMMISSION OF )  
NEVADA, *et al.*, )

Respondents. )

CASE NO. A-19-791302-J

DEPT. NO. 19

**RESPONDENT'S  
MOTION FOR STAY OR,  
ALTERNATIVELY, CONTINUANCE**

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

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NOTICE OF MOTION

TO: The parties and their attorneys of record:

PLEASE TAKE NOTICE that on the 9<sup>th</sup> day of December, 2019, at the hour of 10:00 am, or as soon thereafter as counsel may be heard, Respondent Public Utilities Commission of Nevada will bring its Motion for Stay for hearing in Department No. 19 of the Eighth Judicial District Court, Clark County, Nevada.

DATED this 9<sup>th</sup> day of December, 2019.

GARRETT WEIR AND DEBREA TERWILLIGER  
Public Utilities Commission of Nevada

By: \_\_\_\_\_/s/  
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DEBREA M. TERWILLIGER, ESQ.  
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*Attorneys for the Public  
Utilities Commission of Nevada*

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1150 E. William Street  
Carson City, NV 89701-3109

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. NATURE OF MOTION**

Pursuant to the provisions of NRAP 8(a), the Public Utilities Commission of Nevada (“PUCN”) seeks a stay of the order dated November 11, 2019, granting leave for Petitioner Southwest Gas Corporation (“Southwest Gas”) to file a reply. The PUCN further requests that this Court stay the procedural schedule in this case, pending a decision by the Supreme Court of Nevada regarding the PUCN’s Petition for a Writ of Mandamus or Prohibition, which seeks an order requiring the District Court to vacate the November 11, 2019, Order. Alternatively, the PUCN requests a continuance of the scheduled hearing in this case.

**II. STATEMENT OF FACTS**

On December 6, 2019, the Public Utilities Commission of Nevada filed with the Supreme Court of Nevada its Petition for a Writ of Mandamus or, Alternatively, Prohibition, seeking issuance of an order vacating the District Court’s decision to allow Southwest Gas to file a reply brief. Nevada Revised Statutes (“NRS”) 703.373, the statute governing judicial review of PUCN decisions, does not contemplate the filing of such supplemental briefing, and the PUCN is pursuing extraordinary writ relief to obtain a ruling from the State’s high court on the permissibility of supplemental briefing in this case and in future appeals of PUCN decisions.

As the PUCN argued in its opposition to Southwest Gas’s motion for leave to file a reply, NRS 703.373 appears to limit the District Court’s discretion with regard to setting a briefing schedule for appeals of PUCN decisions. Due to the potentially-harmful impact of delay on utility ratepayers, the Legislature clearly intended for NRS 703.373 to effectuate an expedited process of judicial review for PUCN decisions. This Court’s decision to allow additional briefing extended the process of judicial review and caused delay, seemingly contradicting the legislative mandate of NRS 703.373(7) for courts to proceed quickly after petitioners and respondents each file a single memorandum of points and authorities.

The question of whether a district court may allow additional briefing in appeals of PUCN decisions is an issue of law that requires clarification, and public policy is served by consideration of

Public Utilities Commission of Nevada  
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1 the PUCN’s petition for a writ. Moreover, this is a statewide issue because it affects every customer of  
 2 the approximately 400 PUCN-regulated utilities that provide electricity, natural gas, water, wastewater,  
 3 telecommunication, and rail services throughout Nevada. The negative effect of prolonged briefing  
 4 applies to judicial review of any PUCN decision setting utility rates. If a reviewing court finds that  
 5 rates adopted by the PUCN are too low, the utility is entitled to additional revenue to offset the under-  
 6 collection that occurred during the pendency of the appeal. The resulting revised rates will ultimately  
 7 be higher as more time passes between the PUCN’s initial decision and the PUCN’s subsequent  
 8 approval of revised rates that reflect the court-ordered change. Thus, any delay compounds the rate  
 9 instability caused by a reversal of a challenged PUCN decision by increasing the magnitude of a  
 10 subsequent rate-change.

11 In the absence of guidance from the Supreme Court, this very same issue will likely arise in all  
 12 future appeals of PUCN decisions. Thus, judicial economy and sound administration militate in favor  
 13 of the Supreme Court’s issuance of an order addressing the issue. Judicial economy and sound  
 14 administration also militate in favor of staying the proceedings in the instant case so that neither this  
 15 Court nor any party is compelled to invest resources and time addressing issues raised by Southwest  
 16 Gas in a reply brief that may ultimately be deemed impermissible by the Supreme Court.

17 Finally, given the recent request of Southwest Gas for a continuance of the hearing in this case,  
 18 granting the PUCN’s requested stay will achieve judicial economy by obviating the need for further  
 19 discussion regarding whether and when to reschedule the substantive hearing on Southwest Gas’s  
 20 petition for judicial review. In reliance on Southwest Gas’s letter filed with this Court on November  
 21 26, 2019, and based on subsequent conversations and tentative agreements with Southwest Gas  
 22 regarding potential rescheduled hearing dates, the PUCN and Nevada’s Bureau of Consumer  
 23 Protection each adjusted internal schedules and priorities. Moving forward with a hearing on  
 24 Southwest Gas’s Petition for Judicial Review on December 17, 2019, would therefore have a  
 25 prejudicial effect on the Respondents in the instant case. Accordingly, if the Court is not inclined to  
 26 grant the requested stay, the PUCN asks for a continuance of the scheduled hearing.

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**III. CONCLUSION**

For the foregoing reasons, the PUCN respectfully requests that this Court grant its motion for a stay or, alternatively, a continuance to allow the Supreme Court of Nevada to rule on the pending petition for writ relief and to ensure equitable and efficient administration of this case.

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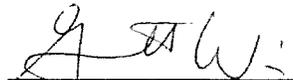
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**AFFIRMATION AND SIGNATURE**  
**Pursuant to NRS 239B.030/603.040A**

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 9<sup>th</sup> day of December, 2019.

by:   
 \_\_\_\_\_  
 GARRETT WEIR, ESQ.  
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 DEBREA M. TERWILLIGER, ESQ.  
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*Utilities Commission of Nevada*

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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 9<sup>th</sup> day of December, 2019, I served a true and correct copy of the foregoing **RESPONDENT'S MOTION FOR STAY** using the Court's CM/ECF electronic service system to the following:

Daniel F. Polsenberg, Esq.  
[dpolsenberg@lrrc.com](mailto:dpolsenberg@lrrc.com)  
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Office of the Attorney General  
Bureau of Consumer Protection  
100 N. Carson Street  
Carson City, Nevada 89701  
*Attorneys for the Nevada Attorney General's Bureau of Consumer Protection*

And by depositing a copy in state mail to:

The Honorable Joseph T. Bonaventure  
330 South Third Street  
Las Vegas, Nevada 89101

The Honorable William D. Kephart  
Department No. 19  
Eighth Judicial District Court  
200 Lewis Avenue  
Las Vegas, Nevada 89155

DATED this 9<sup>th</sup> day of December, 2019.

  
SHAYLA HOOKER

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

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2 Garrett Weir, Esq., NV Bar No. 12300  
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8 Attorneys for: *Public Utilities Commission of Nevada*

DEPARTMENT XIX  
NOTICE OF HEARING  
DATE 12/17/19 TIME 9:00 A.M.  
APPROVED BY *D. J. [Signature]*  
*Special Setting*

9 **IN THE EIGHT JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

10 **IN AND FOR THE COUNTY OF CLARK**

11 SOUTHWEST GAS CORPORATION, )

12 Petitioner, )

13 vs. )

14 PUBLIC UTILITIES COMMISSION OF )  
15 NEVADA, *et al.*, )

16 Respondents. )

CASE NO. A-19-791302-J

DEPT. NO. 19

**RESPONDENT'S EX PARTE APPLICATION  
FOR AN ORDER SHORTENING TIME  
REGARDING ITS MOTION FOR STAY,  
OR, ALTERNATIVELY, CONTINUANCE**

17 Respondent, Public Utilities Commission of Nevada (hereinafter, "PUCN"), by and through its  
18 counsel, Garrett Weir and Debrea M. Terwilliger, hereby moves this Court for an Ex Parte Application  
19 for an Order Shortening Time regarding its Motion for Stay or, Alternatively, Continuance, filed on  
20 December 9, 2019, in accordance with the Eighth Judicial District Court Rule ("EDCR") 2.26. The Ex  
21 Parte Application for an Order Shortening Time is supported by the attached Memorandum of Points  
22 and Authorities, the attached Declaration of Debrea M. Terwilliger, any and all exhibits or documents  
23 on file, and any oral arguments that this Court may seek, as necessary.

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

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**DECLARATION OF DEBREA M. TERWILLIGER, ESQ.**

I, Debrea M. Terwilliger, hereby declare under penalty of perjury, to the following:

- 1) I am an attorney licensed to practice in the State of Nevada, and I represent the interests of Respondent Public Utilities Commission of Nevada ("PUCN") in the instant Petition for Judicial Review.
- 2) I have knowledge of the events attested to herein, and I am competent and willing to testify to those events if called to do so. As those matters stated herein upon information and belief, I believe them to be true.
- 3) This matter is set to go to hearing on December 17, 2019. On December 9, 2019, the PUCN filed with the Supreme Court of Nevada a Petition for a Writ of Mandamus or, Alternatively, Prohibition ("PUCN Petition for Writ"), seeking issuance of an order vacating this Court's decision to permit Southwest Gas Corporation ("Southwest Gas") to file a reply brief. Nevada Revised Statutes ("NRS") 703.373, the statute governing judicial review of PUCN decisions, does not contemplate the filing of such supplemental briefing, and the PUCN is pursuing extraordinary writ relief to obtain a ruling from the State's high court on the permissibility of supplemental briefing in this case and in future appeals of PUCN decisions. In the interest of judicial economy and sound administration, the PUCN seeks a stay of the proceedings before this Court. Holding a hearing wherein the challenged supplemental briefing by Southwest Gas will be addressed without knowing how the Supreme Court of Nevada may address the PUCN Petition for Writ is not an efficient use of Court or State resources.
- 4) The December 17, 2019, hearing date was set at a motion hearing before this Court on October 15, 2019. However, not until a month after the motion hearing, on November 26, 2019, Southwest Gas filed a letter with this Court ("Southwest Gas Letter") stating that "Mr. Polsenberg is unable to attend the December 17, 2019 hearing on the petition for judicial review." Southwest Gas thus requested that the Court vacate the hearing and reschedule for a later date. The PUCN contacted Southwest Gas on that date to discuss the Southwest Gas Letter.
- 5) In discussions with Southwest Gas regarding the need to accommodate Mr. Polsenberg's

1 schedule, the PUCN told Southwest Gas that depending on the outcome of an upcoming vote at  
2 a regularly-scheduled PUCN agenda meeting, the PUCN may be filing a writ with the Supreme  
3 Court of Nevada in the near future. While Southwest Gas was resistant to any discussions of a  
4 stay in conjunction with the PUCN Petition for Writ, Southwest Gas nonetheless urged the  
5 PUCN to find a new hearing date that would accommodate Mr. Polsenberg's unavailability on  
6 December 17, 2019.

- 7 6) Based on the Southwest Gas Letter, as well as subsequent discussions with Southwest Gas, the  
8 Bureau of Consumer Protection ("BCP"), and this Court, the PUCN determined that  
9 professional courtesy was the correct approach, and negotiated with Southwest Gas and the  
10 BCP to continue the hearing to a later date and to address the PUCN's request for a stay in  
11 conjunction with the PUCN Petition for Writ at a later time. Thus, the PUCN had a  
12 preliminary agreement with Southwest Gas to move the hearing date to the week of February 3,  
13 2019. Southwest Gas circulated to the PUCN and the BCP on Wednesday, December 4, 2019,  
14 at approximately 5:17 p.m. a stipulation that would modify the hearing date.
- 15 7) While the December 17<sup>th</sup> hearing date had not been modified yet, the tenure of the discussions  
16 amongst all interested participants indicated that the hearing date would be changed to  
17 accommodate Mr. Polsenberg's request in Southwest Gas's Letter. Thus, the PUCN thought it  
18 was moving toward a later hearing date and acted accordingly.
- 19 8) On December 5, 2019, at approximately 10:43 a.m., Mr. Abraham Smith on behalf of  
20 Southwest Gas sent the PUCN and the BCP an e-mail that stated that Mr. Polsenberg had  
21 "rearranged his schedule to make the hearing on December 17." On December 5, 2019, in  
22 subsequent discussions with Southwest Gas and the BCP, Mr. Polsenberg stated he has just had  
23 a call with his client that morning and that the February hearing date was too late, and as such,  
24 Mr. Polsenberg had cancelled his travel plans.
- 25 9) As an attorney with the PUCN and a former partner in a law firm who myself represented  
26 utility clients, I find the circumstances of Southwest Gas's back-and-forth as to a new hearing  
27 date a bit confounding. The Southwest Gas Letter to this Court on November 26, 2019,  
28 requesting vacatur of the December 17 hearing date and rescheduling to a later date, did *not*

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state that the newly-scheduled hearing must occur before the first week of February. Southwest Gas now claims that its client states that the February hearing date is too late, but it is unclear why that was not so stated in the Southwest Gas Letter. It was only after the PUCN, as a professional courtesy, notified Southwest Gas that it would likely be filing a writ that Mr. Polsenberg changed his travel plans and now argues that the February hearing date is too late for his client.

10) Consistent with the legislative direction in NRS 703.373, the PUCN generally believes that its cases should move to hearing as quickly as possible, such that detrimental ratepayer effects can be mitigated or avoided. However, the PUCN, as a public body, has determined that certainty as to the application of NRS 703.373, which is the basis of the PUCN Petition for Writ, is of great importance to the ratepayers of the approximately 400 PUCN-regulated utilities that provide electricity, natural gas, water, wastewater, telecommunication, and rail services throughout Nevada. The PUCN also does not support actions that would waste this Court's or State resources. As such, the PUCN believes there is a good cause to stay this proceeding until resolution of the PUCN Petition for Writ or to issue a continuance of the proceeding until such time as the requested stay can be fully litigated by the parties.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 9<sup>th</sup> day of December.



DEBREA M. TERWILLIGER, ESQ.,  
Assistant General Counsel  
Public Utilities Commission of Nevada

**MEMORANDUM OF POINTS AND AUTHORITIES**

The Eighth Judicial District Court Rules provide in pertinent part as follows:

**Rule 2.26.** Shortening time. Ex parte motions to shorten time may not be granted except upon an unsworn declaration under penalty of perjury or affidavit of counsel describing the circumstances claimed to constitute good cause and justify shortening of time. If a motion to shorten time is granted, it must be served upon all parties promptly. An order which shortens the notice of a hearing to less than 10 days may not be served by mail. In no event may the notice of the hearing of a motion be shortened to less than 1 full judicial day. A courtesy copy shall be delivered by the movant to the appropriate department, if a motion is filed on an order shortening time and noticed on less than 10 days' notice.

As is demonstrated in the Declaration of Debrea M. Terwilliger, Esq. ("Terwilliger Declaration"), good cause exists to have the Motion for Stay or, Alternatively, Continuance ("Motion for Stay or Continuance") heard on an Ex Parte Application for an Order Shortening Time, as the hearing in the underlying proceeding has been set for December 17, 2019.

The Public Utilities Commission of Nevada ("PUCN") as Respondent in this case has filed a Writ of Mandamus, or Alternatively, Prohibition (the "PUCN Petition for Writ") in relation to the instant proceeding with the Supreme Court of Nevada. The PUCN Petition for Writ asserts, in part, that it may be prejudiced by a reply that was authorized by this Court in contravention of NRS 703.373. Judicial economy and sound administration support a Motion for Stay or Continuance to provide for the disposition of the PUCN Petition for Writ in the Nevada Supreme Court before this Court holds a hearing on Southwest Gas's Petition for Judicial Review. Moreover, Petitioner's counsel filed a letter on November 26, 2019 with this Court, stating that "Mr. Polsenberg is unable to attend the December 17, 2019 hearing on the petition for judicial review." Petitioner Southwest Gas thus requested that the Court vacate the hearing and reschedule for a later date. As detailed in the Terwilliger Declaration, the PUCN chose to exercise professional courtesy and work with Southwest Gas Corporation ("Southwest Gas") and the Bureau of Consumer Protection to change the hearing date based upon Mr. Polsenberg's unavailability. Thus, the PUCN had a preliminary agreement with Southwest Gas to move the hearing date to the week of February 3, 2019. Southwest Gas now states that the February hearing date is too late. The Terwilliger Declaration states why there is good cause

Public Utilities Commission of Nevada  
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1 to stay or continue this matter.

2 Accordingly, the PUCN as Respondent petitions this Court for an Ex Parte Application for an  
3 Order Shortening Time to rule on Respondent's pending Motion for Stay or Continuance in Case No.  
4 A-19-791302-J titled, *Southwest Gas Corporation, Petitioner, v. Public Utilities Commission of*  
5 *Nevada et al., Respondents.*

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Dated this 9<sup>th</sup> day of December, 2019.

By: \_\_\_\_\_/s/  
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Nevada Bar No. 12300  
DEBREA M. TERWILLIGER, ESQ.  
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*Attorneys for the Public*

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

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**AFFIRMATION AND SIGNATURE**  
**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 9<sup>th</sup> day of December, 2019.

By:   
 GARRETT WEIR, ESQ.  
 Nevada Bar No. 12300  
 DEBREA M. TERWILLIGER, ESQ.  
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 of Nevada*

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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 10<sup>th</sup> day of December, 2019, I served a true and correct copy of the foregoing

**RESPONDENT’S EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME REGARDING ITS MOTION FOR STAY, OR, ALTERNATIVELY, CONTINUANCE** using the

Court’s CM/ECF electronic service system to the following:

Daniel F. Polsenberg, Esq.  
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[pstuhff@ag.nv.gov](mailto:pstuhff@ag.nv.gov)  
Office of the Attorney General  
Bureau of Consumer Protection  
100 N. Carson Street  
Carson City, Nevada 89701  
*Attorneys for the Nevada Attorney General's Bureau of Consumer Protection*

And by depositing a copy in state mail to:

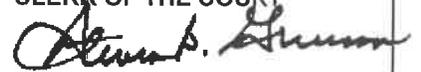
The Honorable Joseph T. Bonaventure  
330 South Third Street  
Las Vegas, Nevada 89101

The Honorable William D. Kephart  
Department No. 19  
Eighth Judicial District Court  
200 Lewis Avenue  
Las Vegas, Nevada 89155

DATED this 10<sup>th</sup> day of December, 2019.

  
SHAYLA HOOKER

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**MSTAY**

Garrett Weir, Esq., NV Bar No. 12300  
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1150 E. William Street  
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Attorneys for: *Public Utilities Commission of Nevada*

**IN THE EIGHT JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF CLARK**

SOUTHWEST GAS CORPORATION, )

Petitioner, )

vs. )

PUBLIC UTILITIES COMMISSION OF  
NEVADA, *et al.*, )

Respondents. )

CASE NO. A-19-791302-J

DEPT. NO. 19

**RESPONDENT'S  
MOTION FOR STAY OR,  
ALTERNATIVELY, CONTINUANCE**

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

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**NOTICE OF MOTION**

1 TO: The parties and their attorneys of record:  
2

3 PLEASE TAKE NOTICE that on the 9<sup>th</sup> day of December, 2019, at the hour of 10:00 am, or as  
4 soon thereafter as counsel may be heard, Respondent Public Utilities Commission of Nevada will  
5 bring its Motion for Stay for hearing in Department No. 19 of the Eighth Judicial District Court, Clark  
6 County, Nevada.

7  
8 DATED this 9<sup>th</sup> day of December, 2019.

9 GARRETT WEIR AND DEBREA TERWILLIGER  
Public Utilities Commission of Nevada

10 By: \_\_\_\_\_/s/  
11 GARRETT WEIR, ESQ.  
12 Nevada Bar No. 12300  
13 DEBREA M. TERWILLIGER, ESQ.  
14 Nevada Bar No. 10452  
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19 gweir@puc.nv.gov  
20 dterwilliger@puc.nv.gov  
21 *Attorneys for the Public*  
22 *Utilities Commission of Nevada*

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

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. NATURE OF MOTION**

Pursuant to the provisions of NRAP 8(a), the Public Utilities Commission of Nevada (“PUCN”) seeks a stay of the order dated November 11, 2019, granting leave for Petitioner Southwest Gas Corporation (“Southwest Gas”) to file a reply. The PUCN further requests that this Court stay the procedural schedule in this case, pending a decision by the Supreme Court of Nevada regarding the PUCN’s Petition for a Writ of Mandamus or Prohibition, which seeks an order requiring the District Court to vacate the November 11, 2019, Order. Alternatively, the PUCN requests a continuance of the scheduled hearing in this case.

**II. STATEMENT OF FACTS**

On December 6, 2019, the Public Utilities Commission of Nevada filed with the Supreme Court of Nevada its Petition for a Writ of Mandamus or, Alternatively, Prohibition, seeking issuance of an order vacating the District Court’s decision to allow Southwest Gas to file a reply brief. Nevada Revised Statutes (“NRS”) 703.373, the statute governing judicial review of PUCN decisions, does not contemplate the filing of such supplemental briefing, and the PUCN is pursuing extraordinary writ relief to obtain a ruling from the State’s high court on the permissibility of supplemental briefing in this case and in future appeals of PUCN decisions.

As the PUCN argued in its opposition to Southwest Gas’s motion for leave to file a reply, NRS 703.373 appears to limit the District Court’s discretion with regard to setting a briefing schedule for appeals of PUCN decisions. Due to the potentially-harmful impact of delay on utility ratepayers, the Legislature clearly intended for NRS 703.373 to effectuate an expedited process of judicial review for PUCN decisions. This Court’s decision to allow additional briefing extended the process of judicial review and caused delay, seemingly contradicting the legislative mandate of NRS 703.373(7) for courts to proceed quickly after petitioners and respondents each file a single memorandum of points and authorities.

The question of whether a district court may allow additional briefing in appeals of PUCN decisions is an issue of law that requires clarification, and public policy is served by consideration of

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1150 E. William Street  
Carson City, NV 89701-3109

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1 the PUCN’s petition for a writ. Moreover, this is a statewide issue because it affects every customer of  
 2 the approximately 400 PUCN-regulated utilities that provide electricity, natural gas, water, wastewater,  
 3 telecommunication, and rail services throughout Nevada. The negative effect of prolonged briefing  
 4 applies to judicial review of any PUCN decision setting utility rates. If a reviewing court finds that  
 5 rates adopted by the PUCN are too low, the utility is entitled to additional revenue to offset the under-  
 6 collection that occurred during the pendency of the appeal. The resulting revised rates will ultimately  
 7 be higher as more time passes between the PUCN’s initial decision and the PUCN’s subsequent  
 8 approval of revised rates that reflect the court-ordered change. Thus, any delay compounds the rate  
 9 instability caused by a reversal of a challenged PUCN decision by increasing the magnitude of a  
 10 subsequent rate-change.

11 In the absence of guidance from the Supreme Court, this very same issue will likely arise in all  
 12 future appeals of PUCN decisions. Thus, judicial economy and sound administration militate in favor  
 13 of the Supreme Court’s issuance of an order addressing the issue. Judicial economy and sound  
 14 administration also militate in favor of staying the proceedings in the instant case so that neither this  
 15 Court nor any party is compelled to invest resources and time addressing issues raised by Southwest  
 16 Gas in a reply brief that may ultimately be deemed impermissible by the Supreme Court.

17 Finally, given the recent request of Southwest Gas for a continuance of the hearing in this case,  
 18 granting the PUCN’s requested stay will achieve judicial economy by obviating the need for further  
 19 discussion regarding whether and when to reschedule the substantive hearing on Southwest Gas’s  
 20 petition for judicial review. In reliance on Southwest Gas’s letter filed with this Court on November  
 21 26, 2019, and based on subsequent conversations and tentative agreements with Southwest Gas  
 22 regarding potential rescheduled hearing dates, the PUCN and Nevada’s Bureau of Consumer  
 23 Protection each adjusted internal schedules and priorities. Moving forward with a hearing on  
 24 Southwest Gas’s Petition for Judicial Review on December 17, 2019, would therefore have a  
 25 prejudicial effect on the Respondents in the instant case. Accordingly, if the Court is not inclined to  
 26 grant the requested stay, the PUCN asks for a continuance of the scheduled hearing.

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**III. CONCLUSION**

For the foregoing reasons, the PUCN respectfully requests that this Court grant its motion for a stay or, alternatively, a continuance to allow the Supreme Court of Nevada to rule on the pending petition for writ relief and to ensure equitable and efficient administration of this case.

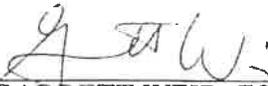
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Public Utilities Commission of Nevada  
1150 E. William Street  
Carson City, NV 89701-3109

**AFFIRMATION AND SIGNATURE**  
**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 9<sup>th</sup> day of December, 2019.

by:   
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*Attorneys for the Public*  
*Utilities Commission of Nevada*

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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 10<sup>th</sup> day of December, 2019, I served a true and correct copy of the foregoing

RESPONDENT'S MOTION FOR STAY using the Court's CM/ECF electronic service system to the following:

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Attorneys for the Nevada Attorney General's Bureau of Consumer Protection

And by depositing a copy in state mail to:

The Honorable Joseph T. Bonaventure
330 South Third Street
Las Vegas, Nevada 89101

The Honorable William D. Kephart
Department No. 19
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, Nevada 89155

DATED this 10<sup>th</sup> day of December, 2019.

[Signature]
SHAYLA HOOKER

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

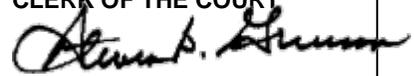
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8 *Attorney for State of Nevada*  
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10 **DISTRICT COURT**  
11 **CLARK COUNTY, NEVADA**

12 SOUTHWEST GAS CORPORATION,  
13

14 Petitioner,

15 vs.

16 PUBLIC UTILITIES COMMISSION OF  
NEVADA, *et al.*,

17 Respondents.  
18  
19

Case No.: A-19-791302-J

Dept No.: 19

20 **STATE OF NEVADA, BUREAU OF CONSUMER PROTECTION'S JOINDER TO**  
21 **THE PUBLIC UTILITY COMMISSION OF NEVADA'S MOTION TO STAY OR,**  
22 **ALTERNATIVELY, CONTINUANCE**

23 The Bureau of Consumer Protection ("BCP"), by and through counsel, Ernest D.  
24 Figueroa, Consumer Advocate for the State of Nevada, and Whitney F. Digesti, Deputy  
25 Attorney General, hereby joins Respondent Public Utilities Commission of Nevada's  
26 ("PUCN") Motion for Stay or, Alternatively, Continuance.

27 ///

28 ///

1 Pursuant to Eighth Judicial District Court Rule (“EJDCR”) 2.2(d), BCP seeks  
2 joinder to the Motion for Stay or, Alternatively, Continuance, filed with this Court on  
3 December 9, 2019. For all the reasons set forth in the Motion for Stay or, Alternatively,  
4 Continuance, Respondent BCP believes that a stay pending the petition for writ relief will  
5 ensure equitable and efficient administration in this case.

6 **AFFIRMATION**  
7 **(Pursuant to NRS 239B.030)**

8 The undersigned does hereby affirm that this document does not contain the social  
9 security number of any person.

10 DATED this 11th day of December 2019.

11  
12 AARON D. FORD  
13 Attorney General

14 ERNEST D. FIGUEROA  
15 Consumer Advocate

16 /s/ Whitney F. Digesti

17 WHITNEY F. DIGESTI, (Bar No. 13012)  
18 Deputy Attorney General  
19 Bureau of Consumer Protection  
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23 *Attorneys for the State of Nevada*

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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the State of Nevada, Office of the Attorney  
 3 General, and that on this 11th day of December, I served a true and correct copy of the  
 4 foregoing **STATE OF NEVADA, BUREAU OF CONSUMER PROTECTION'S**  
 5 **JOINDER TO THE PUBLIC UTILITY COMMISSION OF NEVADA'S MOTION TO**  
 6 **STAY OR, ALTERNATIVELY, CONTINUANCE**, by electronic service to:

7 Daniel F. Polsenberg, Esq.  
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 17 Las Vegas, Nevada 89169  
 18 Attorneys for Southwest Gas Corporation

19 And by depositing a copy in state mail to:

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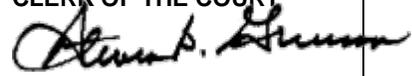
26 The Honorable Joseph T. Bonaventure  
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 28 Las Vegas, Nevada 89101  
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The Honorable William D. Kephart Dept No. 19  
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26 /s/ Vivian Barrera  
 27 An employee of the State of Nevada  
 28 Office of the Attorney General

35

35



1 **OPPM**  
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15 *Attorneys for Petitioner Southwest Gas Corporation*

16 DISTRICT COURT  
17 CLARK COUNTY, NEVADA

18 SOUTHWEST GAS CORPORATION,

19 Petitioner,

20 *vs.*

21 PUBLIC UTILITIES COMMISSION  
22 OF NEVADA,

23 Respondent.

24 Case No.: A-19-791302-J

25 Dep't No.: 19

26 **SOUTHWEST GAS CORPORATION'S**  
27 **OPPOSITION TO MOTION FOR STAY**

28 The Public Utilities Commission's request to stay this litigation pending its extraordinary petition to the Nevada Supreme Court is many things, but it is not a request for "equitable and efficient administration of this case." (Mot. 6; Joinder 2.) It's a request that would create the very delay that the Commission purports to decry. As the Commission has already obtained its requested alternative relief—a continuance through January 9, 2020—this Court should deny the request for a stay.

29 **I.**

30 **A STAY PENDING THE WRIT PETITION IS UNWARRANTED**

31 It is perhaps fitting that the Commission proceeds directly from a "State-  
32 ment of Facts" (Mot. 1) to its "Conclusion" (Mot. 3). Absent from the brief is any

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1 “Argument” that discusses NRAP 8(c), the applicable rule governing a request  
 2 for a stay pending a writ petition. That rule requires the party seeking a stay  
 3 to discuss the following factors:

4 (1) whether the object of the appeal or writ petition will be  
 5 defeated if the stay or injunction is denied;

6 (2) whether appellant/petitioner will suffer irreparable or  
 7 serious injury if the stay or injunction is denied;

8 (3) whether respondent/real party in interest will suffer  
 9 irreparable or serious injury if the stay or injunction is  
 10 granted; and

11 (4) whether appellant/petitioner is likely to prevail on the  
 12 merits in the appeal or writ petition.

13 NRAP 8(c). These factors all militate against a stay here, but in particular the  
 14 petition lacks even the “substantial case on the merits” required by NRAP  
 15 8(c)(4). *See Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 659,  
 16 6 P.3d 982, 987 (2000) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.  
 17 1981)).

18 **A. The Petition Is Likely to Be Denied**

19 **1. *The Right (or Disentitlement) to File a Reply  
 20 Is Not a Significant Issue Requiring the  
 21 Supreme Court’s Extraordinary Intervention***

22 Even if properly presented, the Supreme Court would be unlikely to have  
 23 much interest in the writ petition. The Supreme Court has long held that  
 24 courts have the inherent power to regulate such matters of procedure. *See Al-*  
 25 *bios v. Horizon Communities, Inc.*, 122 Nev. 409, 420 n.12, 132 P.3d 1022, 1029  
 26 n.12 (2006). The arcane question in this petition—whether a petition for judi-  
 27 cial review under NRS chapter 703 categorically forbids the filing of a reply  
 28 brief—is a poor vehicle for the Supreme Court to overturn that jurisprudence.

Moreover, “very few writ petitions warrant extraordinary relief.” *Smith v.*  
*Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). The  
 filing of a reply brief is not extraordinary—it’s as mundane as it gets.

## 2. *The Petition Is Meritless*

For what it's worth, the petition fails on its own merits. First, this is not the situation in *Rural Telephone Co. v. Public Utilities Commission*, 133 Nev. 387, 398 P.3d 909 (2017), where the Legislature had set a specific deadline that the utility wanted to disregard. Here, in contrast, the Legislature has not attempted to prohibit or otherwise regulate the filing of a reply brief. Indeed, the Legislature caps the court's discretion in just one way—it cannot set the hearing any *sooner* than 20 days after the filing of the Commission's response brief. NRS 703.373(7). 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 County 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's petition, though, would unnecessarily force a constitutional conflict. *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.”). Under the separation of powers, the Legislature's sphere is only to enact substantive law; it “may not unduly impinge upon the ability of the judiciary to manage litigation,” *Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1028–30, 102 P.3d 600, 605–06 (2004), such as by promulgating rules of courtroom procedure, *State v. Connery*, 99 Nev. 342, 346, 661 P.2d 1298, 1300 (1983).

1 In *Borger*, the Supreme Court clarified that the Legislature could not  
 2 limit a district court's discretion to allow a medical-malpractice litigant to  
 3 amend the complaint. 120 Nev. 1021, 1028–30, 102 P.3d 600, 605–06 (2004).

4 Here, we are talking about something even farther removed from the Leg-  
 5 islature's power to enact substantive law: the ability of a court to order supple-  
 6 mental briefing on difficult legal questions. To say that the Legislature prohib-  
 7 ited a district court from soliciting needed analysis for a decision—or allows the  
 8 court to solicit that analysis only during an oral hearing, without the benefit of  
 9 written authorities—would not just be nonsensical; it would be unconstitu-  
 10 tional.

### 11 **3. The Petition Is Barred by Laches and Estoppel**

12 Even if the petition had merit, the time for filing it passed long ago.

13 The doctrine of laches requires parties who seek the Supreme Court's ex-  
 14 traordinary relief in a writ petition to do so expeditiously. *See Widdis v. Second*  
 15 *Judicial Dist. Court*, 114 Nev. 1224, 1227–28, 968 P.2d 1165, 1167 (1998). Inex-  
 16 cusable delay, knowing acquiescence in existing conditions, and prejudice to the  
 17 real party in interest are all grounds for denying the petition. *State v. Eighth*  
 18 *Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 148, 42 P.3d 233, 238 (2002).  
 19 Without an adequate excuse, even a short delay risks dismissal for laches.  
 20 *Bldg. & Constr. Trades Council of N. Nev. v. State ex rel. Pub. Works Bd.*, 108  
 21 Nev. 605, 836 P.2d 633 (1992).

22 Here, the Commission's knowing acquiescence in the Court's alternative  
 23 relief of a surreply—the very relief that the Commission requested—acts as a  
 24 waiver that bars the petition. The Commission knew on October 15 that the  
 25 Court was taking this course, but it waited nearly two months to file the peti-  
 26 tion. *See Bldg. & Constr. Trades Council*, 108 Nev. at 611, 836 P.2d at 637 (one  
 27 month was too long). In that time, the Commission and the Bureau of Con-  
 28 sumer Protect not only filed their surreplies, but—as evidenced by the Court's

1 request for hard copies of the parties' briefs—the Court was actively reviewing  
 2 those pleadings in preparation for the December 17 hearing. This delay, moreo-  
 3 ver, irretrievably prejudices both Southwest Gas and this Court: there is no way  
 4 now for the Court to erase the reply and surreplies from its mind, and it is un-  
 5 fair for the Commission to ask it to.

6 **B. Denying a Stay Will Not Prejudice the Commission**  
 7 **or Destroy the Object of the Petition—Any More**  
 8 **than the Commission's Own Delay Has Done So**

9 Denying a stay would not harm the Commission or BCP because they  
 10 have already filed their surreplies. NRAP 8(c)(2) (court should consider  
 11 “whether appellant/petitioner will suffer irreparable or serious injury if the stay  
 12 or injunction is denied”). Those surreplies cured any prejudice that the Com-  
 13 mission or BCP might have suffered from the Court granting relief to file a re-  
 14 ply. In fact, the surreplies gave the Commission and BCP an advantage by giv-  
 15 ing them the last word.

16 And the “object of the appeal or writ petition” will not “be defeated if the  
 17 stay or injunction is denied.” NRAP 8(c)(4). The petition supposedly seeks to  
 18 vindicate the expedited procedure that NRS chapter 703 demands, but a stay  
 19 would undermine—not advance—that object. Regardless, any problems with  
 20 the reviewability of the petition are those that the Commission created by wait-  
 21 ing until a week before the December 17 hearing to seek a stay.

22 **C. The Stay Will Cause the Very Delay that the**  
 23 **Commission Bemoans, to Southwest Gas's Prejudice**

24 The Commission is right about one thing—these are supposed to be expe-  
 25 dited proceedings. So, by definition, a stay would cause harm to Southwest  
 26 Gas. *See* NRAP 8(c)(3) (court must consider “whether respondent/real party in  
 27 interest will suffer irreparable or serious injury if the stay or injunction is  
 28 granted”). The Commission disingenuously purports to be concerned with “the

1 potentially-harmful impact of delay on utility ratepayers,” and the “negative ef-  
 2 fect of prolonged briefing,” but its request for a stay would only delay things fur-  
 3 ther. This Court’s consideration of the underlying petition for review is the only  
 4 thing that will actually move this case forward. The request for a stay is poorly  
 5 camouflaged gamesmanship. The Court should see through this machination.  
 6 *Cf. Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 407 P.3d 702  
 7 (2017) (writ petition relief following denial of motion to dismiss “presents many  
 8 of the inefficiencies that adherence to the final judgment rule seeks to pre-  
 9 vent—an increased caseload, piecemeal litigation, needless delay, and confusing  
 10 litigation over this court’s jurisdiction”).

## 11 II.

### 12 THE ALTERNATIVE RELIEF IS SUFFICIENT

13 Just as this Court appropriate exercised its discretion to adopt the com-  
 14 promise position on reply brief—let both sides file one—this Court should also  
 15 let the agreed-to continuance for the hearing on the petition stand in for the  
 16 more drastic remedy of a stay. This is particularly appropriate given the  
 17 rushed process, in which the Commission rejected Southwest Gas’s offer to hear  
 18 the petition a week early, did not seek an interim stay (pending full briefing),  
 19 and filed this motion for a stay pending the writ petition on shortened time.

20 The Supreme Court is likely to act on the petition one way or another be-  
 21 fore the January 9 hearing. If the Supreme Court denies the petition, the stay  
 22 will have only gummed up this Court’s calendar and required the Court and the  
 23 parties to again resume preparations for the hearing. If the Supreme Court or-  
 24 ders an answer on the petition before January 9, this Court can reevaluate the  
 25 propriety of a stay at that point. That would be far preferable to issuing a blan-  
 26 ket stay on the shortened schedule that the Commission has forced.

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CONCLUSION

The Commission’s petition is self-defeating. In the name of efficiency, it seeks delay. Rather than indulging the Commission, this Court should deny the request for a blanket stay but approve the stipulated continuance and set the petition for judicial review on January 9.

Dated this 16th day of December, 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)  
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*Attorneys for Petitioner*

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CERTIFICATE OF SERVICE

I hereby certify that on the December 16, 2019, I served the foregoing “Opposition to Motion for Stay” on counsel by the Court’s electronic filing system to the persons and addresses listed below:

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/s/ Jessie M. Helm  
An Employee of Lewis Roca Rothgerber Christie LLP

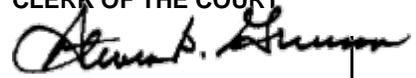
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DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

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

BEFORE THE HONORABLE WILLIAM D. KEPHART, DISTRICT COURT JUDGE  
TUESDAY, DECEMBER 17, 2019

**RECORDER'S TRANSCRIPT OF HEARING:  
RESPONDENT'S EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME  
REGARDING ITS MOTION FOR STAY, OR ALTERNATIVELY CONTINUANCE**

APPEARANCES:

FOR THE PETITIONER:	DANIEL F. POLSENBERG, ESQ. ABRAHAM G. SMITH, ESQ.
FOR THE RESPONDENT:	DEBREA M. TERWILLIGER, ESQ.
FOR THE INTERVENOR:	PAUL E. STUHFF, ESQ.

RECORDED BY: CHRISTINE ERICKSON, COURT RECORDER  
TRANSCRIBED BY: VERBATIM DIGITAL REPORTING, LLC

1                   LAS VEGAS, NEVADA, TUESDAY, DECEMBER 17, 2019

2                   [Case called at 9:06 A.M.]

3                   THE COURT: Southwest Gas Corporation versus Public  
4 Utilities Commission of Nevada in A-791302.

5                   THE COURT RECORDER: Put your names on the record,  
6 please.

7                   MR. POLSENBERG: Good morning, Your Honor. Dan  
8 Polsenberg for Southwest Gas.

9                   MR. SMITH: Abe Smith for Southwest Gas.

10                  MS. TERWILLIGER: Good morning, Your Honor. Debrea  
11 Terwilliger for Public Utilities Commission of Nevada.

12                  MR. STUHFF: Good morning, Your Honor. Paul Stuhff  
13 here for the State of Nevada, Bureau of Consumer Protection.

14                  THE COURT: All right. This is -- all right, I may  
15 need to make a quick record with this.

16                  Okay. This is a matter that preceded before the  
17 Public Utilities Commission of Nevada. After a decision was  
18 rendered in that matter the Southwest Gas took a Petition,  
19 filed a Petition for Judicial Review challenging the  
20 Commission's Findings.

21                  And in a period of time after they had filed their  
22 Petition, they then asked leave to file a Reply to the  
23 Opposition by the Commission and Judge Bonaventure, in my  
24 absence, had granted that. And during that hearing, the  
25 Public Utilities Commission had asked for a surrebuttal time,

1 and so dates were set.

2 This was originally set for Judicial Review for  
3 today. And because of those requests of -- for the -- a Reply  
4 and then a rebuttal to the Reply, it was set -- it's been set  
5 for January 9th.

6 MR. POLSENBERG: Your Honor, if I may interrupt you.

7 THE COURT: Okay.

8 MR. POLSENBERG: The date of today, December 17th,  
9 was based on the Replies and the Surreplies.

10 THE COURT: Okay.

11 MR. POLSENBERG: So, it wasn't --

12 THE COURT: Oh, I'm sorry. Then there --

13 MR. POLSENBERG: -- moved because of the --

14 THE COURT: -- was a time that came because of the  
15 date for today that there was a request to continue it the  
16 9th.

17 MR. POLSENBERG: I had originally requested to move  
18 it because I had something else --

19 THE COURT: Right.

20 MR. POLSENBERG: -- and then realized that this was  
21 more important than my something else --

22 THE COURT: Okay.

23 MR. POLSENBERG: -- and so tried to move it back to  
24 here. By then our friends from the Government had rearranged  
25 their schedules and actually told me they couldn't make it

1 here today, although, they are here today.

2 THE COURT: Okay. Well, needless to say, there was  
3 then a request for a stay filed in light of the fact that the  
4 Public Utilities Commission had filed an appeal of Judge  
5 Bonaventure's decision that I signed, to give the Southwest  
6 Gas an opportunity to file a Reply and then a Surrebuttal.

7 And so today, in light of the fact that I see that  
8 the Petition for Judicial Review is on for the 9th, I'm not  
9 prepared to address your Judicial Review today.

10 MR. POLSENBERG: I understand that and I --

11 THE COURT: Okay.

12 MR. POLSENBERG: -- don't think either of us are  
13 either.

14 THE COURT: All right. So what I'm just addressing  
15 today -- and in the meantime, there's been a Joinder also  
16 filed on behalf of the State of Nevada, so what -- as an  
17 Intervenor.

18 So what I'm just going to do is address the stay at  
19 this point. So it's your motion.

20 MS. TERWILLIGER: Thank you, Your Honor.

21 Debrea Terwilliger for the Public Utilities  
22 Commission. As you stated, we're here asking for a stay of  
23 the -- of the procedural -- the procedural order in this case  
24 given that the Commission, the PUC has filed a Petition for  
25 Writ with the Supreme Court on December 9th.

1           Contemporaneously, we filed the Motion for Stay here  
2 at the Court. You know, this is -- we're asking for this in  
3 the interest of judicial economy. We seek clarity from the  
4 Nevada Supreme Court as to the appeal process for the  
5 Commission. And the Commission's opinion, NRS 703.373, does  
6 not permit Replies. And to the extent this Court would have  
7 the hearing on this matter, whether that be January 9th or  
8 some other time, before the Supreme Court gives us that  
9 clarity as to that statute --

10           THE COURT: Can I ask you a question though?

11           MS. TERWILLIGER: Sure.

12           THE COURT: If we're in a hearing --

13           MS. TERWILLIGER: Yeah.

14           THE COURT: -- and we're actually to the hearing  
15 proceeding, would they not then still be allowed to present  
16 the same information that would be given in a written Reply?

17           MS. TERWILLIGER: Arguably, yes. But nonetheless, I  
18 think, you know, the --

19           THE COURT: Okay.

20           MS. TERWILLIGER: -- the -- look, this is an issue  
21 of matter -- a matter of public importance for the State. The  
22 Nevada Legislature has been clear, in our opinion, that NRS  
23 703.373 requires for an expedited proceeding for Commission  
24 proceedings, and that's in the ratepayer's interest.

25           The longer we go between Commission cases, and the

1 judicial process, the longer that pot of money that's at  
2 issue, particularly in rate cases, which we're here on, that  
3 pot of money grows. But normally, under normal circumstances,  
4 this Commission would be saying, we should have moved to  
5 hearing as quickly as possible.

6 And we did argue that. We argued that the Reply  
7 shouldn't be allowed because we should be moving towards  
8 hearing. But the Commission, as the public body, has decided  
9 that the -- it is more important -- the -- getting clarity  
10 from the Supreme Court, for not just Southwest Gas's  
11 ratepayers, but for all ratepayers, all of us are a ratepayer  
12 of some public utility in the State, whether that's NV Energy,  
13 Southwest Gas, a telecom provider; it's more important to get  
14 clarity and to temporarily ask this Court to stay this  
15 proceeding, such that -- such that we can see if the Supreme  
16 Court is going to give us the clarity we asked for and so that  
17 this Court, in the interest of judicial economy, does not have  
18 to -- to hear Replies, and Surreplies, that the Supreme Court  
19 might now allow.

20 And if I may, I just want to, you know, Southwest  
21 Gas --

22 THE COURT: Okay.

23 MS. TERWILLIGER: -- argues we didn't -- we didn't  
24 address Nevada Rule of Appellate Procedure 8(c). That's the  
25 standard that would be applied if the Nevada Supreme Court, if

1 we asked for a stay here, this Court might find instructive.  
2 You know, that standard is whether the object, the appeal, or  
3 Writ Petition will be defeated if the stay or injunction is  
4 denied.

5           The object or appeal is, again, I'm repeating  
6 myself, but it's to get clarity from the Nevada Supreme Court.  
7 We need to know what the judicial appeal process is for PUC  
8 cases, you know, the Commission, you know, respectfully, Your  
9 Honor, that the order from the -- the Court's order granting  
10 the Reply has thrown that in a bit of a disarray.

11           We have other appeals pending. We have one coming  
12 up for oral argument in the Second JD. NV Energy did not  
13 request a Reply, did not seek a Reply. It's very -- we do not  
14 have Replies in PUC cases.

15           THE COURT: But isn't there not a lot of -- a degree  
16 of discretion that's afforded the District Court in this area  
17 for purposes of having clarity, before you actually go to the  
18 actual -- the actual hearing?

19           MS. TERWILLIGER: I understand your interest, but  
20 the Nevada Supreme Court has spoken. The Rural Telephone  
21 case, you know, Southwest Gas argues that the Rural Telephone  
22 case is not the same as this case. They're right. But that  
23 doesn't mean that the Rural Telephone case didn't address this  
24 very issue.

25           The Nevada Supreme Court said in the Rural Telephone

1 case, There are mandatory discretionary provisions in NRS  
2 703.373. One of the mandatory provisions is NRS 703.373(7)  
3 which says, we -- after the respondents -- that's me and the  
4 BCP, the AG's office, file our Reply Memorandum, the matter is  
5 at issue and the parties have to be ready to go to hearing in  
6 20 days. The Court said that was mandatory language and it  
7 leaves no room for a court discretion.

8 So being -- the matter being at issue after we file  
9 our Reply Memorandum does not leave room for -- for a Reply.  
10 The matter began at issue, and be ready for hearing in 20 days  
11 does not leave room for appeal.

12 So I -- under normal circumstances, I understand  
13 this Court would like the discretion to take more pleadings to  
14 understand issues. But in this case, the Nevada legislature  
15 and the Nevada Supreme Court have spoken; we want Nevada PUC  
16 appeal cases to move quickly.

17 They -- this is why NRS 703.373 is different than  
18 NRS 233B. Other state agencies -- other state agencies have  
19 their appeals governed by NRS 233B, which does allow Replies,  
20 and it allows some room in the procedural schedule.

21 This statute doesn't allow that room. And it's  
22 because we're all ratepayers here. That pot of money  
23 continues to grow between the, you know, the Commission  
24 decision and the resolution of the appeal process, which is  
25 like why I said, under normal circumstances we'd be saying,

1 let's move forward with this case.

2 But in this case, the Commission, as a public body  
3 has said, we want clarity from the Supreme Court, and we, Your  
4 Honor, don't want you to waste your time hearing arguments  
5 that the Replies and Surreplies that the Nevada Supreme Court  
6 say -- may say later, you know -- you know, we don't -- we  
7 don't think those were lawfully made, those Replies and  
8 Surreplies. Those questions can get asked at hearing.

9 Southwest Gas should have known. They should have, you  
10 know, reviewed NRS 703.373, realized they only got one bite of  
11 apple. The arguments they covered in their Reply could have  
12 easily -- they were standard of review arguments.  
13 They could have easily been covered in their opening  
14 memorandum. They -- the fact that they didn't do was -- that  
15 -- that's their -- that's their issue.

16 So, you know, and I just want to make clarification,  
17 because you kind of stated on the record, that we asked for a  
18 Surreply. That was only our backup position.

19 Our -- our primary position that the Commission  
20 took, when we opposed their Motion for a Reply was that we  
21 don't think it's allowed under NRS 703.373. We only asked for  
22 that as a backup because the statute also contemplates the  
23 respondents, that being the PUC in this case, and the BCP get  
24 the last word. So that's the only reason that was asked for.  
25 That was not our primary request.

1           So, you know, I just want to -- you know, Southwest  
2 Gas also makes some laches argument, that we waited too long  
3 to file the Petition for Writ, that we acquiesced in filing  
4 our Surreply.

5           Well, the Surreply was due less than two weeks after  
6 Judge Bonaventure ordered -- he -- that hearing was on October  
7 15th, we had a due date of November 1st. It was a very quick  
8 turnaround. I don't know that the Commission should be  
9 punishing [sic] for following a court order that was -- had a  
10 really quick turnaround for the surreplies.

11           We moved towards this Petition and filing this  
12 Petition as quickly as possible. I think, you know, other --  
13 other cases that -- Southwest Gas cited some cases that seem  
14 to imply that -- that two months was too long.

15           Well, first of all, it wasn't two months. The -- we  
16 had -- Judge Bonaventure set the December 17th -- or set the  
17 -- Judges Bonaventure said on October 15th that we filed the  
18 Replies and Surreplies and moved to hearing on December 17th.  
19 That Notice of Entry of Order was November 15th.

20           We filed on December 9th. If you're going from  
21 October 15th, that was less than two months. If you're going  
22 from November 15th, that was less than a month. There are  
23 other courts who have said that four months does not raise a  
24 laches argument, State versus Eighth JD, Anzalone, and I hope  
25 I'm pronouncing that right, 118 Nev. 140, at pages 147, 48;

1 Moseley versus Eighth JD, 124 Nev. 654, at 659, a four month  
2 delay do not support laches.

3 THE COURT: Okay.

4 MS. TERWILLIGER: We don't think -- we went as  
5 quickly as we could at the Commission, who normally doesn't do  
6 these types of Writs. So I -- you know, I just want to -- I  
7 want to kind of wrap up with one thing. That Southwest Gas  
8 now seems to be causing -- saying we caused a delay.

9 I'm sorry, I just can't -- I can't buy that  
10 argument. We filed our certified record in accordance with  
11 the statute 30 days after their -- their Petition for Judicial  
12 Review was served on us on March 22nd. We filed on April  
13 22nd. They filed their Memorandum 30 days later. We filed  
14 our Reply Memorandum 30 days later. We were ready to go  
15 hearing after all that happened.

16 Southwest Gas filed a Reply -- or a Motion for Reply  
17 and a Reply attached to that Motion, 46 days after we filed  
18 our memorandum.

19 Now, if they were operating under NRS 233B, that  
20 would have been 16 days later than NRS 233B allowed. They  
21 filed that motion 46 days after we filed our Memorandum.

22 We are here -- the notion that Southwest Gas is  
23 harmed in this case is bogus, because we are here now because  
24 of their actions, their decision to file a Reply when the  
25 statute doesn't allow it, 46 days after we filed our

1 Memorandum.

2           So the notion that we caused a delay or that  
3 Southwest Gas is harmed is just -- I'm sorry, I can't -- I  
4 can't buy it. And I want to make this point.

5           Mr. Polsenberg, after he said that he couldn't make  
6 the December 17th hearing, we worked with him to try to come  
7 up with another date. And he's now saying we caused delay  
8 because we couldn't come a week earlier.

9           I'm sorry, I -- I and Whitney Digesti, who's the  
10 counsel who will be arguing the substantive hearing, had been  
11 working on the December 17th hearing.

12           Mr. Polsenberg's conflict doesn't mean I have to  
13 give a week of my prep time up when I have other competing  
14 interests. Believe it or not, being in court is not my day  
15 job. My day job is advising Commissioners, writing Commission  
16 orders. I don't have to give up a week of my prep time in  
17 order to fit Mr. Polsenberg's schedule. I'm sorry.

18           And then the last thing -- I'm jumping around here a  
19 bit -- but Southwest Gas also says it will be harmed. I just  
20 want to make one point for you, from the Commission procedural  
21 perspective.

22           If this Court reverses the Commission, Southwest  
23 Gas, when they -- when Southwest Gas comes back to the  
24 Commission to implement that that -- whatever this Court does,  
25 and let's say it's reverse some component of the Commission's

1 case, Southwest Gas can request that the new rates that get  
2 put into effect take into account the time value of money they  
3 lost between the Commission order and the judicial  
4 proceedings, wherever we are in the judicial proceedings,  
5 essentially, interest. We call it carry in the PUC world.

6 They can ask for that time value of money, that  
7 money their shareholders lost by not collecting the rate that  
8 this Court decides they should have collected.

9 The notion that Southwest Gas's shareholders are  
10 going to be harmed by a stay is just wrong. They can come to  
11 the Commission after this Court order -- this Court rules and  
12 get -- and ask for that interest, that time value of money  
13 back.

14 THE COURT: Okay.

15 MS. TERWILLIGER: So I'm --

16 THE COURT: All right.

17 MS. TERWILLIGER: -- here to answer any questions.

18 THE COURT: Okay.

19 MS. TERWILLIGER: Thank you for giving me the time  
20 to speak.

21 THE COURT: Did you have anything to add?

22 MR. STUHFF: Thank you, Your Honor.

23 Paul Stuhff here for the Nevada Attorney General's  
24 Office, the Bureau of Consumer Protection.

25 We would just join with the Commission's motion in

1 this matter. We represent the interests of ratepayers in this  
2 case. This -- this case has suffered from delays. Those  
3 delays have been brought about by Southwest Gas as Ms.  
4 Terwilliger has stated.

5           Basically, the Southwest Gas has asked for more  
6 briefing on this than is called for by NRS 703.373. Normally,  
7 in a typical case, we would say, you know, that's within the  
8 discretion of the Court. The Court can call for more  
9 briefing. That's absolutely true. We think that in the  
10 typical case that's -- that's fine.

11           But in this case, with the amount of briefing that's  
12 gone on, the Commission has sought extraordinary relief  
13 because they believe that they don't have a plain, speedy, or  
14 adequate remedy, so they've gone to the Nevada Supreme Court.

15           To avoid wasting your time, Your Honor, frankly, we  
16 believe that this case should be stayed pending the decision  
17 of the Nevada Supreme Court and then you will receive a  
18 decision from the Nevada Supreme Court as to whether to  
19 consider the Reply or Surreply or not.

20           And that decision --

21           THE COURT: That was the question I was asking  
22 though, is if the same information can be supplied or given at  
23 the hearing, then what are you gaining? Let's say I deny the  
24 granting of a stay, and we have the hearing on the 9th; the  
25 only issue then would be, you'd think that there would be an

1 appealable issue as to the same idea, and that I wasn't to  
2 consider that information? I don't buy that. I don't think  
3 that the Court's going to tell me, you know what, you should  
4 have -- you shouldn't have considered this additional  
5 information because it wasn't added until after their initial  
6 reply. I don't buy that. That's what I'm saying.

7           So what the concern I have -- I understand your idea  
8 with regards to procedural, that you want some clarify from  
9 the Supreme Court. You know, that -- I think conceptually, we  
10 always say that. We want clarity from the Supreme Court.

11           But in this particular case, when we're talking  
12 about, one, you're putting the same argument about timing and  
13 wanting to move things on, it makes no sense to me that now  
14 you ask to -- to stay this on that particular issue, in light  
15 of the fact that I could accept that or -- or deal with that  
16 information at the hearing itself.

17           That's why I'm having concerns with it. If you're  
18 saying that I cannot, the position you're taking is that I  
19 cannot consider that additional information that they put in  
20 their -- in their brief that, if short -- and say that they  
21 had a brief at all and they gave it to me at the hearing, if  
22 you're saying that, I need some authority on that. Do you  
23 understand what I'm saying?

24           Because if that's your -- if that's the Petition  
25 you're taking -- I mean the position you're taking before the

1 Supreme Court, there is no authority to support that. And so  
2 that's why I'm having some concerns with this at this point.

3 MS. TERWILLIGER: Thank you, Your Honor. Debrea  
4 Terwilliger.

5 Just to -- if I understand your question, that --  
6 what you're saying is that the issues that were addressed in  
7 the Reply and Surreply that you could --

8 THE COURT: Um-h'm

9 MS. TERWILLIGER: -- you can address them at  
10 hearing.

11 THE COURT: Right.

12 MS. TERWILLIGER: You could hear them at hearing.  
13 Of course. Absolutely.

14 THE COURT: Right.

15 MS. TERWILLIGER: That -- that is, you know, that is  
16 your --

17 THE COURT: And so --

18 MS. TERWILLIGER: -- that -- sure.

19 THE COURT: -- with that being said, would it not be  
20 more prudent if the parties be given the opportunity to  
21 provide me with that additional -- with those additional  
22 arguments with some authority that I may be able to prepare  
23 for prior to the date of the actual hearing, if that's  
24 something that there's going to be made -- the arguments are  
25 going to be made before me.

1 I mean, it's one thing to come in here and hear  
2 their arguments, let's say one, two. And then at the hearing  
3 you throw in three and four, but then there's no authority  
4 behind it, and you don't have an opportunity to address that  
5 authority, which you -- however you're giving it at this  
6 point, you will be, because you do have the right to respond  
7 last. That's why I'm having -- I'm --

8 MS. TERWILLIGER: Yeah, you're addressing a  
9 practical matter that I understand your issue.

10 THE COURT: Okay.

11 MS. TERWILLIGER: We're -- we're addressing what we  
12 want is clarity in the law going --

13 THE COURT: All right.

14 MS. TERWILLIGER: -- forward. I --

15 THE COURT: I know, but can't that be something that  
16 can be dealt with at a later time, because I'm still going to  
17 get the information. You're agreeing I'd still get the  
18 information anyhow.

19 MS. TERWILLIGER: Yes. Yes.

20 THE COURT: So if we have the hearing on the 9th, I  
21 make the decision I'm going to make one way or the other.

22 MS. TERWILLIGER: Um-h'm

23 THE COURT: If for some reason you think that you  
24 need to address it further or they need to address it further  
25 then you can address the issue that you've raised now that you

1 want to -- that you're challenging on a Writ. That's what --

2 MS. TERWILLIGER: They --

3 THE COURT: -- that's what I'm getting at.

4 MS. TERWILLIGER: Yeah, the issue is, is that the  
5 Writ, the Petition for Writ asks for the Court to vacate that  
6 order.

7 THE COURT: Right.

8 MS. TERWILLIGER: That the Reply and Surreply, they  
9 shouldn't have gotten another bite of the apple. They should  
10 have known --

11 THE COURT: But are they though? That's what I'm  
12 saying. Is it really another bite of the apple in light of  
13 the fact that they're presenting or giving the Court  
14 sufficient information to support what they're going to be  
15 arguing at the actual hearing?

16 MS. TERWILLIGER: It is another bite at the apple.  
17 I mean, it's -- it's more information that the Court can use  
18 to deal with --

19 THE COURT: Okay.

20 MS. TERWILLIGER: -- that could have come in at the  
21 hearing. But it still is another bite at the apple that has  
22 delayed these proceedings.

23 THE COURT: Okay. All right.

24 I don't need to hear anything from you all, because  
25 the position I'm taking is that -- exactly -- is that I'm of

1 the opinion that the parties brief certain issues in their  
2 initial brief, and you file a response to it, and then they  
3 have other issues that they want to address, they certainly  
4 would have that right to do that at a hearing.

5 So I think for purposes of giving -- being more  
6 informed to the Court, I would -- I would believe that Judge  
7 Bonaventure granted that for that reason.

8 So I'm going to deny the Motion for Stay. We're  
9 going to have the hearing on the 9th. I mean, if you get some  
10 kind of -- something from them, because you'll have to apply  
11 to the Supreme Court, then fine. You know, but at this point  
12 in time, I understand the concerns with both parties of  
13 timing. And that's basically the argument you're making with  
14 regards to the statute. And I understand it. I do.

15 But -- and would I have granted the motion? I don't  
16 know. But I'm going to have the hearing on the 9th and we're  
17 going to resolve this on the merits.

18 MR. POLSENBERG: Thank you, Your Honor.

19 MR. SMITH: Thank you, Your Honor.

20 MS. TERWILLIGER: Thank you, Your Honor.

21 THE COURT: All right.

22 MR. STUHFF: Thank you.

23 THE COURT: So --

24 MR. POLSENBERG: Your Honor, Abe Smith went to a lot  
25 of effort to prepare an argument, so anybody who wants to hear

1 it, he's going to give it out in the hallway.

2 THE COURT: I'm going to ask that you prepare an  
3 order though.

4 MR. POLSENBERG: Yeah, certainly.

5 MR. SMITH: Thank you.

6 THE COURT: Okay.

7 MR. POLSENBERG: And we'll run it by them.

8 THE COURT: Okay. Thank you.

9 MR. POLSENBERG: Thank you, Your Honor.

10 THE COURT: Okay. We'll see you back on the 9th;  
11 okay?

12 MR. POLSENBERG: Great. Thank you, Your Honor.

13 MS. TERWILLIGER: Thank you.

14 MR. STUHFF: Thank you.

15 THE COURT: Okay. You all have a good Christmas and  
16 holidays.

17 MR. STUHFF: You, too.

18 [Hearing concluded at 9:28 A.M.]

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ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

*Julie Lord*

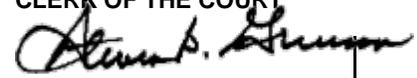
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JULIE LORD, INDEPENDENT TRANSCRIBER  
VERBATIM DIGITAL REPORTING, LLC

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Steven D. Grierson  
CLERK OF THE COURT



RTRAN

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

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

BEFORE THE WILLIAM D. KEPHART, DISTRICT COURT JUDGE

THURSDAY, JANUARY 9, 2020

**RECORDER'S TRANSCRIPT OF HEARING:  
PETITION FOR JUDICIAL REVIEW**

APPEARANCES:

FOR THE PETITIONER:	DANIEL F. POLSENBERG, ESQ. ABRAHAM G. SMITH, ESQ.
FOR THE RESPONDENT:	DEBREA M. TERWILLIGER, ESQ. SHELLY A. CASSITY, ESQ.
FOR THE INTERVENOR:	WHITNEY F. DIGESTI, ESQ. Deputy Attorney General

RECORDED BY: CHRISTINE ERICKSON, COURT RECORDER  
TRANSCRIBED BY: VERBATIM DIGITAL REPORTING, LLC

1                   LAS VEGAS, NEVADA, THURSDAY, JANUARY 9. 2020

2                   [Case called at 12:59 P.M.]

3                   THE COURT: Just for the record, we're on the case  
4 of Southwest Gas Corporation versus Public Utilities  
5 Commission of Nevada. This is A-791302.

6                   This is on for an Evidentiary Hearing regarding a  
7 Petition for Judicial Review. Put your name on the record,  
8 please.

9                   MR. POLSENBERG: Dan Polsenberg and Abe Smith for  
10 the Petitioner, Southwest Gas.

11                   MS. TERWILLIGER: Debrea Terwilliger and Shelly  
12 Cassity for the Respondent, Public Utilities Commission of  
13 Nevada.

14                   MS. DIGESTI: Whitney Digesti with the Nevada  
15 Attorney General's Bureau of Consumer Protection.

16                   THE COURT: Okay. All right. So --

17                   MR. POLSENBERG: Your Honor, I don't think it's  
18 strictly speaking an evidentiary hearing.

19                   THE COURT: Well, you had asked me to review --

20                   MR. POLSENBERG: Yes.

21                   THE COURT: -- you had the Petition, and I had  
22 granted the request for a review on it. Are you --

23                   MR. POLSENBERG: Right, a hearing on the Petition  
24 for Judicial Review.

25                   THE COURT: Right.

1 MR. POLSENBURG: Yeah.

2 THE COURT: So --

3 MR. POLSENBURG: I -- and this is our Petition. If  
4 you look at the Commission's Opposition, they say that there  
5 are five factors. And I think they have them backwards.  
6 They start out by saying that the PUCN weighed the evidence  
7 that determined the amount of the pension expense, it  
8 disallowed certain costs, that it did not apply a  
9 presumption.

10 I think, well, it's not unusual in motions and  
11 appeals for the parties to rank the orders -- the arguments  
12 in the exact opposite order. I think the most critical issue  
13 here and the most important usual here is whether there is a  
14 presumption of prudence.

15 And I think it is clear that there is a presumption  
16 of prudence. Let me take it the easiest way possible, and  
17 I'm going to try to be brief here. I was talking to the  
18 Marshal about how I only ever get 15 minutes in the Supreme  
19 Court, so I'm go to practice doing this one in 15 minutes.

20 So if you look back to Ely Light & Power from 1964,  
21 and the Court there talked about the presumption of the  
22 proper exercise of judgment by the Utility in matters which  
23 are particularly a function of the management. It's the  
24 Commission's duty to regulate rates but not to manage  
25 Utility's business.

1           And then more recently in 2006, Justice Hardesty  
2 explained at length the presumption of prudence, and he  
3 talked about how it applies in rate cases. Now, that case  
4 was -- let me go off on a tangent for a second.

5           That case was a deferred energy accounting case.  
6 And the Supreme Court said at the beginning of the case that  
7 the issue of first impression was whether the presumption of  
8 prudence applies in that type of proceeding.

9           From the language later in the case where they talk  
10 about the presumption, it's pretty clear that they  
11 acknowledge that the presumption, just as in Ely Light &  
12 Power, the presumption exists in general rate cases.

13           Now, my friends on the other side have argued that  
14 the legislature the next year, 2007, passed AB7 to get rid of  
15 the decision in Nevada Power.

16           And if that's what they intended to do, that's all  
17 they did. It's clear, and the Commission admits, that the  
18 language of AB7 is just to abolish the presumption of  
19 prudence in a deferred energy accounting case. It doesn't go  
20 to a general rate case. Now --

21           THE COURT: Are you more specifically talking about  
22 NRS 704.185?

23           MR. POLSENBERG: Yes, Your Honor.

24           THE COURT: Okay. Well, just since we're there,  
25 let me just read into the record how it reads.

1           Subsection (3) reads: "When a Public Utility which  
2 purchases natural gas for resell, files an annual rate  
3 adjustment application, or an annual deferred energy  
4 accounting adjustment application, the proceeding regarding  
5 the application must include a review of the transactions and  
6 recorded costs of natural gas included in application, there  
7 is no presumption of reasonableness or prudence for any  
8 transactions or recorded costs of natural gas included in the  
9 application, and the Public Utilities has the burden of  
10 proving reasonableness and prudence in the proceedings."

11           MR. POLSENBERG: Right. But that's what I'm  
12 talking about.

13           THE COURT: So --

14           MR. POLSENBERG: There are two different things.  
15 There's the deferred energy accounting proceeding --

16           THE COURT: Right.

17           MR. POLSENBERG: -- And that's what that is. And  
18 then there's the general rate proceeding. In a general rate  
19 case --

20           THE COURT: Okay.

21           MR. POLSENBERG: -- you look at all the types of  
22 costs and expenditures that the Utility has. In the deferred  
23 energy accounting case, you only look at the variation in the  
24 energy acquisition costs themselves.

25           THE COURT: Yeah, but doesn't it specifically

1 address that in this when it talks about annual rate  
2 adjustment application or --

3 MR. POLSENBERG: No, because --

4 THE COURT: -- or --

5 MR. POLSENBERG: -- you can --

6 THE COURT: -- an annual deferred energy  
7 accounting?

8 MR. POLSENBERG: Well, no, because this isn't  
9 either one of them. This is a general rate case.

10 THE COURT: Okay.

11 MR. POLSENBERG: This isn't an annual case. As the  
12 Commission points out in their Brief, this proceeding started  
13 in 2019. The one -- the general rate case before that was  
14 2012.

15 So this isn't -- and this is a proceeding to change  
16 the rate, not just to make an adjustment to the rate. It  
17 isn't just -- and if you look at the statute, it's talking  
18 about the costs of energy, about the costs of gas.

19 THE COURT: What's that? What did you say?

20 MR. POLSENBERG: It's -- look, it can -- said --  
21 there is no presumption of reasonableness or prudence for any  
22 transaction or recorded costs of natural gas.

23 THE COURT: Um-h'm.

24 MR. POLSENBERG: So we're only -- in those  
25 proceedings, in that kind of adjustment, we're only looking

1 at a change in the cost of energy.

2           The Nevada Power case was a case where the cost of  
3 electricity went way up, and Nevada Power had not entered  
4 into a fail safe arrangement with Merrill Lynch where they  
5 could have had the option to buy energy cheaper. So they  
6 came in on the deferred energy accounting proceeding, an  
7 adjusted case. Not a general rate case; an adjusted case  
8 where all the PUCN would be looking at is the acquisition  
9 cost of power itself.

10           Now, the Public Utilities Commission of Nevada in  
11 that case disallowed \$180 million of acquisition costs for  
12 energy itself, for electricity, and -- on the basis that the  
13 Nevada Power could have entered into arrangements before  
14 that, which would have avoided all that cost.

15           The Supreme Court said, no, you can't question the  
16 prudence of a decision-maker at the Utility to acquire -- to  
17 handle the cost of getting additional energy. And it's  
18 roughly the same, whether you're dealing with electricity or  
19 natural gas. It's the cost of acquiring the energy itself  
20 because those rates can fluctuate.

21           The Supreme Court said the presumption that applies  
22 in general rate cases also applies in deferred energy  
23 accounting cases. This is not an annual adjustment case  
24 where we're looking at how much the price of natural gas has  
25 changed.

1           In fact, the costs that we're looking at here,  
2 obviously, are the capital cost. We're looking at over \$50  
3 million in software programs. We're look at the pension  
4 expenses.

5           These things that we're talking about here, and the  
6 rate of return on the investment, none of these have to do  
7 with the cost of acquiring energy. That's something that we  
8 can take up with the PUCN on a more frequent basis, if it  
9 becomes necessary.

10           Now, I -- you know, a lot of the cases we cite go  
11 back to Noah. But I remember 2006, and remember the uproar  
12 there was about Nevada Power being allowed to charge higher  
13 rates when they could have avoided the entire situation.

14           Now, there's a principle of statutory construction,  
15 that is, if you're looking at a statute, you look at the  
16 tumult, t-u-m-u-l-t, which is the issue that caused all the  
17 concern that started the statute.

18           And the issue was the Nevada Supreme Court  
19 extending the presumption of prejudice to deferred energy  
20 accounting cases. And that's what the legislature took up.  
21 That's what they were upset about. They quote Barbara  
22 Buckley saying, we're -- you know, Utilities shouldn't be  
23 allowed to make ratepayers pay for their mistakes.

24           The mistake there was Nevada Power not having the  
25 backup agreements, which would have saved \$180 million.

1 That's why they passed the statute. That's why the statute  
2 is so narrowly worded.

3 The Commission admits that the language of AB7 only  
4 goes to actual deferred energy agreements, not to this kind  
5 of case.

6 They insinuate, however, and the Bureau actually  
7 comes right out and says, well, why would the legislature  
8 have gotten rid of the presumption of prudence for one type  
9 of a case, but not for another type of case?

10 Well, the first principle of statutory of  
11 instruction is what did the legislature say? And they only  
12 got rid of this. They only got rid of a deferred accounting  
13 case. They did not -- they did not change the presumption in  
14 a general rate case.

15 THE COURT: Well, explain to me, then, what --  
16 okay. So your position is, is that -- is that when they're  
17 talking about in 704.185, where it says -- talking about  
18 annual rate adjustment application --

19 MR. POLSENBERG: Yes.

20 THE COURT: -- that would be something separate  
21 than an annual deferred energy accounting adjustment  
22 application.

23 MR. POLSENBERG: No, I'm talking about those two  
24 being one type of thing in a general --

25 THE COURT: Well, why would they --

1 MR. POLSENBERG: -- rate case.

2 THE COURT: Okay. That's -- that's where you have  
3 to talk to me a little bit more about that because --

4 MR. POLSENBERG: Okay. We're --

5 THE COURT: -- because --

6 MR. POLSENBERG: What we're in here right now isn't  
7 either one of those. Those things are adjustments to general  
8 rate cases, based on changes in -- you can tell from the  
9 legislature, if you're going to go in on one of those, it  
10 can't be based on the costs of acquiring energy, in this  
11 case, natural gas.

12 THE COURT: Okay. That's what I mean. That's --  
13 so your position is, is that when they're talking about an  
14 annual rate adjustment application, it's only subject to the  
15 -- you having to prove reasonableness and prudence and  
16 proceeding when you're talking about --

17 MR. POLSENBERG: Acquisition costs.

18 THE COURT: -- the costs of natural gas?

19 MR. POLSENBERG: Yeah.

20 THE COURT: So -- so it has nothing to do with the  
21 costs associated with --

22 MR. POLSENBERG: Operating the business.

23 THE COURT: -- operating the business.

24 MR. POLSENBERG: The capital costs of operating the  
25 business.

1 THE COURT: Okay. Okay. All right.

2 MR. POLSENBERG: And I'll go further than capital  
3 costs. It's clear that the software costs are capital costs.  
4 I think the pension costs may be as well, but they are also a  
5 cost of doing business.

6 THE COURT: Okay. So the whole issue, then, that  
7 we're getting around is whether or not you're entitled to  
8 that presumption in a situation when we're talking about the  
9 software costs, and even you've went so far as to say even  
10 the pension costs.

11 MR. POLSENBERG: Right.

12 THE COURT: And you're saying that's because it has  
13 nothing to do with acquisition of natural gas, the costs of  
14 natural gas as a rate increase.

15 MR. POLSENBERG: I'm saying AB 7 --

16 THE COURT: Okay.

17 MR. POLSENBERG: -- did nothing to change the  
18 common law rule in this regard. You know, I was in a case  
19 years ago with the Nevada Supreme Court -- a case called  
20 Medallion 1:11:13\*(phonetic) said, okay, you can have -- you  
21 can have indemnity actions even when there's a prior  
22 settlement.

23 And the legislature got all upset, and they came in  
24 and they changed the statute and said, okay, you can have --  
25 you can have -- you cannot have implied indemnity agreements,

1 but you can have express contractual indemnity agreements.

2 It's the same kind of thing here.

3 THE COURT: Well --

4 MR. POLSENBERG: The legislature was only looking  
5 at a narrow part of the case.

6 THE COURT: Okay. And your further argument or  
7 position is, is that there was a due process violation  
8 because your interpretation of how this should have been  
9 handled in regards to the fact that you were entitled to a  
10 presumption of reasonableness is that the violation of due  
11 process is that because they didn't give you that presumption  
12 and they required you to prove reasonableness and prudence in  
13 the proceeding?

14 MR. POLSENBERG: That's part of it.

15 THE COURT: Okay.

16 MR. POLSENBERG: I think I've got two  
17 constitutional arguments on the on the presumption. One is a  
18 due process aspect, and that goes to all the issues because  
19 it -- the taking is -- it's a deprivation of property rights,  
20 it's a confiscatory -- I think it -- we are also under the  
21 Takings Clause of the 5th and 14th amendments.

22 So the 5th amendment, as incorporated to the States  
23 through the 14th. The -- but I have another due process  
24 argument as well. The due process argument is that we didn't  
25 have proper notice in -- both in light of -- I've got to tell

1 you, I think I can win this case without the presumption.

2           It's a sexier case arguing for the presumption  
3 because, I think, it's clear that the presumption exists both  
4 under Nevada law, under federal common law, and under --  
5 okay, all right, maybe it's not sexy. But and the federal  
6 common law cases that we have are bounded on just those  
7 constitutional provisions that I'm talking about.

8           So we come in on the same types of showings that  
9 we've always had to make in front of the Public Utilities  
10 Commission and the Public Service Commission. You know, I've  
11 been -- I've been doing rate cases --

12           THE COURT: Well, what's the -- the notice -- I  
13 kind of read those together. The due process violation was  
14 that -- is that they didn't use the presumption standard, and  
15 therefore, required you to provide -- you know, prove  
16 reasonableness and produce it and that would be -- the notice  
17 argument is that you weren't put on notice that you needed to  
18 do that, but --

19           MR. POLSENBERG: My best argument is when you  
20 combine those.

21           THE COURT: But here's the issue, is that if you  
22 misinterpret the statute, how is -- how is the notice  
23 requirement then imputed upon Public Utilities Commission  
24 here?

25           MR. POLSENBERG: Well, they have a duty to --

1 that's what I'm talking about. The way --

2 THE COURT: Okay.

3 MR. POLSENBERG: -- rate cases always have been is  
4 you make a certain showing. Here's my argument, without the  
5 presumption --

6 THE COURT: Um-h'm.

7 MR. POLSENBERG: -- although, as I say, it's better  
8 with the presumption; we go in there and we don't know that  
9 they're going to challenge the discount rate. And we have a  
10 witness there.

11 Their argument is well, the discount rate is part  
12 of your case. Well, our case is huge. And so we asked a  
13 witness about it. He had the opportunity to explain it, but  
14 we didn't know what the -- there hadn't been an attack on the  
15 discount rate beforehand in the prepared testimony.

16 So we were not aware that they were going to attack  
17 the pensions in the way that they attacked them. So that's  
18 the -- that's the just plain old vanilla due process notice,  
19 and -- and the opportunity to be heard.

20 THE COURT: Okay. But if the -- if the position  
21 that the Commission takes is that under these circumstances,  
22 is that you're not entitled to that notice because the  
23 statute puts us on notice that -- that you need to prove  
24 reasonableness in the proceeding, if -- if that's the  
25 position they have, then how -- would you agree with me -- if

1 that's correct, if that's a correct position --

2 MR. POLSENBERG: Right.

3 THE COURT: -- then what you presented at the  
4 hearing would have fallen pretty short of that because you're  
5 claiming that you weren't ready for that.

6 MR. POLSENBERG: Let me -- yes. Let me do two --

7 THE COURT: Okay.

8 MR. POLSENBERG: -- two parts to that. Yes, if we  
9 have the presumption --

10 THE COURT: Um-h'm.

11 MR. POLSENBERG: -- then their decisions, based on  
12 our failure to present evidence, are completely wrong.

13 THE COURT: Right. Okay.

14 MR. POLSENBERG: If we don't have the presumption,  
15 then we're into Franz Kafka, and where their idea of due  
16 process is we're going to have a trial, but we don't know  
17 what -- precisely what all the battle grounds are. And we  
18 don't know it's going to be the discount rate, for example.

19 THE COURT: Okay. That's your position?

20 MR. POLSENBERG: Yeah.

21 THE COURT: Okay. So you're saying if you don't  
22 have the presumption, you're in a -- in a position that you  
23 think that there still needed to be further notice of what  
24 their concerns were or what -- what their position's going to  
25 be? Is that --

1 MR. POLSENBERG: Right.

2 THE COURT: -- what you're saying?

3 MR. POLSENBERG: Yeah, and I think the two --

4 THE COURT: So you're put on notice --

5 MR. POLSENBERG: -- of them come together too,

6 because --

7 THE COURT: So you're saying under those  
8 circumstances, they lacked giving you notice of something  
9 that -- that --

10 MR. POLSENBERG: That was going to be the real  
11 disputes involved --

12 THE COURT: But that would be some -- but --

13 MR. POLSENBERG: Judge, look, it's like the  
14 practice for decades was that we had the presumption.

15 THE COURT: I know, but that -- but it appears to  
16 me, the way I'm look being at this, is that -- is that that's  
17 the -- obviously, that's the contention is that -- and --  
18 and, you know, that -- that's where you're at right now.  
19 You've asked me to --

20 MR. POLSENBERG: Correct.

21 THE COURT: -- make a decision as to whether or not  
22 it applies in -- but you're -- you made it pretty broad.  
23 You're just asking for me to make a decision that the  
24 presumption of prudence applies in general rate cases.

25 MR. POLSENBERG: Yes.

1 THE COURT: And -- but even when I -- when -- and  
2 then you've differentiated the difference to me, which I --  
3 I'm having -- I'm still not comfortable with, is that an  
4 annual rate adjustment, you do not consider that a general  
5 rate case.

6 MR. POLSENBERG: Right.

7 THE COURT: And so explain to me why. And you're  
8 position is, is because in a general rate case you're talking  
9 about costs of capital -- I mean, capital expenditures and --

10 MR. POLSENBERG: And you don't talk about the costs  
11 of energy acquisition in a general rate case.

12 THE COURT: Okay.

13 MR. POLSENBERG: They're two --

14 THE COURT: Okay.

15 MR. POLSENBERG: -- two different things.

16 THE COURT: Okay.

17 MR. POLSENBERG: Look --

18 THE COURT: I think I -- I think I understand the  
19 position you're in.

20 MR. POLSENBERG: Yeah.

21 THE COURT: I do.

22 MR. POLSENBERG: I think -- I think I do, too.

23 THE COURT: I --

24 MR. POLSENBERG: But let me go a little further,  
25 though, on the -- on the work orders on the computer details,

1 \$50 million worth, which were rejected because I think that  
2 is a huge change in the outcome.

3           What they did was they came in and they did an  
4 audit. These are big ticket items. They do an audit. They  
5 found a bunch of things that they thought were inappropriate.  
6 They found a \$9,000 backhoe that we said we would take out,  
7 and it was still booked. They found a bunch of other stuff  
8 that they like to bring up because honestly it's kind of  
9 embarrassing the way those things were booked.

10           THE COURT: Well, it -- I mean, Mr. -- it's no  
11 reflection on you, but I'll tell you, it doesn't look good  
12 for your client when you have this kind of thing.

13           MR. POLSENBERG: Sure.

14           THE COURT: When -- when it's a --

15           MR. POLSENBERG: And that's how we lost, Judge.

16 That's --

17           THE COURT: Well --

18           MR. POLSENBERG: -- how we lost because they took  
19 those particulars that came out to less than one percent, and  
20 they said, well, since you -- you haven't produced the backup  
21 for everything -- first, the Commission staff said wipe out  
22 50 percent.

23           THE COURT: I gotcha.

24           MR. POLSENBERG: Then the Commission went further  
25 and wiped out everything.

1 THE COURT: Um-h'm.

2 MR. POLSENBERG: Now, it's no -- if they -- if they  
3 are not going to use the privilege -- the presumption, here's  
4 how it should work under the presumption; we present, they  
5 audit, they go through and find stuff that looks irregular,  
6 and they did. And we disagreed -- we didn't disagree, we  
7 agreed with all of those. And we took all of those out.

8 But the fact that those were in there, they  
9 surmise, they speculate.

10 THE COURT: Well, let -- let me ask you this, is it  
11 a rebuttable presumption?

12 MR. POLSENBERG: Yes.

13 THE COURT: So under the circumstances of this  
14 matter, if I even accept the fact that they're -- that you  
15 got the presumption --

16 MR. POLSENBERG: Yeah.

17 THE COURT: -- is it your position, then, based on  
18 the -- their location of these irregularities is that they  
19 went ahead and took the presumption out based on that? Said  
20 we're no longer going to grant you the presumption --

21 MR. POLSENBERG: No, they don't think --

22 THE COURT: -- because we're looking at something  
23 that's pretty irregular.

24 MR. POLSENBERG: Here's what they did, they made --  
25 they said there's a systematic lack of oversight, and so they

1 assumed that nothing -- that there -- that nothing in what we  
2 were proposing in the software work orders was appropriate.

3 THE COURT: Okay.

4 MR. POLSENBERG: Now, that can't be the way to do  
5 it.

6 THE COURT: So under those circumstances, then they  
7 -- they found, I guess, you would say arguably sufficient  
8 information, in their opinion, that would strike the  
9 presumption?

10 MR. POLSENBERG: No.

11 THE COURT: Okay.

12 MR. POLSENBERG: It doesn't strike the presumption.  
13 It strikes the presumption as to the particular things that  
14 they're talking about. Look, we put forth -- I mean,  
15 obviously, these programs were needed. Nobody doubted that.  
16 They -- they were beneficial to ratepayers. They -- the  
17 thing that they were questioning was well, they don't say you  
18 could have gone to this vendor and gotten it cheaper. They  
19 say, maybe we could have gone to it.

20 And to tell you the truth, under the presumption of  
21 prudence, the way we -- I mean, these particular things  
22 aren't the real issue. It's the software programs and those  
23 projects themselves. Okay? They're necessary. They don't  
24 come in and say that what we were trying to do is  
25 unreasonable. They're not coming in and saying that the

1 general cost of what we're doing is unreasonable. They just  
2 didn't like what had happened in particulars, and so rejected  
3 everything.

4 I don't think that's -- that's clearly not  
5 appropriate under the presumption of prudence. They can come  
6 in on individual things and say here's what's wrong. But I  
7 don't think even without the presumption, that's an adequate  
8 adjudication.

9 You -- I think, you have a prima facie case that we  
10 need these things. For them to just speculate that they're  
11 not necessary is -- for \$50 million --

12 THE COURT: Okay.

13 MR. POLSENBERG: -- I think that's arbitrary and  
14 capricious. I think it's compounded when you deal with the  
15 pensions. With the pensions, what they did, we had costs for  
16 2018, and we booked them that way. We used a particular  
17 discount rate. They decided that they would average it over  
18 a three-year average, and that's not the way we do the  
19 accounting within the business.

20 And the discount rate that we had, they came in and  
21 they questioned the person who didn't know that that witness  
22 was going to have to justify everything. The witness was  
23 able to say, well, we got these from our actuaries, that was  
24 a recommendation to top management, management approved this.  
25 That person wasn't ready to testify on all these particulars.

1 That wasn't brought up at something in -- in advance.

2           So I think -- I think all -- I can make an argument  
3 for all of this being arbitrary and capricious. But I also  
4 think it's an error of law in the way it was handled either  
5 with the presumption or without the presumption.

6           Their main argument is for -- for -- for our  
7 projects is we -- we didn't produce enough information. But,  
8 you know, they had access to everything. The way it's always  
9 operated is we present something, parties, intervenors, come  
10 in, and they raise the issues. It -- it's not something  
11 where we don't know what's going on.

12           And the last one, which is a confiscatory issue as  
13 well, is that there were all these number of rates proposed.  
14 We were at 10.25, and they were at 9.4 and 9.3, and the  
15 Commission comes down with 9.25.

16           Realize, it's -- the role of the Commission isn't  
17 the kind of role you have as a District Judge. They're not  
18 supposed to come in here and decide how the business is  
19 supposed to be run. What we're, as a franchise, as a  
20 Utility, we're licensed -- I'm licensed as an attorney, but  
21 the State Bar doesn't come in and tell me what I have to  
22 charge.

23           The Public Utilities Commission comes in and  
24 regulates rates, but it doesn't say how the business should  
25 be run. It's actually Utilities that establish rates and

1 they review.

2 Now, their argument is they can pick a zone of  
3 reasonableness, and anywhere on that zone of reasonableness  
4 is okay. So they picked a zone is of reasonableness of 9.1  
5 to 9.7. And instead of being in the middle of that range,  
6 the way the Commission and the Bureau were, they were way  
7 down at the bottom of that.

8 THE COURT: But isn't that similar to kind of maybe  
9 in a -- maybe in a criminal statute, you know, where the  
10 Court has between one to six years and --

11 MR. POLSENBERG: And that's why I'm saying --

12 THE COURT: -- and if the Court --

13 MR. POLSENBERG: -- they're not the same as you are  
14 as a District Judge.

15 THE COURT: I know, but you're -- but if they're in  
16 that range, though, how is it that it's something that the  
17 Court would look at and say, you know -- substitute my  
18 judgment for and say, you know what, you were wrong, even  
19 though they're in a range that -- that everybody would  
20 consider reasonable.

21 It's just you just wanted the higher number and  
22 they picked the low number.

23 MR. POLSENBERG: Got it. And an example I've been  
24 playing around with for a week, I had a pro bono family law  
25 appeal once where, you know, the husband said the house is

1 worth a hundred, and the wife said it was worth a hundred and  
2 fifty, and Judge McGroarty said it was 200.

3 Well, the Judge has that kind of discretion. Okay?  
4 Because the Judge is the real authority here. What they are  
5 supposed to do is regulate what we do, not decide everything.

6 And we start out our Reply Brief by saying their  
7 argument is that they can do anything they want. And we  
8 think that's improper. We think it's confiscatory in this --  
9 in this context. We think as a result, you have a duty to  
10 review all the facts on that and not just take their  
11 position.

12 But I have to repeat again, they're not the  
13 District Court deciding things. They're not the Judge  
14 sentencing a defendant or deciding the valuation of a house.

15 THE COURT: Yeah, but aren't you asking me only in  
16 that situation, then, to sit as a -- maybe de novo?

17 MR. POLSENBERG: You are sitting de novo because  
18 I'm raising legal issues and constitutional issues.

19 THE COURT: Okay.

20 MR. POLSENBERG: Thank you, Your Honor.

21 THE COURT: All right.

22 MR. POLSENBERG: And I've got to apologize for  
23 these Briefs because that was a lot you had to take on.

24 THE COURT: I'm -- not so much the Briefs. I mean,  
25 just read the doggone orders. Holy smokes.

1 MR. POLSENBERG: Yes. Yeah.

2 THE COURT: But, okay.

3 MR. POLSENBERG: Thank you, Your Honor.

4 THE COURT: All right. Okay. So who wants to  
5 speak on behalf of the Commission or however you want to do  
6 this?

7 MS. DIGESTI: Good afternoon, Your Honor.

8 THE COURT: All right.

9 MS. DIGESTI: Your Honor, if it's okay, Debrea or  
10 Ms. Terwilliger was going to speak on behalf of the PUC, and  
11 then the BCP can come in and take over --

12 THE COURT: Sure.

13 MS. DIGESTI: -- take over anywhere if she wants me  
14 to.

15 THE COURT: Sure. Okay.

16 MS. TERWILLIGER: Good afternoon, Your Honor.  
17 Thank you for hearing us. Debrea Terwilliger on behalf of --  
18 Assistant General Counsel for the PUC.

19 So I'm going to interchangeably probably -- I tried  
20 to use PUCN in the Brief, but I'm probably going to  
21 interchange between PUC and Commission. Please forgive me.

22 So before I kind of get into the -- some rebuttal  
23 as to this argument --

24 THE COURT: I -- I want to address specifically --

25 MS. TERWILLIGER: Sure.

1 THE COURT: -- the argument as to whether or not  
2 this should be treated with the presumption or not. That's  
3 the main area that I'm looking at. Okay?

4 MS. TERWILLIGER: Okay. Yeah.

5 THE COURT: And -- and what position does the --  
6 what authority do I have with regards to that. That's what I  
7 want to know.

8 MS. TERWILLIGER: Sure.

9 THE COURT: Because, I mean, I'm looking at your  
10 cases, and I've looked at what -- what was cited and had an  
11 opportunity to read through that. And I've cited to 704.185  
12 in Mr. Polsenberg's argument.

13 MS. TERWILLIGER: Right.

14 THE COURT: So that's where I'm at. That's what I  
15 want to know about.

16 MS. TERWILLIGER: Yeah, and let me -- let me just  
17 -- I don't normally offer help to opposing counsel, but let  
18 me offer you help for clarity of the record.

19 THE COURT: Okay.

20 MS. TERWILLIGER: This is the kinds of things  
21 lawyers at the Commission do, but I'm going to do it here.

22 NRS 704.185, when it references an annual rate  
23 adjustment --

24 THE COURT: Um-h'm.

25 MS. TERWILLIGER: -- that's what we call a deferred

1 accounting adjustment in the gas world. We call it deferred  
2 accounting in electric Utility world, NV Energy. We call it  
3 an annual rate adjustment in Southwest Gas, natural gas  
4 world.

5 So that statute does not address a general rate  
6 case. We totally agree.

7 THE COURT: Okay.

8 MS. TERWILLIGER: But let's -- let's walk through  
9 why there is no rebuttable presumption of prudence. So  
10 first, there's no statute of regulation that says there's a  
11 rebuttable presumption of prudence in a rate case. We can  
12 all agree with that. Southwest Gas would have cited it if  
13 there was one. There's not.

14 Now, the only case -- the only case the Nevada  
15 Supreme Court issued where it found a rebuttable presumption  
16 of prudence, that's that Nevada Power case, 122 Nevada 821,  
17 it was specific -- it specifically referenced deferred  
18 accounting positions.

19 I think if you go into our Brief, I pulled the  
20 pages out of our Brief so I could read them to you. It's  
21 page 49 of our Memorandum. We cite a couple of notations in  
22 that case where it specifically says, "Under the PUCN's  
23 presumption framework, a Utility requesting a customer rate  
24 increase enjoys a presumption that the expenses reflected in  
25 the deferred energy application were prudently incurred and

1 taken in good faith."

2           Again, another quote, "Accordingly, we conclude  
3 that a Utility enjoys a rebuttable presumption as to its  
4 incurred costs in deferred energy accounting proceedings."

5           That Nevada Power case was not talking about rate  
6 cases in general, period, end of story. It was talking about  
7 deferred accounting. The facts were about deferred  
8 accounting. It was about deferred accounting.

9           So the next year -- that -- it was issued in 2007.  
10 The next year, the Nevada legislature comes in and says,  
11 gosh, we're -- they were not happy that the Nevada Supreme  
12 Court had ruled that way. So AB7 was adopted. That's the  
13 changes to NRS 704.185 that said there's no rebuttable  
14 presumption.

15           THE COURT: Okay.

16           MS. TERWILLIGER: So no statute or no regulation.  
17 There's been no Nevada court case that found there was  
18 rebuttable presumption of prudence.

19           THE COURT: Okay.

20           MS. TERWILLIGER: Southwest Gas tries to go to Ely  
21 Light. They come up with this notion that Ely Light had a  
22 rebuttable presumption of prudence, but you can't get there.  
23 And, in fact, the Nevada Power case, that 122 Nevada 821 --

24           THE COURT: Um-h'm.

25           MS. TERWILLIGER: -- it didn't rely on Ely Light to

1 say there was a rebuttable presumption. It relied on a prior  
2 Commission case.

3 So let's talk about the prior Commission cases  
4 because Mr. -- Southwest Gas didn't address that much here,  
5 but let's -- they talked about it in their Briefs.

6 So there's no stare decisis in Nevada. We know  
7 that. And there -- it is the case the Commission in three  
8 prior cases has found there's a rebuttable presumption of  
9 prudence.

10 Two of those cases were in the 1980s. One of them  
11 was in a deferred accounting proceeding, and that's already  
12 been taken care of by NRS 704.185. They were -- there were  
13 two Commission cases that were in general rate cases where  
14 they found a rebuttable presumption of prudence.

15 But the Commission in this case specifically  
16 distinguished those cases; found they either were superseded  
17 or an error. So the notion that Southwest -- and let me back  
18 up. The more important point here is that none of those  
19 cases, those three cases where the Commission found there was  
20 a rebuttable presumption applied to Southwest Gas. They were  
21 Nevada Power or Sierra Pacific, Sierra Pacific being the  
22 Northern Nevada Electric --

23 THE COURT: Um-h'm.

24 MS. TERWILLIGER: -- Utility. Those were not --  
25 those were not Southwest Gas cases. So for Southwest gas to

1 make the argument that it had a rebuttable presumption of  
2 prudence, then a rule of general applicability would have had  
3 to have been adopted to say there was a rebuttable  
4 presumption of prudence, but there is no rule.

5           So they're trying to take these cases, two of them  
6 decided in the '80s, and say, you know, we were relying on a  
7 rebuttable presumption of prudence that -- they just can't --  
8 you can't get there.

9           And the other reason you can't get there, and we  
10 talk about this in our Brief, the last -- Southwest Gas's  
11 last rate case was 2012. They raised the rebuttable  
12 presumption of prudence in that case.

13           And in that case, the Commission said -- the  
14 Commission said, no, presumption is one of the step -- or  
15 sorry, prudence is one of the steps you have to prove to get  
16 to a just and reasonable rate.

17           We also cited a 2008 case that the Commission  
18 decided. Same concept. Before you can get to this question  
19 of just and reasonable rates, you first have to determine  
20 that it was a prudent outlay, that it was a prudent project.

21           And just so we can get an understanding of what we  
22 mean when we say what is prudence, you know, what we're  
23 asking the Utility to do, this is a monopoly Utility, right,  
24 we are captive ratepayers. I'm a Southwest Gas customer. If  
25 I don't like my rates, I can't go somewhere and say, hey,

1 competitor, give me -- give me different gas. These are  
2 captive ratepayers.

3 The Commission was created to engage in rigorous  
4 oversight of those monopoly utilities. So -- sorry, I lost  
5 my point here, but -- yeah. So, I mean, so the -- so the --  
6 the presumption -- I mean, the notion that when the Utility  
7 comes -- oh, sorry, I was trying to explain what prudence  
8 was.

9 So what we want to know from management is why did  
10 you do this project? Why now? Why this timeline? And there  
11 were issues of costs that came up in this case about  
12 excessive outside expenses from consultants because they were  
13 rushing to finish this case. Why did you do it under this  
14 timeline? Why now? Did you choose the right vendor? Was it  
15 the least cost option? Did you -- did you conduct an RFP?

16 That's the type of stuff that Southwest Gas asked  
17 for. And this notion that Southwest Gas argues that -- that  
18 -- sorry, I have much to say that I keep getting lost in my  
19 own head.

20 Well, let me go back because I just want to cover  
21 this.

22 THE COURT: Well, let me -- let me --

23 MS. TERWILLIGER: Yeah, sure, sure.

24 THE COURT: -- let me interject here --

25 MS. TERWILLIGER: Yeah.

1 THE COURT: -- and get us kind of on the same  
2 mind --

3 MS. TERWILLIGER: Yeah.

4 THE COURT: -- mindset. Okay. And it's back to  
5 the same argument about whether or not they're entitled to  
6 this presumption or not.

7 MS. TERWILLIGER: Right, right.

8 THE COURT: If there's no statute, no statutory  
9 authority that says they are --

10 MS. TERWILLIGER: Um-h'm.

11 THE COURT: -- but there is statutory authority  
12 that talks about presumptions not available under the --  
13 under, you know, 704.185, does that not then lend some kind  
14 of credence to the fact that since it's not mentioned in any  
15 other statute, that maybe we start with that premise?

16 MS. TERWILLIGER: No. I'm sorry.

17 THE COURT: Okay.

18 MS. TERWILLIGER: I -- I'm sorry.

19 THE COURT: I'm just asking.

20 MS. TERWILLIGER: Yeah. I mean --

21 THE COURT: Okay.

22 MS. TERWILLIGER: -- so --

23 THE COURT: Because, I mean, it appears to me that  
24 there -- the legislature specifically say you're not entitled  
25 to it under these circumstances.

1 MS. TERWILLIGER: Right.

2 THE COURT: And so then, I guess, logically, the  
3 next step would be, well, if you're not entitled to it under  
4 these circumstances, somebody has said no to it here --

5 MS. TERWILLIGER: Right.

6 THE COURT: -- but no one has said no to it in  
7 other situations, in general rate or -- I'm not -- or -- or  
8 cost -- you know, capital costs and stuff.

9 So -- so I guess, then the argument is, is that --  
10 made by Southwest Gas is that in the past, we have leisured  
11 under this that presumption. And now the Commission for some  
12 reason has taken a turn and said, no, you don't get the  
13 presumption, and -- and then by doing that, required them to  
14 present -- present evidence in order to support the  
15 reasonableness.

16 MS. TERWILLIGER: Yeah.

17 THE COURT: I mean, that's the argument. Now, the  
18 other argument could be is, no, we've never had a  
19 presumption. You've never -- never, you know, had the  
20 leisure of having a presumption. You know better --

21 MS. TERWILLIGER: Right.

22 THE COURT: -- Southwest Gas. You shouldn't --  
23 that's your argue. You shouldn't be asking -- you know,  
24 telling us this now. And the only reason why you're saying  
25 it is because you screwed up by not having the evidence

1 proper to present to present your case to overcome the --  
2 your burden of proof.

3 Those are how I see the two arguments.

4 MS. TERWILLIGER: Yeah.

5 THE COURT: And so that's why I say it lies on you  
6 convincing me. Now, they're saying, Judge, we want you to  
7 give us the presumption. We want you to issue a ruling. And  
8 you're saying, Judge, you shouldn't do that because no one  
9 has ever done it, and you would be going out on a limb with  
10 this, and there's nothing -- no statutory authority to  
11 support it.

12 Almost -- almost kind of like an estoppel argument.  
13 They're saying, hey, we -- we -- we've got this before, why  
14 are you changing up on us now? That's kind of now I'm  
15 hearing it. Am I wrong?

16 MS. TERWILLIGER: That's what you're hearing,  
17 but --

18 THE COURT: Okay.

19 MS. TERWILLIGER: -- that's not valid.

20 THE COURT: Okay.

21 MS. TERWILLIGER: There's a -- I mean, first of  
22 all, like I said, no statute, no rule that says there's a  
23 rebuttable presumption.

24 THE COURT: Okay.

25 MS. TERWILLIGER: The Nevada Power case was clearly

1 only about deferred accounting and -- and the -- all the  
2 prior Commission cases, which there are only three, that's  
3 where they said there was a rebuttable presumption didn't  
4 apply to Southwest Gas.

5 THE COURT: Okay. But -- but -- but it applied to  
6 a Utilities Commission.

7 MS. TERWILLIGER: It applied to a Public Utility,  
8 but if it would --

9 THE COURT: Okay.

10 MS. TERWILLIGER: -- have applied generally to  
11 all --

12 THE COURT: Okay.

13 MS. TERWILLIGER: -- Public Utilities, it would  
14 have to have been under a rule of adopted under the  
15 Administrative Procedure Act --

16 THE COURT: Okay.

17 MS. TERWILLIGER: -- and been a rule of general  
18 applicability. It's not something they can rely on. And  
19 certainly, you know this, there's no stare decisis in  
20 Nevada.

21 But this is the reason why -- this is -- this is  
22 the -- one of the key reasons why their version of the story  
23 can't be the truth because --

24 THE COURT: But is -- is there -- is there sound  
25 reasoning why I should adopt Southwest's position with

1 regards to -- to a presumption under these circumstances?

2 MS. TERWILLIGER: No.

3 THE COURT: Okay.

4 MS. TERWILLIGER: And let me get to that, too. But  
5 I want to tell you the key reason why you can't find a  
6 presumption.

7 THE COURT: Okay.

8 MS. TERWILLIGER: It would upend existing Nevada  
9 law. There's two statutes, NRS 704.110, sub 13, and NRS  
10 704.661 that say in a resource planning case, that's a case  
11 where the Utility brings in all this investment they're going  
12 to make, and they ask the Commission to bless that -- that  
13 investment. They say -- and in that -- and at the conclusion  
14 of that case, if the Commission agrees with that investment  
15 -- those investment decisions of the public utilities, then  
16 a decision is made that they're -- that they're -- that was a  
17 prudent -- that's a prudent undertaking.

18 So when we get to a rate case for those utilities  
19 who have had prudence determined in a resource plan, when we  
20 get to a rate case, the only thing we're looking at is  
21 whether the Utility was just and reasonable.

22 And this fits within the Commission case law that  
23 says prudence is the first step.

24 THE COURT: Um-h'm.

25 MS. TERWILLIGER: We look first to prudence and

1 then we look and see whether when you were building the power  
2 plant or you were putting the pipe in the ground, were your  
3 costs just and reasonable?

4           So it's kind of that two-step thing. It would --  
5 if you found a rebuttable presumption of prudence, that means  
6 NV Energy could theoretically not ask for approval in a  
7 resource plan of its power plant and not get prudence from  
8 the Commission and come into a rate case and say, hey, I got  
9 a rebuttable presumption of prudence because the Court gave  
10 it to me.

11           That's the reason why it -- that's the key reason  
12 why it doesn't exist in Nevada law. And in our Surreply we  
13 cited the legislature and the Commission know how to write a  
14 rebuttable presumption of prudence. We cited two, and I'm  
15 not remembering off the top of my head.

16           We cited a statute where there's a rebuttable  
17 presumption of prudence that applies to damage to Utility  
18 property, and we cited a regulation that says there's a  
19 rebuttable presumption when water utilities use a certain  
20 return on equity.

21           Neither the legislature nor the -- nor the  
22 Commission has written a rebuttable presumption of prudence,  
23 and if you found that there was one, it would upend existing  
24 law.

25           But now let me get to your question as to why it's

1 not sound reasoning. So let me do two things here. Let's  
2 talk about the practical implications, and then we'll talk  
3 about -- well, let's talk about the practical implications of  
4 that.

5 So I attached Exhibit A to the surreply --

6 THE COURT: Yep.

7 MS. TERWILLIGER: -- if you have that. Let's just  
8 flip to that because I think this is important. So for these  
9 challenged work orders, this is the extent of the evidence.  
10 Or I'm sorry, I'm --

11 (Pause in the proceedings)

12 THE COURT: Okay. Go ahead.

13 MS. TERWILLIGER: Okay. So this is the extent of  
14 the testimony that was filed on the challenge worked orders.  
15 And not even all of this was filed. So that -- if you look,  
16 there's Exhibit 42, which is a testimony of Randy Cunningham  
17 (phonetic). That was filed with their application. Exhibit  
18 97, which is kind of a breakdown of the challenged work  
19 orders, actually was supposed to be filed with their direct  
20 case, but was not filed with their direct case.

21 They realized at hearing they had inadvertently  
22 left it out, so it didn't even get in until hearing. So the  
23 practical implications are the Utility can file basically  
24 nothing. I mean, this is hardly any information. Say I get  
25 a rebuttable presumption of prudence, now prove me wrong.

1           Now we have discovery that happens at the  
2 Commission. So just so you have an understanding, because  
3 this comes up in rebutting some of the due process arguments,  
4 we pre-file testimony at the Commission. So they go first.  
5 They file their application. Intervenors go next, they file  
6 their testimony, pre-file it. It's written. And then they  
7 get a rebuttal testimony, pre-filed written. And then we go  
8 to hearing. We had six days of hearing in this case.

9           So -- so they can file virtually nothing. And then  
10 in discovery, they can stonewall, which it kind of happened  
11 in this case. They -- they didn't give -- as the Commission  
12 found, they didn't give anybody enough evidence to determine  
13 prudence or imprudence. They just wouldn't tell us why did  
14 management decide to do these projects? Why -- did you  
15 conduct an RFP? Did you -- why -- what was in the mind of  
16 management when you decided to enter into these projects?

17           They can stonewall the Commission and the parties,  
18 and then under Southwest Gas's version, you know, they say  
19 they're asking for a rebuttable presumption of prudence, but  
20 in their Briefs they said nobody proved us imprudent. So  
21 under their versions of the facts, they get to file virtually  
22 nothing, stonewall us in discovery, and then because we can't  
23 -- we don't have enough information to prove imprudence,  
24 they're controlling the information, they're the Public  
25 Utility, they get to say nobody proved us imprudent so -- so,

1 you know, we win.

2 I mean, that -- that's a very dangerous concept for  
3 a regulated Utility where, you know, it's a wholesale burden  
4 shift, first of all. It's not -- what they're really asking  
5 for when they say you didn't prove imprudence is not just a  
6 rebuttable presumption of prudence, it is, in fact, wholesale  
7 burden shift.

8 You -- we're going to file virtually nothing, you  
9 prove us imprudent. So, I mean, you know, and this -- you  
10 know, if it's -- if it's a rebuttable presumption of  
11 prudence, which we say doesn't exist, but the Commission  
12 found in weighing the facts that that was overcome, that was  
13 overcome with the \$90,000 backhoe. It wasn't 9,000, it was  
14 90,000.

15 THE COURT: So what you're saying is that -- is  
16 that even if I take the position that there is a rebuttable  
17 presumption, under the circumstances of this case, where the  
18 position would be that you've already -- they start with the  
19 reasonableness and the Commission's overcome that? Is that  
20 what you're saying?

21 MS. TERWILLIGER: Say it -- I mean, can you ask --

22 THE COURT: Through this hearing?

23 MS. TERWILLIGER: -- your question again? Sorry.

24 THE COURT: Are you saying that -- I understand  
25 completely that you're saying there's no rebuttable

1 presumption --

2 MS. TERWILLIGER: Right.

3 THE COURT: -- in this matter. But even if there  
4 was one for --

5 MS. TERWILLIGER: Yeah.

6 THE COURT: -- if I accepted that there was one --

7 MS. TERWILLIGER: Right.

8 THE COURT: -- and Southwest Gas took the position  
9 that there was one when they come to the hearing, and they  
10 basically step back and said, you know what, we have this  
11 presumption, and so you need to show that we weren't  
12 reasonable, you're saying under those circumstances, if I  
13 accept that, even under those circumstances, the Commission  
14 has shown through this hearing that they -- that -- and they  
15 overcame, if there was that standard requirement.

16 MS. TERWILLIGER: Right. So the Commission found  
17 -- sorry.

18 THE COURT: So if we exercise the rebuttable  
19 presumption and we gave it to them --

20 MS. TERWILLIGER: Um-h'm.

21 THE COURT: -- even under that scenario, the worst  
22 scenario on behalf of the Commission, the Commission  
23 undertook a task and overcame a presumption showing that what  
24 they had was not reasonable?

25 MS. TERWILLIGER: Right, yes.

1 THE COURT: Okay. All right.

2 MS. TERWILLIGER: Serious doubt was --

3 THE COURT: Okay. I --

4 MS. TERWILLIGER: -- raised. I think if you go to  
5 the Memorandum, it's pages like 31 to 33. We outlined all of  
6 the places where we had found things in the work orders that  
7 shouldn't have been there, massages, expensive meals --

8 THE COURT: Yeah.

9 MS. TERWILLIGER: -- the backhoe.

10 THE COURT: Well, that's -- that's what  
11 Mr. Polsenberg was talking about and saying that after that  
12 happened, and they got no love.

13 MS. TERWILLIGER: Right. Well --

14 THE COURT: Okay.

15 MS. TERWILLIGER: -- but that -- there's the  
16 point.

17 THE COURT: Um-h'm.

18 MS. TERWILLIGER: I mean, first of all, the most  
19 damaging thing that could happen out this hearing is that you  
20 find there's a rebuttable presumption. That would be bad  
21 because then it changes the whole dynamic of how we operate  
22 at the Commission, and it would give --

23 THE COURT: Well, would the --

24 MS. TERWILLIGER: -- it would give -- it would give  
25 the utilities so much more than the captive --

1 THE COURT: Right.

2 MS. TERWILLIGER: -- ratepayers. It would give  
3 them the -- sorry, go ahead.

4 THE COURT: For the sake of argument --

5 MS. TERWILLIGER: Yes.

6 THE COURT: -- like once again, if I just accepted  
7 that there was a rebuttable presumption there --

8 MS. TERWILLIGER: Yeah.

9 THE COURT: -- that was my question to  
10 Mr. Polsenberg, is that with the information that you've  
11 provided showing these expenditures that were obviously not  
12 reasonable --

13 MS. TERWILLIGER: Right.

14 THE COURT: -- does the Commission end with that  
15 and say, you know what, out of \$51 million of expenditures,  
16 we find, you know, a thousand dollars or a hundred thousand  
17 or whatever in unreasonable expenditures, so for that reason,  
18 all of your accounting is incorrect, or would it -- or do  
19 they -- or do they go further and say let's look at these  
20 individually?

21 MS. TERWILLIGER: Yeah, the --

22 THE COURT: And so --

23 MS. TERWILLIGER: That --

24 THE COURT: -- you see what I mean?

25 MS. TERWILLIGER: Yes.

1 THE COURT: Because that's the argument he's saying  
2 -- that would seem to be the arbitrary and capricious type of  
3 argument --

4 MS. TERWILLIGER: Yeah.

5 THE COURT: -- is that -- is that they got so fed  
6 up --

7 MS. TERWILLIGER: Yeah.

8 THE COURT: -- with what they were seeing that  
9 looked -- looked sneaky to them --

10 MS. TERWILLIGER: Yeah.

11 THE COURT: -- or -- or shady --

12 MS. TERWILLIGER: Yep.

13 THE COURT: -- that they just said, you know what  
14 -- they threw up their hands and said, you know what, we're  
15 not going to do this anymore, and we're denying everything.

16 MS. TERWILLIGER: Right.

17 THE COURT: That --

18 MS. TERWILLIGER: And that didn't happen, and I'll  
19 tell you why --

20 THE COURT: Okay.

21 MS. TERWILLIGER: -- in just a second.

22 THE COURT: Well, that -- that's what I -- I don't  
23 think that was the words they were using, but that's kind of  
24 how I --

25 MS. TERWILLIGER: Yeah. No, I -- that's --

1 THE COURT: -- I'm --

2 MS. TERWILLIGER: -- the right takeaway.

3 THE COURT: Okay.

4 MS. TERWILLIGER: But I first want to correct the  
5 record that this is nowhere near 51 million.

6 THE COURT: Okay. I -- I just -- that's the number  
7 I just --

8 MS. TERWILLIGER: I know, I know.

9 THE COURT: -- read in here.

10 MS. TERWILLIGER: I just -- it was -- we said it in  
11 the surreply. I -- if you wanted to go to the record, you  
12 could go to page 13-292. I can tell you the volume here in a  
13 second. It's volume 17.

14 So that 51 million --

15 THE COURT: Um-h'm.

16 MS. TERWILLIGER: -- this is why I -- it offends me  
17 when that number gets thrown out.

18 THE COURT: Okay.

19 MS. TERWILLIGER: Not you because that's the only  
20 number you --

21 THE COURT: No, I -- that's fine. I --

22 MS. TERWILLIGER: -- that's the only number you  
23 have, but it's --

24 THE COURT: That's the number that is being cited  
25 here.

1 MS. TERWILLIGER: Yeah, that's what Southwest Gas  
2 is citing, but they should know better.

3 THE COURT: Okay.

4 MS. TERWILLIGER: So -- so --

5 MR. POLSENBERG: They used it, too, Judge.

6 MS. TERWILLIGER: No, I didn't. I said it was a  
7 false number.

8 THE COURT: It's okay.

9 MS. TERWILLIGER: So --

10 THE COURT: I --

11 MS. TERWILLIGER: -- so \$51 million is the  
12 corporate -- it's the amount that Southwest Gas was asking  
13 put into rates in all three of its jurisdictions, it is three  
14 jurisdictions; Arizona, Nevada, California.

15 THE COURT: Okay.

16 MS. TERWILLIGER: And then some of it had already  
17 depreciated. So by the time we got to the rate case, this is  
18 page 13-292 --

19 THE COURT: So -- so does the Public Utilities  
20 Commission of Nevada have any jurisdiction whatsoever --

21 MS. TERWILLIGER: No.

22 THE COURT: -- over Arizona or California?

23 MS. TERWILLIGER: No. No, that why we didn't  
24 disallow 51 million.

25 THE COURT: Okay. Okay.

1 MS. TERWILLIGER: So at -- some of it had already  
2 depreciated. So we go from 51 million to 20 million just by  
3 function of time. And then if you do the allocation, which  
4 approximately is one-third, one-third, one-third between the  
5 three jurisdictions, Nevada, California, Arizona --

6 THE COURT: Okay.

7 MS. TERWILLIGER: -- you get --

8 THE COURT: So roughly six --

9 MS. TERWILLIGER: 6.7 million.

10 THE COURT: -- 6 million?

11 MS. TERWILLIGER: Way different than what Southwest  
12 Gas is arguing.

13 THE COURT: Okay.

14 MS. TERWILLIGER: Now, did the Commission get fed  
15 up? It looked at what staff filed, the backhoes, the  
16 massages, the iPad and say, okay, we're done, we're -- we're  
17 not going to consider this at all.

18 THE COURT: And we want 51 million.

19 MS. TERWILLIGER: No. Yeah.

20 THE COURT: Okay.

21 MS. TERWILLIGER: The Commission didn't do that.  
22 The Commission -- we walked through it in the Memorandum. At  
23 every step of the way, the Commission gave the Utility an  
24 opportunity to prove its case. They -- there's a Memorandum  
25 we walked through paragraph 623, 624, 625, and 626, I think,

1 of the modified order where the Commission said, okay, what  
2 came in on the application? Then what -- what came in --  
3 what did staff say?

4 And then let's talk about Southwest Gas's rebuttal.  
5 Yes, there was a wholesale lack of accountability, systemic  
6 problems with their accounting, but the Commission also said,  
7 you never -- we looked. We -- we tried to decide --  
8 determine -- I want to find something, Your Honor, just  
9 because I think it's important.

10 We tried to determine the why. You know, why  
11 did --

12 MS. DIGESTI: Your Honor, I'm looking for an  
13 organic break in this because I'm very pregnant, and I have  
14 to use the restroom. Is there any way we can --

15 THE COURT: Do you want to -- we can do it right  
16 now, yeah.

17 MS. DIGESTI: -- take a small break?

18 THE COURT: We can do it right now, if you want.  
19 Just --

20 MS. DIGESTI: I apologize.

21 THE COURT: -- go ahead. No, you're fine. You  
22 don't have to apologize for that.

23 MR. POLSENBERG: Judge Wendell used to let pregnant  
24 lawyers just raise their pencil.

25 MS. DIGESTI: Okay. That's -- I'll do that.

1 THE COURT: Oh, I -- I wouldn't know what that  
2 meant, so -- so I have a lot of people raise -- a few guys  
3 who are probably pregnant, then, in my courtroom. But, yeah,  
4 go ahead, we'll just --

5 THE COURT RECORDER: Do you want me to go off,  
6 Judge?

7 THE COURT: Yeah, we can just -- yeah, we can go  
8 off the record at this time. If you need to take a break,  
9 everybody just --

10 (Court recessed at 1:50 p.m. until 1:57 p.m.)

11 (Pause in the proceedings)

12 THE COURT: Okay. We're back on the record in the  
13 case of Southwest Gas versus Public Utilities Commission of  
14 Nevada in A-791302.

15 Before we took our break, counsel for the Public  
16 Utilities Commission was addressing the Court.

17 So at this point in time, I think we've -- we've  
18 addressed the issue and the thoughts of the Public Utilities  
19 Commission as to whether or not there's a rebuttable  
20 presumption. And we're -- I think, if I'm hearing you  
21 correctly, you're saying, Judge, even if you accept that  
22 there was one, under the circumstances to this case, the  
23 evidence shows that the Public Utilities Commission was able  
24 to overcome any presumption or any concept of a presumption  
25 by showing that what they had was unreasonable?

1 MS. TERWILLIGER: Serious doubt was raised by the  
2 parties that overcame --

3 THE COURT: Okay.

4 MS. TERWILLIGER: -- a rebuttable presumption.

5 THE COURT: Okay.

6 MS. TERWILLIGER: Yes.

7 THE COURT: All right.

8 MS. TERWILLIGER: But if I may --

9 THE COURT: Uh-huh.

10 MS. TERWILLIGER: -- I want to also explain why it  
11 would be nonsensical to have the legislature say there's no  
12 rebuttable presumption in a deferred proceeding, but there is  
13 one in a rate case. This is one more piece I want to kind of  
14 get to.

15 So deferred energy accounting, that's for the  
16 recovery of fuel cost. That's a pass-through cost. The  
17 Utility doesn't earn more when it spends more. It buys more  
18 natural gas. That just gets passed on to ratepayers.  
19 There's no earnings that they get on that cost.

20 When you file a rate case, and you put  
21 infrastructure in the ground, you earn a return on what you  
22 get from a rate case. In this -- in this case the Commission  
23 awarded Southwest Gas a 9.25 percent.

24 So the more they spend, the more they earn. So the  
25 Nevada legislature was so offended by the rebuttable

1 presumption in the deferred, they got rid of it the next  
2 session. But they didn't have to get rid of it in the rate  
3 case because first of all, it doesn't exist.

4           And they didn't need to say it because it's just  
5 ridiculous. There's no way that if the Nevada legislature  
6 thought it was important enough to get rid of it in a  
7 deferred case where they don't earn a return on the natural  
8 gas cost, they would let it stand in a indicate case where  
9 the Utility, when they put infrastructure in the ground, they  
10 get a return on that. And they get -- they get a -- they get  
11 more advantage coming into the rate case for a rebuttable  
12 presumption than though do going into a deferred where it's  
13 just pass-through costs that are reflecting to that.

14           It's nonsensical that the Nevada legislature would  
15 be like, oh, it's still okay in the rate case, but let's get  
16 rid of it in the deferred. Let's just -- it doesn't work  
17 that way. But the rate case is where the infrastructure  
18 costs is where the Utility earns money.

19           So, you know, I do want to -- just to kind of go  
20 back to just briefly this -- what -- you know, that the  
21 Commission made its decision on just -- threw up its hands  
22 when it saw the kind of messages, backhoe, all that stuff  
23 came up.

24           You know, the Commission, I -- it's page 38 of my  
25 Memorandum, just to make it easier for you. That's where we

1 walk through the Commission's order, where it walks through  
2 each phase of the case where they didn't feel like Southwest  
3 Gas had met its burden of proof.

4           So it's not just the Commission looking at the bad  
5 actions of Southwest Gas. They actually did a -- they  
6 actually weighed the evidence and decided there wasn't  
7 evidence, and so we're going to -- we're going to have a --  
8 we're going to give you the amount that you proved.

9           They proved zero percent was prudent, so we're  
10 going to give you zero percent. And that's exactly what the  
11 PUC should do for a monopoly Utility.

12           So Southwest Gas did provide, they provided the  
13 names and budgets for the project, the invoices or estimates,  
14 the name and/or signature of the employee or the consultant  
15 authorizing the expenditures, memos identifying individuals  
16 in charge of the projects, organizational charts, and I'm  
17 citing to 4 Certified Record at 2601.

18           What it didn't provide was that those projects,  
19 authorized budgets, expenditures were prudent investments in  
20 the sense this they were the lost option, the best available  
21 project, reasonable under the circumstances. I'm citing to 4  
22 Certified Record at 2601 again.

23           They provided little or no evidence by various  
24 costs incurred by Southwest Gas -- were incurred by Southwest  
25 Gas for consultant, expert fees or services, personnel

1 overtime, rental car fees, and daily meals and refreshments.  
2 4 Certified Record at 2601.

3 I mean, the only substantial evidence in the  
4 record, Your Honor, is the mistakes they made. I mean,  
5 that's -- that's -- that's the truth here. There -- there  
6 was -- they have a -- they have an obligation to meet their  
7 burden of proof. NAC 702 -- 703.2231 says they have to meet  
8 their burden of proof, and they have to be ready to go  
9 forward when they make their application.

10 So I -- I -- have I -- I want to make sure I cover  
11 all of your issues for rebuttable presumption of prudence.  
12 Do you have any more questions onto that before I move on to  
13 the due process issue?

14 THE COURT: I don't.

15 MS. TERWILLIGER: Okay. So -- so Southwest Gas has  
16 kind of raised two process arguments. They have raised this  
17 rate switching methodology, that we switched the game on  
18 Southwest Gas, and that they didn't have proper notice.  
19 We'll look at the rate switching methodology first.

20 That -- that's the Verizon case where the U.S.  
21 Supreme Court said in Verizon that there was no evidence of  
22 rate switching methodology. But again, there is -- there is  
23 no evidence of that in this case. The Commission told  
24 Southwest Gas in its 2012 rate case the prudence is the first  
25 step in determining just and reasonable rates.

1           They asked for a presumption of prudence in that  
2 case, and the Commission didn't give it to them. There was  
3 to change in rate setting methodologies in terms of Southwest  
4 Gas. They can't argue that as a due process concern. They  
5 weren't on notice that they had a rebuttable presumption and  
6 then it disappeared. It -- it's just wrong. It doesn't --  
7 it doesn't work.

8           So the other due process argument that is they  
9 weren't on notice that their witnesses we're going to have to  
10 respond to questions regarding the discount rate. Okay.

11           So let's -- so Southwest Gas proposed a 3.75  
12 percent discount rate for its pension cost. The -- in the  
13 years past, the discount rate has been, it averaged -- from  
14 2011 to 2017, it averaged about 4.75 percent. And when the  
15 discount rate goes down, costs go up for ratepayers, just so  
16 you kind of understand. That's usually the opposite of how  
17 it works.

18           But the average had been 4.75 percent for the last  
19 several years. So the Commission at hearing says to  
20 Southwest Gas's witness -- now, this is the witness that she  
21 -- she was a very, by the way. Mr. Polsenberg said it was  
22 he, but she was a she. Ms. Berger [phonetic] that looks --  
23 the Commission --

24           MR. POLSENBERG: I apologize. I try to avoid  
25 pronouns entirely.

1 MS. TERWILLIGER: Ms. Berger was the witness who  
2 was testifying and sponsoring the discount rate. She was  
3 sponsoring the pension cost. So she had testimony on the  
4 pension cost in her -- in her -- she had testimony.

5 The Commission asked her some clarifying questions.  
6 Why did the discount rate go from 4.75 average to 3.75  
7 percent? Tell me why. And she couldn't answer the  
8 questions. She didn't know. She said, well, you know, we  
9 get this number from the actuary.

10 So then the Commission said, well, what  
11 management's involvement in that actuarial recommendation?  
12 And she couldn't answer. She didn't know if management it  
13 changed it, if management it input on it.

14 I'm sorry, when this comes up at hearing, Southwest  
15 Gas needs to be -- witnesses need to be prepared to answer  
16 Commission questions. The Nevada APA, the Commission's  
17 rules, both require that witnesses be ready to answer  
18 questions on their pre-file testimony. There's -- that is  
19 not a due process issue when the Commission asks you a  
20 question and you're not prepared to answer it.

21 So what the Commission said is we don't have enough  
22 evidence, so we're not giving you your discount rate. They  
23 didn't disallow costs, by the way.

24 THE COURT: Okay. Let me --

25 MS. TERWILLIGER: They --

1 THE COURT: -- ask you this question.

2 MS. TERWILLIGER: Yeah, sure.

3 THE COURT: And maybe I'm -- I'm --

4 MS. TERWILLIGER: Yeah.

5 THE COURT: -- crossing over too much.

6 MS. TERWILLIGER: Yeah.

7 THE COURT: But let's take the same -- same  
8 position with regards to a presumption of reasonableness.  
9 Under the -- under -- let's just go to this one  
10 narrow issue --

11 MS. TERWILLIGER: Okay.

12 THE COURT: -- with regards to the discount rate.

13 MS. TERWILLIGER: Okay.

14 THE COURT: If -- indulge me.

15 MS. TERWILLIGER: Sure.

16 THE COURT: Is there a possibility that a discount  
17 -- that a presumption of reasonableness can be applied in  
18 this situation?

19 MS. TERWILLIGER: No, Your Honor.

20 THE COURT: Don't -- don't just say no to every  
21 time a presumption of innocence.

22 MS. TERWILLIGER: Sorry.

23 THE COURT: I just want to know, is there any way  
24 because the question I had -- my next question is, is -- does  
25 it -- is it reasonable? Let's say I say there is one, there

1 is a presumption there.

2 MS. TERWILLIGER: Okay.

3 THE COURT: Under the answers or the requests that  
4 the parties have made, asking for something less that would  
5 increase the cost to the taxpayer --

6 MS. TERWILLIGER: Um-h'm.

7 THE COURT: -- was there any testimony or any  
8 documentation or anything to support that that is a  
9 reasonable request? That's what I'm getting at.

10 MS. TERWILLIGER: That it's reasonable for them to  
11 have a presumption of prudence to the --

12 THE COURT: Or even just the request, was it  
13 reasonable?

14 MS. TERWILLIGER: Was their request --

15 MS. DIGESTI: The pension request, yes.

16 THE COURT: Yes.

17 MS. TERWILLIGER: Well, no, because it -- let me  
18 ask -- answer your first question --

19 THE COURT: Okay.

20 MS. TERWILLIGER: -- as to why it can apply to a  
21 pension. So --

22 THE COURT: But the reason I -- the reason I ask  
23 that --

24 MS. TERWILLIGER: Yeah, sure.

25 THE COURT: -- the reason I ask it like this is

1 because if they start with the presumption already, and the  
2 way I understand this, if they start with it already, and  
3 they show up, they basically say, hey, we've got this  
4 presumption.

5 Now, you have to do something to show that what we  
6 did is unreasonable. And so we're kind of working under that  
7 premise right now because you've made that argument  
8 previously in that you're saying that the -- that the  
9 Commission had -- had done that. Irrespective of whether or  
10 not there was a presumption or not, we believe that -- your  
11 argument is, is that you believe that the Commission had  
12 overcome any presumption of -- so that's why I'm saying in  
13 this situation where you're talking about a discount rate,  
14 and let's say they start with the presumption.

15 MS. TERWILLIGER: Okay.

16 THE COURT: So when they walk in, we have this  
17 presumption.

18 MS. TERWILLIGER: Um-h'm.

19 THE COURT: And we're clouded over by this  
20 protection, so to speak.

21 MS. TERWILLIGER: Um-h'm.

22 THE COURT: Can you tell me under the circumstances  
23 with regards to the way it works, is that a reasonable rate  
24 of the lower amount just like that, or do you need more  
25 information?

1 MS. TERWILLIGER: No.

2 THE COURT: Okay.

3 MS. TERWILLIGER: The Commission said it wasn't  
4 reasonable because since from 2011 to 2017 --

5 THE COURT: Um-h'm.

6 MS. TERWILLIGER: -- the discount rate had averaged  
7 4.75 percent --

8 THE COURT: Okay.

9 MS. TERWILLIGER: -- and it had only dipped once to  
10 4.25 percent.

11 THE COURT: Okay.

12 MS. TERWILLIGER: So that 3.75 percent, when it  
13 wasn't -- I suppose if they got a presumption of prudence,  
14 maybe --

15 THE COURT: Okay.

16 MS. TERWILLIGER: -- they could have, but let me  
17 tell you why it --

18 THE COURT: But what I'm saying --

19 MS. TERWILLIGER: Yeah, yeah.

20 THE COURT: -- is, though, under those  
21 circumstances --

22 MS. TERWILLIGER: Yes.

23 THE COURT: -- that if the Commission is  
24 questioning --

25 MS. TERWILLIGER: Yes.

1 THE COURT: -- in that area, and they say, okay,  
2 have you this and now you're asking to lower it --

3 MS. TERWILLIGER: Yep.

4 THE COURT: -- and even if they accept -- and I'm  
5 saying that they are. This is me putting in it. That they  
6 start with the presumption --

7 MS. TERWILLIGER: Yeah.

8 THE COURT: -- so it's proper the Commission, then,  
9 to ask follow-up questions to see whether or not -- whether  
10 or not the presumption's reasonable to the point where they  
11 -- it's rebuttable.

12 MS. TERWILLIGER: Right.

13 THE COURT: So basically, the Commission's  
14 rebutting it, saying, hey, you know, your --

15 MS. TERWILLIGER: Yep.

16 THE COURT: -- your rate isn't correct. So what  
17 we'll do is we'll use this particular witness and ask these  
18 questions. Witness tell me, you know, why did it drop, tell  
19 me why -- and when there's no answers to support that --

20 MS. TERWILLIGER: Yep.

21 THE COURT: -- under those circumstances, I would  
22 -- I would submit that Southwest Gas would have problems,  
23 Mr. Polsenberg, with the fact that if you start with the  
24 presumption, you -- it's not just a blanket protection, you  
25 still have to be able to answer why you stay within -- why

1 you still can maintain that presumption.

2 MS. TERWILLIGER: That's right, and I can tell you  
3 why in the Commission --

4 MR. POLSENBERG: You want me to wait, right?

5 THE COURT: Yeah.

6 MS. TERWILLIGER: Yeah.

7 THE COURT: And I'm just letting you know that's --  
8 that's -- so I'm even going that one step further because --

9 MR. POLSENBERG: Yeah.

10 THE COURT: -- in reading all this, it appears that  
11 there -- even if we accept there's a presumption, which the  
12 question would be, is it -- would -- is it -- would it even  
13 -- does it even matter for the Court to make that  
14 determination if the findings would show something to  
15 overcome even that presumption.

16 MS. TERWILLIGER: I -- I --

17 MR. POLSENBERG: Just to foreshadow, there's  
18 another due -- the other due process issue is involved in  
19 this.

20 THE COURT: Okay. The rate switching or are you  
21 talking about --

22 MR. POLSENBERG: No, the -- the notice that that's  
23 going to be an issue that --

24 THE COURT: Okay.

25 MR. POLSENBERG: -- we have to present on.

1 THE COURT: Well -- well -- okay. If you present  
2 -- I know I'm bouncing back and forth, but if you present --

3 MR. POLSENBERG: That's fine, that's fine.

4 THE COURT: -- something -- if you come in and say  
5 here's my Petition, and this is what I want to do, I want X  
6 amount of money for this, I need this amount of money for  
7 this, and I need this here and this here, okay, you start  
8 with -- let's say you start with the presumption. You've  
9 submitted the Petition, your protect the by the presumption  
10 of reasonableness, and now while you're in the hearing, the  
11 Commission says, okay, expenditure number one, let's question  
12 about that, and you can't respond to that, how is that a due  
13 process violation when you have said this is what I'm  
14 presenting on, and you should have the understanding that you  
15 need to be ready to answer any question --

16 MR. POLSENBERG: Well, here, so --

17 THE COURT: -- specifically if you have a  
18 presumption because the party needs to see whether or not  
19 they overcome it or not.

20 MR. POLSENBERG: This is why I said it's right out  
21 of Kafka. All right? In the trial of Franz Kafka writes  
22 about somebody on trial who knows he's on trial, the  
23 Government has told him he's on trial, but he doesn't have  
24 the details of what the trial is about.

25 Under the presumption of prudence --

1 THE COURT: But Mr. Polsenberg, hear me out. If  
2 he's on trial, when he goes in -- Mr. Kafka says, okay, I  
3 want to go to trial on -- on issue one, issue two, issue  
4 three, and issue four, this -- these are my issues I want to  
5 go to trial on --

6 MR. POLSENBERG: Under the presumption of prudence,  
7 what -- what I -- our -- our management decisions are wrapped  
8 in the momentum that we are presenting a prima facie prudent  
9 case. We weren't told in advance that that was going to be  
10 an issue.

11 THE COURT: Okay. But you -- but would -- would  
12 you not agree with me, though, that when you file a Petition,  
13 everything on your Petition is at issue?

14 MR. POLSENBERG: No, I don't agree with that.

15 THE COURT: You don't agree?

16 MR. POLSENBERG: No, I don't. Here, because that's  
17 the whole idea of the presumption of prudence, is we present  
18 this. This is the -- this is the way we run the business.  
19 We booked the pensions --

20 THE COURT: Okay. So what would you suggest under  
21 those circumstances? So you submit your Petition, then  
22 you're saying before the hearing, they -- they should be  
23 telling you, hey, we've got a issue with this, we got a issue  
24 with this, we got a issue with this?

25 MR. POLSENBERG: Yes. Yes.

1 THE COURT: Okay.

2 MR. POLSENBERG: Yes, that's the whole idea.

3 THE COURT: Okay. All right.

4 MR. POLSENBERG: It's a -- it's -- it's -- they  
5 complained it was burden-shifting.

6 THE COURT: I'm -- hold on. You're okay. I'm just  
7 saying.

8 MR. POLSENBERG: In our Reply Brief we do the whole  
9 quote from the Nevada Power Nevada Supreme Court decision  
10 where it does talk about it's burden-shifting.

11 We walk in there --

12 THE COURT: Um-h'm.

13 MR. POLSENBERG: -- with the -- the idea that we've  
14 -- we've presented our case.

15 THE COURT: Okay.

16 MR. POLSENBERG: They have to challenge first and  
17 then prevail on that.

18 THE COURT: But are they able to under the  
19 circumstances in light of the fact that the discovery --

20 MR. POLSENBERG: Well, that's --

21 THE COURT: -- is coming from you all?

22 MR. POLSENBERG: -- that's -- you know, this is --  
23 all of a sudden this has --

24 THE COURT: Because --

25 MR. POLSENBERG: -- turned into a delay in

1 discovery case.

2 THE COURT: But would not the position, though,  
3 that what you're taking is that in every single application,  
4 every single application, just a boilerplate response would  
5 be, okay, be prepared to answer on every one of these issues?

6 MR. POLSENBERG: No, no, no, no, no, no, no, no.  
7 These -- these things are huge.

8 THE COURT: I know.

9 MR. POLSENBERG: Here's what the --

10 THE COURT: I -- I mean --

11 MR. POLSENBERG: -- Commission staff and the --

12 THE COURT: I know, but --

13 MR. POLSENBERG: -- intervenors have to raise these  
14 issues in discovery, and that's what the discovery is for to  
15 give us notice. Okay?

16 THE COURT: Okay.

17 MR. POLSENBERG: We have to know that that's the  
18 issue involved. Now, that is where the pension issues have  
19 two parts --

20 THE COURT: Okay.

21 MR. POLSENBERG: -- because they -- they did  
22 challenge the averaging, but they didn't challenge the  
23 discount rate.

24 And the determination on both was that there was  
25 not enough evidence. But that -- that is assuming that we're

1 not giving the preference or the presumption of prudence to  
2 the way we do business, the way we book the pension, the way  
3 we handle costs. This is the way we're operating our  
4 business.

5 If they want to come in and say that the rates have  
6 to be determined on some other basis, they have to let us  
7 know, and they have to prevail on their rebuttal of the  
8 presumption.

9 And the Nevada Supreme Court's very clear, it is  
10 burden-shifting. I don't have any burden. They have the  
11 burden to come in to rebut the presumption. And Counsel's  
12 used the phrase --

13 THE COURT: But that -- I know, but --

14 MR. POLSENBERG: Right. And then the burden --

15 THE COURT: -- we're still in a position right now  
16 that's assuming --

17 MR. POLSENBERG: -- comes over to --

18 THE COURT: -- that there is a presumption. That's  
19 what did -- I mean, your argument is --

20 MR. POLSENBERG: I understand that --

21 THE COURT: -- that there is and --

22 MR. POLSENBERG: -- which is why you are saying --

23 THE COURT: So --

24 MR. POLSENBERG: -- a lot of this turns on -- I  
25 think you are saying all of it turns on the presumption of

1 prudence.

2 MS. TERWILLIGER: Your Honor --

3 THE COURT: Okay. Go ahead.

4 MS. TERWILLIGER: -- Southwest Gas is ignoring the  
5 law. This -- their idea is that only if parties raise these  
6 issues in discovery, which is not -- that's not really  
7 notice, so I don't know where he's getting that from. But  
8 only if parties raise this issue, that's the only time that  
9 the Commission can issue an -- can address an issue.

10 That -- that flouts the law. NRS 704.120 says the  
11 Commission has an independent duty to ensure just and  
12 reasonable rates. In fact, the Commission on its own motion  
13 can ask for a hearing, and it can replace rates that are  
14 unjust and reasonable.

15 That's not -- that's never how this works at the  
16 Commission. The Commission -- I'm sorry, I'm not finished.  
17 Let me go.

18 THE COURT: But under those circumstances, though,  
19 if the Commission's asking for a hearing, would you not  
20 expect the Commission to let the parties know what the basis  
21 of the hearing's for?

22 MS. TERWILLIGER: Sure. But --

23 THE COURT: Okay.

24 MS. TERWILLIGER: -- the parties know what the  
25 basis of the hearing is. She filed testimony on that issue.

1 I mean, the Nevada APA and the NAC 703.2231 says that  
2 witnesses have to be prepared at hearing to respond to  
3 questions on written testimony. The regulations --

4 THE COURT: Okay.

5 MS. TERWILLIGER: -- require that. And the reason  
6 is, the Commission has an independent duty, independent of  
7 the issues the parties raise or don't raise, to ensure  
8 there's just and reasonable rates.

9 It is true that the discount rate did not come up  
10 with the parties. It came up at the Commission hearing.

11 THE COURT: Um-h'm.

12 MS. TERWILLIGER: And this witness had filed  
13 testimony on the 3.75 percent, and she couldn't answer the  
14 Commission's questions. And therefore, based on the history,  
15 the historical data that showed the discount hadn't dipped  
16 below 4.25 percent, the Commission didn't think that was just  
17 or reasonable in a rate.

18 It didn't disallow it. It just changed the  
19 discount rate. There's not -- this notion -- I mean, that's  
20 the problem with the rebuttable presumption of prudence is  
21 that some -- I mean, let's say even if it does exist, the  
22 Commission, under the statute because it has to ensure just  
23 and reasonable rates, has to also be able to raise serious  
24 doubt.

25 I mean, that's an obligation of the Commission,

1 independent of the parties. They have to ensure just and  
2 reasonable rates. It happens at hearing all the time that  
3 the Commission -- the Commission has policy advisors.  
4 They're engineers, accountants, economists, and their whole  
5 job to ask -- they ask questions in addition to the  
6 Commissioners at the hearing because they're also wondering  
7 -- they're thinking about issues that sometimes the parties  
8 didn't raise.

9 I mean, that's -- that's -- that's what the  
10 Commission does in its oversight of -- of public monopoly  
11 utilities. So, I mean -- so the other piece that I hadn't  
12 got to, the reason rebuttable presumption can apply to  
13 pension is pension is not rate-based, as Southwest Gas said.  
14 It's an expense.

15 The -- if you go with Southwest Gas's theory that  
16 this prudent investment test or the Burns report signals that  
17 there's a presumption of prudence, you have to have an  
18 investment, not an expense.

19 This is -- this -- the -- the discount rate -- what  
20 the Commission's doing is it's setting a discount rate for  
21 how we collect pension in the future. It's not, I have built  
22 a power plant, or I have put this natural gas pipeline in the  
23 ground, and therefore, I can get a presumption of prudence.

24 It's actually -- it's actually talking about we're  
25 going to set this discount rate to determine how you collect

1 pension costs in the future. That's not something that a  
2 rebuttable presumption of prudence applies to. It assumes  
3 that there's -- there's a -- their notion is that a  
4 presumption exists because of its investment.

5           So under their theory of why a presumption exists,  
6 it can't exist for this pension expense. So I -- you know,  
7 there --

8           THE COURT: Okay.

9           MS. TERWILLIGER: -- there -- there were two  
10 pension issues. There was the discount rate --

11          THE COURT: Right.

12          MS. TERWILLIGER: -- and then there was the  
13 normalization of the discount rate. So that -- it's  
14 essentially -- normalization is essentially averaging.

15          The Commission looks at your historical data and  
16 decides the history -- what your historical data doesn't  
17 reflect what costs you're going to incur going into the  
18 future so they normalize it or they average it. We'll use  
19 averaging to make it a little bit easier.

20          Well, Southwest Gas, that issue, the averaging, was  
21 raised by staff in its testimony, which means Southwest Gas  
22 could have rebutted it in their pre-filed testimony and they  
23 could address it a hearing.

24          There's into due process issue with the fact --  
25 with that averaging. They needed to be -- I mean, they could

1 have addressed it, and they did in their rebuttal testimony,  
2 and they could have addressed it at a hearing. There's no  
3 due process issue, this notion that the -- the Commission  
4 couldn't consider something other than -- so South -- so what  
5 the issue with the -- sorry, go ahead.

6 THE COURT: When the applications are presented --

7 MS. TERWILLIGER: Uh-huh.

8 THE COURT: -- and there's specific -- like in this  
9 case we have issues involving the pension or issues involving  
10 the -- the infrastructure, you know, the --

11 MS. TERWILLIGER: Um-h'm.

12 THE COURT: -- the software and all that. When  
13 those -- those issues are -- are presented to the -- to the  
14 Commission, the application, does it not include some type of  
15 written testimony or some type of affidavit that supports the  
16 -- the request, meaning, I want -- I want one and here's why  
17 I deserve one or here's why we need one.

18 I -- we also want two, and here's why we -- we --  
19 we're asking for two, and -- is that what you're talking  
20 about with regards to the written testimony and the -- and  
21 the --

22 MS. TERWILLIGER: Yeah.

23 THE COURT: Okay. And so -- so when they say we  
24 need these -- this software or we need this expenditure for  
25 pensions or -- and the discount rate on -- that's all that's

1 presented in the application to explain why they -- why they  
2 deserve it, maybe in their sense also why they believe it's  
3 reasonable.

4 MS. TERWILLIGER: You would hope. It didn't happen  
5 in this case.

6 THE COURT: Well, but that's what I'm saying --

7 MS. TERWILLIGER: Yeah.

8 THE COURT: -- that's -- and so -- so when -- when  
9 you are in a hearing --

10 MS. TERWILLIGER: Yeah.

11 THE COURT: -- on each one of those particular  
12 issues, the Utility Commission is -- is relying on what's  
13 been presented to them; is that correct?

14 MS. TERWILLIGER: Yes, they're looking at all the  
15 testimony that's presented.

16 THE COURT: Okay.

17 MS. TERWILLIGER: The Utility goes first, then the  
18 intervenors, and then the Utility goes again.

19 THE COURT: Okay.

20 MS. TERWILLIGER: Yes.

21 THE COURT: And so if somebody -- somebody that has  
22 presented the testimony to you and then you've asked  
23 questions specifically about that testimony, and that person  
24 can't answer, like you -- and so -- okay. I'm good. Go  
25 ahead.

1 MS. TERWILLIGER: Okay.

2 THE COURT: Okay.

3 MS. TERWILLIGER: Yeah, I mean, that's what the --  
4 that's what the discount rate was, Southwest Gas had filed  
5 testimony on the 3.75 percent, their witness couldn't answer  
6 the Commission's questions. That is not a due process issue,  
7 and there's no notice -- there's no notice issue there.

8 I mean, Southwest Gas's witness by the regulations  
9 was on notice that you have to be ready to defend your  
10 testimony. I mean, that's -- they sign -- when they file  
11 testimony, they sign an affidavit that everything's true and  
12 correct to the best of their knowledge.

13 Well, you have to tell us why it's true and  
14 correct. I mean, that -- if the Commission has a clarifying  
15 questions, we need answer to those questions, so --

16 So one of the other things Southwest Gas -- and  
17 we're flipping. I don't know if you want to leave pension.

18 THE COURT: No, I -- I think -- no, I think I want  
19 to stay in this area because --

20 MS. TERWILLIGER: Yeah.

21 THE COURT: -- my question keeps going back to this  
22 -- to this presumption that under those circumstances I just  
23 talked about --

24 MS. TERWILLIGER: Yeah.

25 THE COURT: -- if you start with the presumption

1 that it's -- that it's reasonable --

2 MS. TERWILLIGER: Prudent.

3 THE COURT: -- and -- and prudent or whatever the  
4 -- yeah, prudent and reasonable, that's given to you in this  
5 application, is there -- is the argument that -- that -- that  
6 the -- that the Commission through -- here's how I'm seeing  
7 this.

8 If -- if it's presented to you in an application,  
9 and even -- even if I accept that there's a presumption  
10 already, so when it comes to you, the party that submits it  
11 to you saying we're under the somewhat of a protection under  
12 presumption, this is what we've given you is reasonable.

13 And so if the Commission -- I don't want to use the  
14 word challenges it, but questions that, and -- and is there a  
15 further requirement or something that -- that -- I mean, are  
16 the parties saying there's a further requirement that the  
17 Commission then has to -- before they make a ruling, they  
18 have to stop and say, oh, okay, I -- we don't agree with  
19 this, you have to do more to convince us or something? Or, I  
20 mean, is there -- that's what I'm -- I'm kind of hung here.

21 Even if I granted you the presumption, but -- but I  
22 understand if there's no presumption, it's their burden to  
23 establish the prudence and reasonableness. And that  
24 definitely would be subject to scrutiny by the -- by the  
25 Commission based on the -- and -- and so that's how I'm

1 seeing it.

2 So even if I give the benefit to -- to Southwest  
3 Gas, which I'm not saying I'm doing, but even if I did for  
4 the sake of argument, it sounds to me that under the  
5 circumstances, that the parties -- the reasonable -- I mean,  
6 the presumption was being challenged and that -- and that is  
7 -- I mean, even though the words weren't used by the -- by  
8 the Commission to say, you know, you failed to -- based on  
9 the testimony that we've heard that, you know, you've --  
10 we've overcome a burden of your -- of your reasonableness,  
11 and, I mean, I -- I -- that's what I'm -- that's what I'm  
12 hung up here, is that --

13 MS. TERWILLIGER: Yeah, I mean, I agree with you.  
14 Even if -- even if there weren't words spoken, certainly in  
15 the final order, the Commission said -- for the challenged  
16 work orders, they said, even if there was a rebuttable  
17 presumption and serious doubt was raised, it was overcome.  
18 Southwest Gas had to meet its burden of proof, and it didn't.

19 THE COURT: Okay.

20 MS. TERWILLIGER: So therefore, those costs are  
21 disallowed.

22 And the pension, the discount rate. The Commission  
23 questioned a witness who should have been prepared to go  
24 forward at hearing and be able to defend their testimony.  
25 And so yes, there was a challenge as to what -- there was

1 serious doubt raised as to the efficacy of the pension rate  
2 they were putting forth.

3 I mean, this is the problem with --

4 THE COURT: So that's -- that's to the question why  
5 I'm asking this is that I --

6 MS. TERWILLIGER: Yeah.

7 THE COURT: -- what I'm saying is that -- is if I  
8 accept it.

9 MS. TERWILLIGER: But --

10 THE COURT: And what about Polsenberg's telling me,  
11 they'd start out with presumption, and if I accept that --

12 MS. TERWILLIGER: Yes.

13 THE COURT: -- what effect, if any, is there in  
14 this situation, based on the -- what appears to me to be  
15 somewhat some overwhelming evidence that overcomes that  
16 presumption? That's -- that's what I'm saying is that -- is  
17 that -- so what -- what effect, if any, would my ruling have  
18 if I was to rule in that manner --

19 MS. TERWILLIGER: And --

20 THE COURT: -- saying yeah, I do believe there's a  
21 presumption, however, the -- the Public Utilities Commission  
22 has overcome that presumption by -- by -- throughout this  
23 hearing that was handled in the 20,000 pages of hearing or  
24 whatever, so -- I mean, that's what I'm saying. What effect,  
25 if any, would that have?

1 I'm not saying that that's what I'm going to do.

2 I'm just --

3 MS. TERWILLIGER: In the instant case, I think you  
4 would affirm the Commission's order because the --

5 THE COURT: Um-h'm.

6 MS. TERWILLIGER: -- the presumption was overcome.

7 THE COURT: Okay. But -- but -- but would it  
8 affect it if I said that there was a presumption?

9 MS. DIGESTI: Yes.

10 MS. TERWILLIGER: Yes.

11 MS. DIGESTI: Sorry.

12 THE COURT: Okay.

13 MS. TERWILLIGER: Yes.

14 THE COURT: Okay.

15 MS. TERWILLIGER: Yes. I mean, I -- I still want  
16 to remind you that if we --

17 THE COURT: Yeah, I know. I'm --

18 MS. TERWILLIGER: -- if you find a presumption --

19 THE COURT: I'm just looking at --

20 MS. TERWILLIGER: Yeah, I know.

21 THE COURT: -- it like that and --

22 MS. TERWILLIGER: But I think -- this is -- this  
23 is --

24 THE COURT: So even under that circumstance,  
25 though --

1 MS. TERWILLIGER: Yeah.

2 THE COURT: -- the argument is, is that the  
3 Commission order should be upheld, even under that  
4 circumstance?

5 MS. TERWILLIGER: Yes.

6 THE COURT: Okay. Now, I'm saying --

7 MS. TERWILLIGER: Even --

8 THE COURT: -- I've not made that decision. I'm  
9 just saying that --

10 MS. DIGESTI: I'm like --

11 THE COURT: Okay. You will.

12 MS. TERWILLIGER: Yes, I mean, it -- it would -- I  
13 argue that you don't have to --

14 THE COURT: Right.

15 MS. TERWILLIGER: -- decide presumption.

16 THE COURT: No, I understand.

17 MS. TERWILLIGER: You don't even have to get to it  
18 because the Commission -- the Commission -- none of the  
19 Commission's decisions turned on a rebuttable presumption of  
20 prudence at all.

21 I mean, the Commission found you -- you didn't --  
22 you didn't meet your burden of proof, which is a regulation  
23 that requires it --

24 THE COURT: Okay.

25 MS. TERWILLIGER: -- for the challenged work

1 orders. You didn't meet your burden of proof of pension  
2 cost.

3           You can -- I mean, Southwest Gas's Brief asks for  
4 guidance on this presumption of prudence. I don't even think  
5 you have to get there. Nothing -- there are cases where --  
6 where they could turn on a presumption of prudence applying  
7 or not, but in this case it didn't. There's nothing turned  
8 on a presumption of prudence.

9           But I want to get to -- this is the problem with  
10 Southwest Gas's argument that a presumption exists, and I  
11 practice in other states, in New Mexico and Colorado, and  
12 there's a presumption, at least in Colorado, and there's very  
13 definite rules and processes that happen when there's a  
14 presumption.

15           You know, they say, okay, you have to meet a  
16 preponderance of evidence to overcome the presumption, and  
17 then there's this ruling, there's this interim order from the  
18 Commission that says the presumption's been overcome, you got  
19 to prove your case.

20           We don't do that in Nevada because it doesn't  
21 exist, the presumption doesn't exist. There's all these  
22 other processes in states where the presumption exists, and  
23 we don't have that here. There's no rule that says, hey,  
24 this is how we go about doing this.

25           So, I mean --

1 THE COURT: But what I was saying is that --

2 MS. TERWILLIGER: Yeah, yeah.

3 THE COURT: -- if there was a presumption --

4 MS. TERWILLIGER: Yeah.

5 THE COURT: -- is it -- is it your position that  
6 the Commission, through the presentation in their -- in their  
7 -- their hearings, is that that has been overcome?

8 MS. TERWILLIGER: I -- there's substantial evidence  
9 that serious doubt was raised --

10 THE COURT: Okay.

11 MS. TERWILLIGER: -- in the record, and that was  
12 overcome. But --

13 THE COURT: And that -- that would even -- meet the  
14 standard maybe in New Mexico that --

15 MS. TERWILLIGER: Well, in Colorado, but like I  
16 said --

17 THE COURT: Colorado.

18 MS. TERWILLIGER: -- there's processes --

19 THE COURT: Oh, I'm sorry.

20 MS. TERWILLIGER: -- in place. They -- they --  
21 Colorado and New Mexico, they're -- they operate differently.  
22 I was talking about Colorado.

23 But, you know, there's processes in place where the  
24 Commission does things because there's a presumption and  
25 issues this interim order and says hey, it's been overcome,

1 prove your case --

2 THE COURT: Okay.

3 MS. TERWILLIGER: -- you've got -- you have the  
4 full burden of proof now. We don't have that here because it  
5 doesn't exist.

6 THE COURT: Okay. Well, that -- that's why I'm --

7 MS. TERWILLIGER: Yeah.

8 THE COURT: Okay.

9 MS. TERWILLIGER: Yeah.

10 THE COURT: Independent -- so what you're saying,  
11 though --

12 MS. TERWILLIGER: Yeah.

13 THE COURT: -- is there's a standard?

14 MS. TERWILLIGER: Yeah.

15 THE COURT: You say, okay, we've overcome your  
16 burden, so now prove your case, right, in Colorado?

17 MS. TERWILLIGER: Yeah.

18 THE COURT: You said that's a process. That's what  
19 I'm saying here is that under the circumstances of this  
20 matter, is there not something that -- that is saying in the  
21 first place -- first of all, there's no -- no presumption at  
22 all, so prove your case.

23 MS. TERWILLIGER: Right. That's --

24 THE COURT: Okay.

25 MS. TERWILLIGER: -- that's the obligation. It's

1 set --

2 THE COURT: And so -- so the -- is the proving of  
3 the case in this case just by simply submitting an  
4 application and --

5 MS. TERWILLIGER: No.

6 THE COURT: -- relying on -- relying on testimony  
7 of individuals that have -- have supported the application --

8 MS. TERWILLIGER: No.

9 THE COURT: -- or is it -- or is it something more?

10 MS. TERWILLIGER: It's more. NAC 704 -- or  
11 703.2221, triple two one, says that -- it says -- it says,  
12 hey, you've got all these schedules you've filed, so in  
13 addition to the testimony when they file their application  
14 fee, they file all these schedules that are laid out in the  
15 regulations.

16 THE COURT: Um-h'm.

17 MS. TERWILLIGER: There's like 30 regulations on --

18 THE COURT: Okay.

19 MS. TERWILLIGER: There's Schedules A through Q  
20 that have to be --

21 THE COURT: And all that was required here?

22 MS. TERWILLIGER: It's all required here. So file  
23 these schedules --

24 THE COURT: Okay.

25 MS. TERWILLIGER: -- and that reg says in addition

1 to those schedules, if the Commission asks you more  
2 questions, you've got to answer them. You've got to prove  
3 that it's reasonable.

4 I mean, the -- the -- this is -- because the  
5 Commission under statute was created to ensure just and  
6 reasonable rates, no matter what gets raised by the parties,  
7 there's this ongoing obligation as the case proceeds for the  
8 Utility to meet its burden of proof, and they have multiple  
9 opportunities to do so.

10 They have their application, and then they get  
11 questions in discovery and intervenors raise issues, and then  
12 they file rebuttal, and then they -- they go to hearing.

13 But that doesn't mean that a presumption existed.  
14 I mean, it just -- it would upend existing Nevada law, so, I  
15 mean, that's one of the reasons for --

16 THE COURT: Well, that's what I'm getting at, is  
17 the --

18 MS. TERWILLIGER: Yeah.

19 THE COURT: -- procedure that was exercised, at  
20 least in this case, is where you give them the different  
21 steps and you require them to do different things would be  
22 consistent with them not exercising it with a presumption.

23 MS. TERWILLIGER: They should have known that they  
24 did not have a presumption and they had to prove their case  
25 in total.

1 THE COURT: Because they were required to do -- all  
2 these different steps?

3 MS. TERWILLIGER: Because they were required to  
4 meet their burden of proof that it was prudent and just and  
5 reasonable because NAC 703.2231 says they have the burden of  
6 proof --

7 THE COURT: Um-h'm.

8 MS. TERWILLIGER: -- and they know that they do,  
9 and that they were required to do so.

10 THE COURT: Okay.

11 MS. TERWILLIGER: So --

12 THE COURT: Well, the reason be I ask that, was  
13 there anything done differently in this particular case that  
14 would give them the impression that, hey, we -- we -- we're  
15 exercising under a presumption?

16 MS. TERWILLIGER: No. And --

17 THE COURT: Like, there was no requirement for them  
18 to do this or no requirement them to do that, that, you know,  
19 that they would say, okay, well, I can understand because we  
20 have a presumption?

21 MS. TERWILLIGER: No.

22 THE COURT: That's what I'm getting at.

23 MS. TERWILLIGER: No, they're --

24 THE COURT: Okay.

25 MS. TERWILLIGER: I mean, there was -- in fact,

1 there was testimony elicited and I -- I'm going to have to  
2 call it up. It's in our Briefs --

3 THE COURT: Um-h'm.

4 MS. TERWILLIGER: -- where a Southwest Gas witness  
5 actually said at hearing, we know we have the obligation to  
6 prove --

7 THE COURT: Um-h'm.

8 MS. TERWILLIGER: -- prudence.

9 THE COURT: Okay.

10 MS. TERWILLIGER: I mean, that came um at hearing.  
11 I mean, this notion that they didn't know that they didn't  
12 know that they had to prove prudence is just -- it hasn't  
13 existed, they were warned in 2012, and even one of their  
14 witnesses said, yeah, we've got to prove this.

15 THE COURT: Okay.

16 MS. TERWILLIGER: So there's nothing that was  
17 unique -- this is -- this is a -- this was a classic, plain  
18 vanilla review of a monopoly Utility's costs --  
19 infrastructure, costs, and expenses that come in in a rate  
20 case, and the Commission, as the regulator, was applying the  
21 oversight it's supposed to do, it weighed the evidence, and  
22 then it's -- in some -- it determined the credibility of the  
23 evidence, and there's case law that says that, you know, the  
24 Court shouldn't substitute its judgment as to the  
25 Commission's weight of the evidence or the credibility of the

1 evidence.

2           And it -- it weighed the evidence, it determined  
3 what evidence wasn't credible or it found there was no  
4 evidence, and that's -- that's --

5           THE COURT: Do you --

6           MS. TERWILLIGER: -- that's the result that  
7 happened.

8           THE COURT: Do you interpret the argument by  
9 Southwest Gas to be suggesting that independent of any type  
10 of presumption argument, independent of that --

11           MS. TERWILLIGER: Yeah.

12           THE COURT: -- that we lost that, okay, there's  
13 still a due process violation here?

14           MS. TERWILLIGER: No.

15           THE COURT: It's all independent, right? I mean,  
16 all dependent on the question of whether or not there's a --  
17 a presumption?

18           MS. TERWILLIGER: Well, they didn't raise their due  
19 process arguments very well, but let's -- let me get what  
20 their due process --

21           THE COURT: Well, the way -- the way I understand  
22 it --

23           MS. TERWILLIGER: Yeah.

24           THE COURT: -- is that -- is that because you  
25 changed up --

1 MS. TERWILLIGER: Right.

2 THE COURT: -- and you required me to prove this --

3 MS. TERWILLIGER: Yes.

4 THE COURT: -- versus giving me the presumption,  
5 now we're not on notice, proper notice, in order to do this.

6 MS. TERWILLIGER: Yes.

7 THE COURT: That's how I read it. Maybe --

8 MS. TERWILLIGER: That's the --

9 THE COURT: -- maybe I'm --

10 MS. TERWILLIGER: Yeah.

11 THE COURT: -- mistaking that, but that -- that's  
12 what I asked Mr. Polsenberg earlier because I wanted to be  
13 clear on that.

14 MS. TERWILLIGER: Yeah. That's the Verizon case.

15 THE COURT: Okay.

16 MS. TERWILLIGER: There was this whole notion that  
17 it can be a confiscatory taking if full's a change in rate  
18 setting --

19 THE COURT: Right.

20 MS. TERWILLIGER: -- methodologies.

21 THE COURT: Um-h'm.

22 MS. TERWILLIGER: There wasn't. Southwest Gas was  
23 told in 2012 prudence was on the table, there's no rule,  
24 there's no statute. The presumption of prudence, yes, has  
25 been erroneously applied by the Commission --

1 THE COURT: Um-h'm.

2 MS. TERWILLIGER: -- in prior cases, but those were  
3 not Southwest Gas cases. And if it applied to Southwest Gas,  
4 there would have had to have been a rule of general  
5 applicability, and there wasn't.

6 This notion of reliance on a prudence, especially  
7 when there's in stare decisis in Nevada, everybody who  
8 practices before the Commission knows there's no stare  
9 decisis in Nevada. Now, there is arbitrary and capricious,  
10 but what -- the Commission didn't arbitrary and capricious  
11 because in 2012, the Commission said you have to prove  
12 prudence. That is the first step in determining a just and  
13 reasonable rate.

14 They -- they had notice that they had to prove  
15 prudence, and there was nothing unique to --

16 THE COURT: Okay.

17 MS. TERWILLIGER: -- this case they didn't.

18 THE COURT: Okay.

19 MS. TERWILLIGER: I think Ms. Digesti would really  
20 like to go.

21 THE COURT: Go ahead.

22 MS. TERWILLIGER: Unless you have more questions  
23 for me --

24 THE COURT: No.

25 MS. TERWILLIGER: -- I'm going to --

1 THE COURT: I'm good.

2 MS. DIGESTI: But if we do need to come back, can  
3 we before we go back to his reply and rest?

4 THE COURT: Sure. Just finish.

5 MS. DIGESTI: Because there's --

6 THE COURT: When you guys are done --

7 MS. DIGESTI: Okay.

8 THE COURT: -- then I'll give Mr. Polsenberg --  
9 he's writing notes.

10 MS. DIGESTI: Because I think --

11 THE COURT: He wants to talk.

12 MS. DIGESTI: Yeah. I think that there's several  
13 different arguments up in the air here --

14 THE COURT: Um-h'm.

15 MS. DIGESTI: -- and it's all -- it's a big case,  
16 so -- but I -- I represent the BCP, you know, the Attorney  
17 General's Bureau of Consumer Protection, and I think that a  
18 couple of points need to be made from the point of protecting  
19 the interest of Nevada ratepayers because specifically,  
20 Southwest Gas provides service to about 643,000 captive  
21 customers in the south, and about 89,000 in the north.

22 So -- so it -- I think that it goes without saying,  
23 but I'll say it for the record, we support everything that  
24 Ms. Terwilliger, PUC, has said, all of the arguments they  
25 have made because we do believe that the PUC got it right in

1 this case.

2 But I'd like to point out, to answer your question,  
3 if you did find that a presumption of prudence exists in this  
4 case, what would that effect be? But you found that they  
5 rebutted the presumption and --

6 THE COURT: Um-h'm.

7 MS. DIGESTI: -- that it still should be affirmed,  
8 that would simply mean that a presumption of a prudence --  
9 for the first time you'd be creating law, and a presumption  
10 of prudence would not apply in Nevada where it never has  
11 before.

12 And so that would completely change the way rate  
13 hearings -- general rate cases work.

14 THE COURT: Um-h'm.

15 MS. DIGESTI: So I'd just like to --

16 THE COURT: Well, would it necessarily be that --  
17 that the only thing would be that I've made a finding of it  
18 versus it's being actually exercised before? Do you see what  
19 I'm mean?

20 MS. DIGESTI: No, will you elaborate a little bit?

21 THE COURT: Well, if -- well, if you -- if you've  
22 exercised in other situations the presumption of prudence --

23 MS. DIGESTI: Um-h'm.

24 THE COURT: -- and now it's only being challenged  
25 because -- because they believe that they've -- they weren't

1 given that, and now for some reason, you know, the -- the  
2 Commission is saying we're not doing that any longer --

3 MS. DIGESTI: Um-h'm.

4 THE COURT: -- then wouldn't it just be that I'm  
5 making the determination for the first time, but it was  
6 actually exercised before?

7 MS. DIGESTI: Yeah, well, only --

8 THE COURT: Is -- is there evidence to support --  
9 that's what I'm saying, is there evidence --

10 MS. DIGESTI: Only if --

11 THE COURT: -- to --

12 MS. DIGESTI: -- it was the -- the presumption was  
13 applied in the past and that was the way it happened, and  
14 that's -- and the PUC and the --

15 THE COURT: And no one's able to cite to --

16 MS. DIGESTI: -- BCP --

17 THE COURT: -- any of that, is there?

18 MS. DIGESTI: As for as it being applied in the  
19 past and that's just the way --

20 THE COURT: In the state of Nevada?

21 MS. DIGESTI: -- it's done? In the state of  
22 Nevada, no. And that's what I would like to get to, if I  
23 may.

24 THE COURT: Okay. Okay.

25 MS. DIGESTI: So the first point that Southwest Gas

1 made, he referred to Ely Light, to hold that that's the case  
2 that says that there's a presumption. And so he quotes -- or  
3 Southwest Gas quotes in their Petition -- this is the -- this  
4 is the quote that they used to say that it -- there is a  
5 holding of presumption of prudence in Nevada.

6           They say, in the absence of an abuse of discretion  
7 on the part of the Utility, and in the absence of a showing  
8 of lack of good faith, inefficiency or improvidence, and if  
9 the amounts in questions are actually paid, and then they do  
10 a dot, dot, dot, and then they say, the Commission should not  
11 substitute its judgment for that of management.

12           And so if you actually look at the case, they left  
13 out, and if the amounts in question are reasonable, they just  
14 left that phrase out of that quote, and I think that they  
15 left that out because it completely is devastating for their  
16 argument, because this language, this quote that they quote,  
17 is more of a standard of review that the Commission must  
18 follow when they're analyzing a general rate case. It's not  
19 a -- an evidentiary burden shift. It's not anything that's  
20 telling you who has the initial burden and that they -- that  
21 the PUC needs to assume that they are prudent -- it says --  
22 it has none of that language.

23           It's just simply a standard of review, and it does  
24 not talk about a burden shift. So Ely Light never holds that  
25 there's a presumption of prudence, which is -- which makes

1 sense because Nevada Power, which actually talks about a  
2 presumption of prudence, and it had a holding of it, they  
3 never cite to Ely Light because Ely Light doesn't stand for  
4 there being a presumption of prudence, right?

5 So Nevada Power -- Nevada Power, I think, needs to  
6 be talked about because in our view, when we are looking at  
7 all of this, it is wholly inapplicable, and I think there's  
8 some confusion about the applicability.

9 Nevada Power talked about, and Ms. Terwilliger  
10 spoke about in at length, but Nevada Power directly  
11 addresses, expressly is limited to deferred energy accounting  
12 cases for the reasons she talked about. It only talks about  
13 deferred energy.

14 And so it -- it's like when you're reading a case,  
15 and that case is limited to a certain thing, you don't apply  
16 it broadly. You don't apply it to general rate cases because  
17 it doesn't talk about general rate cases.

18 THE COURT: Well -- well, simply because it doesn't  
19 talk about it doesn't mean that it doesn't necessarily apply.  
20 That's -- that's the concern I'm having.

21 MS. DIGESTI: But the language -- the language in  
22 it makes it --

23 THE COURT: Because -- because they're actually  
24 talking about it applying and making a limited distinction in  
25 something that's -- that's, I would say, of lesser quality

1 than a general rate, for lack of better terms. So then --

2 MS. DIGESTI: No, it's --

3 THE COURT: -- if -- if they're doing that, how  
4 would it not apply maybe to a higher quality? That's --

5 MS. DIGESTI: What -- I guess, will you please  
6 elaborate on higher quality versus lower quality because --

7 THE COURT: Well, when you -- well, I understand  
8 that's probably a bad word.

9 MR. POLSENBERG: Bigger --

10 MS. DIGESTI: No --

11 MR. POLSENBERG: -- and smaller.

12 THE COURT: Yeah. But, yeah, it seems like there's  
13 a more narrow issue when it talks about the deferred energy  
14 versus general rate.

15 MS. DIGESTI: No.

16 THE COURT: And so -- so when you -- when you limit  
17 it in that area, I could see limiting it in a -- or in that  
18 case they didn't. They said -- and that's why the  
19 legislation came out --

20 MS. DIGESTI: Well, what's --

21 THE COURT: -- the way did.

22 MS. DIGESTI: Well -- okay.

23 THE COURT: So if they're -- so if they're so  
24 inclined to go so far as to grant it in a limiting area --

25 MS. DIGESTI: Um-h'm.

1 THE COURT: -- why would they not be necessarily --

2 MS. DIGESTI: So --

3 THE COURT: -- so inclined to go --

4 MS. DIGESTI: -- and that's --

5 THE COURT: -- to the bigger area?

6 MS. DIGESTI: Sure. So --

7 THE COURT: Okay.

8 MS. DIGESTI: -- Ms. Terwilliger actually addressed  
9 that. And I apologize if this is inappropriate, but my  
10 husband was actually the Clerk that wrote this. Okay. So I  
11 can say that they limited it to deferred energy accounting  
12 cases.

13 THE COURT: Yeah, but is that -- is that --

14 MR. POLSENBERG: Judge, I'd -- I'd --

15 THE COURT: Hold on, hold on. Is that --

16 MR. POLSENBERG: I don't think she wants to say  
17 that.

18 THE COURT: Yeah.

19 MS. DIGESTI: No, I -- I didn't -- I don't know  
20 any --

21 THE COURT: Are you saying it's coming from some  
22 other information --

23 MS. DIGESTI: No, I just --

24 THE COURT: -- because I'm reading exactly what is  
25 being said in the record, and I -- and I don't know if they

1 -- they don't specifically limit it there. That's what I --

2 MS. DIGESTI: Yeah. No --

3 THE COURT: That's --

4 MS. DIGESTI: -- they do. And I'll find it.

5 THE COURT: Okay.

6 MS. DIGESTI: It's on page -- I had it here. Where  
7 is it?

8 THE COURT: I mean, we all know that Supreme Court  
9 does --

10 MS. DIGESTI: I had it.

11 THE COURT: -- addresses maybe smaller issues that  
12 have bigger -- bigger ramifications and we --

13 MS. DIGESTI: No.

14 THE COURT: -- we've seen that --

15 MS. DIGESTI: But --

16 THE COURT: -- all the time and just --

17 MS. DIGESTI: You can --

18 MS. TERWILLIGER: This is the nonsensical argument,  
19 though.

20 THE COURT: Okay.

21 MS. TERWILLIGER: If -- if the Nevada legislature  
22 reversed the rebuttable presumption for a deferred injury  
23 accounting case where the Utility earns no return, they get  
24 no benefit for spending more money, if they -- if the Nevada  
25 legislature upended the rebuttable presumption that was in --

1 found in Nevada Power case for that --

2 THE COURT: Um-h'm.

3 MS. TERWILLIGER: -- surely if the Nevada Power  
4 case would have reached further to a general rate case, if  
5 that's what the legislature thought was happening, I can  
6 guarantee you they would have said there was no rebuttable  
7 presumption in a rate case because that's where there's more  
8 danger to ratepayers.

9 MS. DIGESTI: Because that's where they earn a  
10 profit.

11 THE COURT: Yeah, but why -- but here's the issue  
12 with that, is why -- why would they stop there?

13 MS. TERWILLIGER: Because there was -- it doesn't  
14 exist in Nevada law so they didn't have to --

15 THE COURT: Okay.

16 MS. DIGESTI: Yeah.

17 THE COURT: -- address it.

18 MS. DIGESTI: Yeah, yeah, it doesn't exist.

19 THE COURT: I know, but here -- here's the issue,  
20 is that are you saying that because of the case, because of  
21 the Supreme Court opinion, it created the law that they had  
22 to legislate against?

23 MS. TERWILLIGER: Yes.

24 THE COURT: Okay.

25 MS. TERWILLIGER: But that --

1 THE COURT: So -- so that's what I'm getting at is  
2 in, in fact, the Supreme Court's taking the position in a --  
3 in that limited area, and they don't address the bigger  
4 area --

5 MS. TERWILLIGER: That -- they don't address the  
6 bigger area, so there is no case law that applies a  
7 rebuttable presumption in a rate case --

8 THE COURT: I know, but --

9 MS. TERWILLIGER: -- period.

10 THE COURT: -- the --

11 MS. TERWILLIGER: And they were --

12 THE COURT: Okay.

13 MS. TERWILLIGER: They couldn't have been more  
14 specific. Under the PUCN's presumption of framework, a  
15 Utility requesting a customer rate increase -- they say rate  
16 increase generally.

17 THE COURT: Okay.

18 MS. TERWILLIGER: I agree with that. But then they  
19 go on to say, enjoys the presumption that the expense is  
20 reflected in its deferred energy application were prudently  
21 incurred and taken in good faith. That's the finding. It  
22 only is about deferred energy accounting. It did not go so  
23 far as to reach to a general rate case.

24 THE COURT: Okay.

25 MS. TERWILLIGER: It just didn't. I mean, the case

1 -- the wording -- I mean, there's another quote.

2 THE COURT: And your -- and your reasoning for that  
3 is because of the -- how it affects the taxpayer.

4 MS. TERWILLIGER: Well, the reason that the Nevada  
5 Supreme Court only ruled on a deferred energy accounting case  
6 and the Nevada Power case is because that was the issue --  
7 that was the justiciable issue before them.

8 THE COURT: Right, right, right.

9 MS. TERWILLIGER: That -- it was only --

10 THE COURT: But you're saying the reasonableness,  
11 why it wouldn't apply to a general count is because of the --  
12 you were saying -- you -- put it in the record again.

13 MS. TERWILLIGER: The reason it wouldn't apply in a  
14 rate case is because it would be nonsensical because --

15 THE COURT: Okay.

16 MS. TERWILLIGER: -- the Utility actually has a  
17 bigger incentive to gain its rebuttable presumption of  
18 prudence in a rate case --

19 THE COURT: Um-h'm.

20 MS. TERWILLIGER: -- because they earn a return on  
21 everything they get -- they are bringing all the investment  
22 they're bringing into the rate case.

23 So they have a much bigger incentive to say, hey,  
24 I've got a rebuttable presumption of prudence, I -- I'm going  
25 to -- I'm going to earn return on everything that comes in,

1 I'm going to provide the Commission with as much -- little  
2 information as possible, and then --

3 THE COURT: Okay.

4 MS. TERWILLIGER: -- I'm going to stonewall them in  
5 discovery.

6 THE COURT: I got you.

7 MS. TERWILLIGER: That's what happened here. And  
8 then --

9 MR. POLSENBERG: Judge, I need --

10 MS. TERWILLIGER: And then -- hey --

11 MR. POLSENBERG: -- I need to object to that.

12 MS. TERWILLIGER: No, it's in my Memorandum.

13 MR. POLSENBERG: Because that's -- that's --

14 MS. TERWILLIGER: I talked about the -- and even  
15 Southwest Gas's witness, there's a quote in the Memorandum  
16 where Southwest Gas's attorney is asking a staff witness,  
17 yeah, we could have done better with discovery, we know we  
18 were a little bit late, and we didn't always get you stuff on  
19 time.

20 MR. POLSENBERG: Judge, discovery issues, just like  
21 in the District Court, a discovery issue is something that  
22 has to be handled in that tribunal. It is not the basis for  
23 a decision or for -- for law-making.

24 MS. TERWILLIGER: And we're not -- we're not saying  
25 it's a basis for a decision here. We're saying this is the

1 practical reason why rebuttable presumption of prudence  
2 doesn't exist in Nevada because this situation can occur.

3 We're not saying that somehow you should do  
4 something against Southwest Gas because of a discovery issue.  
5 That's not -- I'm explaining it as a practical implication.

6 THE COURT: I understand.

7 MS. TERWILLIGER: So --

8 THE COURT: I understand.

9 MS. DIGESTI: Your Honor, may I continue?

10 MS. TERWILLIGER: Sorry.

11 THE COURT: Sure, sure, go ahead.

12 MS. DIGESTI: So --

13 MR. POLSENBERG: Oh, sorry about that.

14 MS. DIGESTI: It's okay. So -- where was I? So  
15 back to Nevada Power. Where -- are -- do you have any  
16 questions about Nevada Power because to -- to us, it seems so  
17 evident that it only referred to a specific --

18 THE COURT: No, I -- I agree with you there.

19 MS. DIGESTI: Okay.

20 THE COURT: I do, but -- but -- but it doesn't say,  
21 on the other hand, it doesn't say that a presumption doesn't  
22 apply in these other situations. It specifically says --

23 MS. DIGESTI: Go ahead, go ahead.

24 THE COURT: -- a presumption does apply in --

25 MS. DIGESTI: She --

1 THE COURT: -- this situation.

2 MS. TERWILLIGER: I --

3 MS. DIGESTI: She wants -- she's --

4 MS. TERWILLIGER: I can --

5 THE COURT: That it was overdone by the  
6 legislature.

7 MS. TERWILLIGER: I can -- I can't help myself --  
8 the reason it didn't is because that wouldn't have been a  
9 justiciable issue.

10 Deferred energy accounting applications and rate  
11 cases are two different applications.

12 MS. DIGESTI: Right.

13 MS. TERWILLIGER: The only thing --

14 THE COURT: No, no, no, I know that. I know that.

15 MS. TERWILLIGER: Yeah, the only thing the --

16 THE COURT: But -- but --

17 MS. TERWILLIGER: -- thing that the Nevada Supreme  
18 Court had in front of it was a deferred energy accounting  
19 application. So for it to rule that the rebuttable  
20 presumption applies in a general rate case, that wouldn't  
21 have been --

22 THE COURT: No, no, no, no, no, no.

23 MS. TERWILLIGER: Yeah, okay.

24 THE COURT: I think you and I probably --

25 MS. TERWILLIGER: Okay. All right. Sorry.

1 THE COURT: -- are thinking the same way, but --

2 MS. TERWILLIGER: Okay.

3 THE COURT: -- but -- but what I'm also need you to  
4 understand is that I'm not seeing it specifically anywhere  
5 saying that there is not a rebuttable presumption.

6 MS. DIGESTI: Yeah, the -- so I --

7 THE COURT: Okay?

8 MS. DIGESTI: -- so -- and that --

9 THE COURT: That's what I'm saying. I know, and  
10 there -- but your argument also is there's no -- nothing to  
11 say that there is a rebuttable presumption.

12 MS. DIGESTI: Right.

13 THE COURT: And their argument is, is that the --  
14 is that the Nevada Power case has carved out an area to -- to  
15 tell me that there is a rebuttable presumption in -- in the  
16 general rate just like there's one in a -- under that case in  
17 the deferred -- yeah, the deferred accounting, which was  
18 overcome by statute. That -- that's the argument they're  
19 making. That's how I read it.

20 MS. DIGESTI: Right.

21 THE COURT: Okay? And so that's why I was just  
22 asking --

23 MS. DIGESTI: Yeah.

24 THE COURT: -- is that --

25 MS. TERWILLIGER: So it's --

1 THE COURT: -- is in your argument is there  
2 anything that you could say that -- I mean, and I think I  
3 understand it, and I've heard it, is that -- is that that  
4 case only applies to deferred, and they're not making any  
5 decision. There's no dicta or anything like that when  
6 they're talking about -- talking about general rate --

7 MS. DIGESTI: Um-h'm.

8 THE COURT: -- but you also agree that there's  
9 nothing in there to say that it doesn't apply --

10 MS. DIGESTI: Right. And --

11 THE COURT: -- to general rate.

12 MS. DIGESTI: -- in Nevada Power it --

13 THE COURT: And that it only applies to deferred --

14 MS. DIGESTI: Right. In Nevada Power essentially,  
15 they -- the Court never had to think about general rate --

16 THE COURT: Right, right.

17 MS. DIGESTI: -- rate cases so they didn't --

18 THE COURT: Right. No, I --

19 MS. DIGESTI: -- specifically --

20 THE COURT: -- agree.

21 MS. DIGESTI: -- carve that out.

22 THE COURT: I agree.

23 MS. DIGESTI: But then for -- it's almost like it's  
24 frustrating that in AB7 the legislature didn't just --

25 THE COURT: Didn't go further.

1 MS. DIGESTI: Didn't just say, okay, obviously --

2 THE COURT: And that's their argument.

3 MS. DIGESTI: -- it's an all --

4 THE COURT: That's their argument. They saying --

5 MS. DIGESTI: But --

6 THE COURT: -- it leaves it open. It's there --

7 MS. DIGESTI: So then --

8 THE COURT: -- and their position is, is Judge,

9 yes, it is.

10 MS. DIGESTI: So no --

11 THE COURT: Or Judge make the decision that it is.

12 That's what they're doing.

13 MS. DIGESTI: Right. So then -- so then it leaves

14 it open, meaning, Your Honor, for the first time you would

15 have to --

16 THE COURT: Right.

17 MS. DIGESTI: -- say that there is one because

18 there is -- we -- I think both parties agree that it doesn't

19 clearly say it anywhere that it applies to general rate

20 cases.

21 THE COURT: Right.

22 MS. DIGESTI: So it's a matter of first impression.

23 THE COURT: Right.

24 MS. DIGESTI: And then -- but then it kind of -- I

25 think that it does say it when you look at the other law, the

1 statutes. Like, in -- as Ms. Terwilliger has pointed out in  
2 -- in NAC 703.2231 --

3 THE COURT: Um-h'm.

4 MS. DIGESTI: -- they expressly say, a Utility  
5 applies for a rate adjustment. The Utility must sustain the  
6 burden of proof of establishing that the proposed changes are  
7 just and reasonable and not unduly discriminatory or  
8 preferential.

9 THE COURT: Okay. Does the --

10 MS. DIGESTI: I mean --

11 THE COURT: -- rate adjustment -- does that  
12 language regarding rate adjustment apply to the -- what was  
13 -- what we're talking about here with regards to the discount  
14 rate --

15 MS. DIGESTI: Yes, that is a general rate case.

16 THE COURT: -- rate switching? We're talking about  
17 the software costs, of the capital costs --

18 MS. DIGESTI: Yes.

19 THE COURT: -- pension costs?

20 MS. DIGESTI: Yes, it is the entire --

21 THE COURT: Okay.

22 MS. DIGESTI: -- general rate case.

23 THE COURT: Okay.

24 MS. DIGESTI: Is -- is covered by NAC 703.2231. It  
25 is --

1 THE COURT: So your --

2 MS. DIGESTI: -- that case.

3 THE COURT: -- your position is that all the costs  
4 that are associated with this apply in a general rate?

5 MS. DIGESTI: Yes, Your Honor.

6 THE COURT: Okay.

7 MS. DIGESTI: And --

8 THE COURT: Now, Mr. Polsenberg, I felt in his  
9 argument, disagreed with that. Is that it doesn't apply  
10 because it's a -- it's a capital cost, and capital costs  
11 aren't considered as part of a rate.

12 MS. DIGESTI: Disagrees with the applicability of  
13 NAC?

14 THE COURT: Is that -- did I misunderstand that?

15 MR. POLSENBERG: You and I were talking about the  
16 statute.

17 THE COURT: Okay.

18 MR. POLSENBERG: She's talking about a regulation.

19 THE COURT: Okay.

20 MS. DIGESTI: Yes, I'm talking about the regulation  
21 703 --

22 THE COURT: Okay.

23 MS. DIGESTI: -- .2231. And then -- and then, Your  
24 Honor, I also wanted to point out that in -- and I -- again,  
25 Ms. Terwilliger has already talked about this so I don't want

1 to be too repetitive. But in the Southwest Gas 2012 case,  
2 when they were put on actual notice of their burden of proof,  
3 in -- in paragraph 42 of that order, the Commission expressly  
4 says that their application must contain all material  
5 necessary to sustain its burden of proof, and the application  
6 will serve as a -- as their complete case at the hearing.

7 So they -- well, they were on actual notice, and  
8 they were on statutory notice for this case. And they, as  
9 Mr. Terwilliger pointed out, they simply failed to meet their  
10 burden, and then they -- and then instead of saying, okay, we  
11 failed to meet our burden, we didn't get what we wanted,  
12 they're raising a presumption, which to us seems ludicrous  
13 because we know that no presumption exists in --

14 THE COURT: Okay.

15 MS. DIGESTI: -- PUC hearings.

16 THE COURT: Well, once again, if I accept that  
17 there's a presumption, when you use the language that the  
18 Southwest Gas must provide all information to meet their  
19 burden of proof, is there a burden of proof beyond the -- I  
20 mean, initially with the presumption?

21 If there's a presumption, is there -- is there a  
22 burden of proof at all with that?

23 MS. TERWILLIGER: There's a burden of proof. There  
24 has to be substantial evidence for the -- the -- for the --

25 THE COURT: Okay.

1 MS. TERWILLIGER: -- costs that are reflected in a  
2 rate case to make it into rates.

3 THE COURT: Okay.

4 MS. TERWILLIGER: -- there --

5 THE COURT: So there would be, even in a -- in a  
6 rebuttable presumption situation?

7 MS. TERWILLIGER: Well --

8 THE COURT: That's what I'm asking.

9 MS. TERWILLIGER: Well, what I -- the -- we would  
10 argue that the burden of proof -- and there's case law that  
11 says independent of a presumption, the burden of proof still  
12 applies --

13 THE COURT: Um-h'm.

14 MS. TERWILLIGER: -- that it doesn't matter if you  
15 have a rebuttable presumption, ultimately, you have to meet  
16 your burden of proof. The rebuttable presumption is just if  
17 it existed, it would help you -- it would make the other  
18 parties raise a serious doubt first.

19 But --

20 THE COURT: Okay.

21 MS. TERWILLIGER: -- in the end, you still have to  
22 put forth such a case that you can prove to the Commission  
23 that your just -- rates are just and reasonable.

24 THE COURT: Okay.

25 MS. TERWILLIGER: That's what NAC 702 -- or

1 703.2231 says very clearly.

2 THE COURT: Okay. So -- so would you agree, then,  
3 that under paragraph number 42, is that the -- the notice was  
4 putting Southwest Gas on notice that they had to meet their  
5 standards based on what you've just indicated?

6 MS. TERWILLIGER: The Commission went further than  
7 that.

8 THE COURT: Okay.

9 MS. TERWILLIGER: The Commission specifically --

10 THE COURT: That's what I want to know.

11 MS. TERWILLIGER: -- said -- and it's cited -- it's  
12 cited in the -- in our Memorandum. I think it's one of the  
13 footnotes in that same order where the Commission says,  
14 prudence is the -- is one of the steps to determining just  
15 and reasonable rates.

16 So in the Utility -- Public Utility world, it's not  
17 -- it's an overarching substantial evidence standard, but we  
18 look at two different things.

19 THE COURT: Okay.

20 MS. TERWILLIGER: We look at prudence and we looked  
21 at just and reasonable. And those are two different things.

22 Prudence is why did you do it? Did you do a RFP?  
23 Why did you choose this vendor? Why did you do it now?

24 Just and reasonable is once they've incurred the  
25 cost, they've -- you know, they've built the money, they've

1 spent the money, was your -- was your incurrence of cost just  
2 and reasonable? Those are kind of -- those are the two  
3 components, and the Commission specifically said in 2012,  
4 when Southwest Gas -- Southwest Gas raised -- I can't be more  
5 clear, and they didn't appeal this decision.

6           The Southwest Gas said it had a rebuttable  
7 presumption in 2012, and they lost an issue because the  
8 Commission didn't find that they met their evidentiary  
9 standard, and the Commission said, prudence is a -- is one of  
10 the steps in determining just and reasonable rates.

11           They knew in the 2012 case, that they didn't  
12 appeal, that prudence was one of the things the Commission  
13 was going to be looking at. I mean, it's -- it couldn't have  
14 been more clear.

15           THE COURT: No, but --

16           MR. POLSENBERG: I've appealed now.

17           MS. TERWILLIGER: Well, but the -- but it -- it  
18 totally refutes their argument that this was a magic change  
19 in rate setting methodology.

20           MS. DIGESTI: Right. That they were not on notice  
21 of it. They had notice of it.

22           THE COURT: Okay.

23           MS. TERWILLIGER: That they didn't have notice that  
24 they had to prove -- prove presumption, that's not a -- it's  
25 not a -- there's no taking there. They didn't have to prove

1 it.

2 MS. DIGESTI: Wait, [Inaudible] --

3 MS. TERWILLIGER: Well, they have to prove it.

4 MR. POLSENBERG: I have to object that --

5 MS. DIGESTI: No.

6 MR. POLSENBERG: -- because the failure to appeal  
7 in a case that we considered inconsequential is not a waiver  
8 of -- of an issue in the subsequent case.

9 MS. TERWILLIGER: It's a waiver --

10 MR. POLSENBERG: Which is why we are here.

11 MS. DIGESTI: It's a waiver of your notice  
12 argument.

13 MS. TERWILLIGER: It's a waiver of your notice  
14 argument. That's right.

15 THE COURT: Okay. All right.

16 MR. POLSENBERG: I don't agree, Judge.

17 THE COURT: Okay.

18 MS. DIGESTI: But, then, Your Honor, may I  
19 continue? So --

20 THE COURT: Sure.

21 MS. DIGESTI: -- so then we kind of get into -- so  
22 for those reasons that I have set forth, I -- presumption of  
23 prudence just doesn't apply. So for you to rule that way  
24 would be for you to make the law that there --

25 THE COURT: Um-h'm.

1 MS. DIGESTI: -- is a presumption.

2 THE COURT: Um-h'm.

3 MS. DIGESTI: But, then, when they get into their  
4 constitutional arguments, it -- I think a lot of it -- a lot  
5 of the arguments that they make are based on the presumption  
6 being there, right?

7 THE COURT: Um-h'm.

8 MS. DIGESTI: So they say lack of notice, the 14th  
9 amendment procedural due process, violations are because they  
10 thought there was going to be a presumption, and then there  
11 was not. So, right? So if the --

12 THE COURT: Well, that's what -- that's what you  
13 were kind of getting at right now when I was asking you about  
14 paragraph 42, is that -- can you read it to me? Just read it  
15 in the record. Read the whole paragraph into the record.

16 MS. DIGESTI: I have it in --

17 (Pause in the proceedings)

18 MS. DIGESTI: I have it in my notes, but I --

19 THE COURT: That's fine. Do you have the --

20 MS. DIGESTI: -- would rather --

21 THE COURT: -- whole -- the whole paragraph?  
22 That's what I want to hear. Because that's your notice  
23 paragraph.

24 MS. DIGESTI: I -- I have it -- I have it, and then  
25 if it's -- if somehow it's missing something, someone else

1 can find the rest.

2 THE COURT: Read it.

3 MS. DIGESTI: Okay. Pursuant to NAC 703.2231, an  
4 applicant must ensure that its application contains all of  
5 the material necessary to sustain its burden of proof, that  
6 its proposed changes are just and reasonable and not unduly  
7 discriminatory or preferential, and that its application will  
8 serve as its complete case at hearing.

9 THE COURT: Okay. That's the extent as far as you  
10 know that-- you believe of that notice?

11 MS. DIGESTI: Do you see anything else?

12 MS. TERWILLIGER: Yeah, here, let me read -- so  
13 it's actually paragraph 45.

14 THE COURT: Okay.

15 MS. TERWILLIGER: Sorry. Okay. And this was --  
16 this was a -- this is a --

17 MR. POLSENBERG: Forgive me, Doctor, Doctor.

18 THE COURT: What's that.

19 MR. POLSENBERG: Your Honor, which document are we  
20 in?

21 MS. TERWILLIGER: We're in the 2012 --

22 MR. POLSENBERG: Okay.

23 MS. TERWILLIGER: -- rate case for --

24 MR. POLSENBERG: Got it.

25 MS. TERWILLIGER: -- Southwest Gas.

1 MS. DIGESTI: Order.

2 MS. TERWILLIGER: But this -- so this is paragraph  
3 45.

4 Now, turning to -- turning now to Southwest Gas's  
5 Petition for Reconsideration. Southwest Gas argues in that  
6 determining the cost for recovery allowed for the MIP --  
7 that's Management Incentive Plan --

8 THE COURT: Um-h'm.

9 MS. TERWILLIGER: -- the Commission erroneously  
10 applied the standard of whether the incurred expense provides  
11 benefits to ratepayers and disallowed certain costs, despite  
12 a lack of evidence demonstrated, and that the costs  
13 associated with the MIP were imprudently or unreasonably  
14 incurred. This is the key sentence: Whether a cost was  
15 prudently incurred is only one step in determining whether or  
16 not a cost should be allowed in rates. The next step, as set  
17 forth in NRS 704.001, requires the Commission to view the  
18 evidence in light of NRS 704.001, which includes balancing  
19 the interests of customers and shareholders by providing  
20 Public Utilities with the opportunity to earn a fair return  
21 on its investment while providing customers with just and  
22 reasonable rates. All of which leads to the Commission's  
23 ultimate charge to ensure a decision results in just and  
24 reasonable rates. And then they cite NRS 704.040 and NRS  
25 704.120.

1           If including a costs and rates would result in  
2 unjust and unreasonable rates, costs cannot be allowed in  
3 rates.

4           So the Commission said Southwest Gas specifically  
5 said that the Commission didn't determine that its MIP was  
6 imprudent. And the Commission said, no, no, no, whether a  
7 cost was prudently incurred is only --

8           MR. POLSENBERG: Forgive me for interrupting.

9           MS. TERWILLIGER: -- one step in --

10          MR. POLSENBERG: But are we done the quote because  
11 I don't remember the no, no, no.

12          THE COURT: Oh, that's all right.

13          MR. POLSENBERG: I'm -- I need --

14          MS. TERWILLIGER: I was done with the quote, I'm  
15 sorry.

16          MR. POLSENBERG: Okay.

17          MS. TERWILLIGER: Yes. Yes, sir. I thought that  
18 was clear.

19          THE COURT: Okay. So --

20          MS. TERWILLIGER: So --

21          THE COURT: Go on.

22          MS. TERWILLIGER: That was it. That was the quote.

23          THE COURT: Okay.

24          MS. TERWILLIGER: Not -- without the no, no, no.

25          THE COURT: Okay. All right.

1 MS. TERWILLIGER: And we cited that in our -- in  
2 our -- in the record.

3 THE COURT: Okay.

4 MS. TERWILLIGER: You can pull up the Westlaw.

5 THE COURT: Okay.

6 MS. DIGESTI: So where were we? So we were talking  
7 about the due process claims being based on the presumption  
8 being applied.

9 THE COURT: Right.

10 MS. DIGESTI: So if there's no presumption as a  
11 matter of law, then they can't rely on that for the 14th  
12 amendment due process claims.

13 THE COURT: Okay.

14 MS. DIGESTI: And then also, of course, the  
15 alternative claim that they were on actual notice because of  
16 that Southwest Gas, that 2012 case --

17 THE COURT: Okay.

18 MS. DIGESTI: -- not to mention NAC 703.22 -- or  
19 .2231, and the fact that there is an absence of any  
20 presumption of prudence being mandated in any Nevada case or  
21 United States Supreme Court case.

22 So they were on actual notice that there should --  
23 they should not rely on a presumption. And then I don't  
24 think that we've really addressed it yet, but then they kind  
25 of talk about the 5th amendment takings claim.

1 THE COURT: Um-h'm.

2 MS. DIGESTI: And they kind of -- they jumble it  
3 together, but there's that case, Duquesne, and can -- that's  
4 at 1488 U.S. 299.

5 And the Duquesne case expressly provides test for  
6 what you need to do if you're going to make a 5th amendment  
7 confiscation claim. And that test mandates that in order to  
8 have a viable confiscation claim, the Utility must provide  
9 that the rate setting decision, number one, leaves Southwest  
10 Gas with insufficient operating capital; number two, impedes  
11 its ability to raise future capital; or number three, is  
12 inadequate to compensate current equity holders for the risks  
13 associated with their investments.

14 So in this case, Southwest Gas in their Petition  
15 and in their Reply made no effort to cite the case, cite the  
16 test, analyze the case, present evidence to meet any of those  
17 factors. They -- they made absolutely zero effort to meet  
18 that burden of proof under the Duquesne test.

19 And so when we're looking at the takings claim, all  
20 we have is -- is merely the claim. We have the claim that  
21 there was a takings, and that's it. And so they have not met  
22 the burden under -- under Duquesne and under --

23 MS. TERWILLIGER: Hope.

24 MS. DIGESTI: -- Hope.

25 THE COURT: Okay. Anything else?

1 MS. DIGESTI: And then --

2 THE COURT: Okay.

3 MS. DIGESTI: -- I -- sorry. One more thing.

4 Under this -- the standard of review, it's kind of like it  
5 jumps, you know, like they -- they say there's a presumption  
6 of prudence, and then say there's a 14th amendment and 5th  
7 amendment constitutional issues. And then because there's  
8 these constitutional issues, we get a de novo standard of  
9 review on the entire thing. We get a de novo standard of  
10 review on both law and facts.

11 And they cite to Ben Avon for that. And that case  
12 doesn't apply in Nevada for a few reasons, Your Honor. The  
13 first it doesn't apply because it would be in direct conflict  
14 with NRS 703.373, which provides the standard of review in  
15 Petitions for Judicial Review and that provides that the  
16 Court must not substitute its judgment for that of the  
17 Commission, and must affirm the Commission's order that are  
18 based on substantial evidence.

19 And there's case law to back that up, Nevada case  
20 law that provides substantial evidence is the standard in  
21 these cases; right? And then -- but then they say -- they're  
22 asking you to create new law in Nevada today in this case  
23 that that law that provides the standard of review should not  
24 be the law, and the law should be Ben Avon.

25 But Ben Avon is -- should be disregarded because

1 it's never been applied in Nevada, and it's -- it's actually  
2 a horrible rule, and it's from an outdated case. And  
3 Mr. Terwilliger can probably go into some more detail, but  
4 it's not the law because the effects of applying this law  
5 would be -- would absolutely upturn a Public Utility  
6 Commission hearings in the state.

7           It would just -- it would -- it would, in effect,  
8 make the function of the Utility obsolete because all the  
9 Utility would do was -- would be to ask for a rate increase  
10 in a general rate case, get their outcome, and then file a  
11 Petition for Judicial Review and get a completely new hearing  
12 on both the law and facts simply by claiming confiscation  
13 without back -- without backing it up and without meeting the  
14 Duquesne test.

15           And so it would -- it would render all of the  
16 things that -- that the PUC does in these cases. For  
17 instance, all of their expertise on -- oh, all their  
18 accounting -- accountants and engineers and everyone that  
19 they employ to make sure that they get it right would, in  
20 effect, kind of be rendered obsolete.

21           THE COURT: Okay.

22           MS. TERWILLIGER: I just have two issues I want to  
23 address before I hand it back over.

24           THE COURT: I didn't even know there was that many  
25 issues in this case.

1 MS. TERWILLIGER: There's -- there's a lot of  
2 issues --

3 THE COURT: Okay.

4 MS. TERWILLIGER: -- like, you know, I -- I mean,  
5 Southwest Gas is really asking for you to make some extreme  
6 or extraordinary findings here. First they're asking you to  
7 say their constitutional rights have been violated. There  
8 was a taking -- even they didn't meet the heavy burden of  
9 that Duquesne case that Ms. Digesti just cited to say --

10 MR. POLSENBERG: Judge, I don't really mind the  
11 back and forth, but they're -- at this point, they're making  
12 the same arguments.

13 THE COURT: We're done right now. I mean, she's  
14 going to finish right now.

15 MS. TERWILLIGER: I'm going to -- I'm going to  
16 finish. So they're asking you to make some Constitution --  
17 in particular, they're asking you to make -- file -- find  
18 that their constitutional rights have been violated. That  
19 there was a taking, they haven't met the standard the U.S.  
20 Supreme Court said for a taking, and they haven't  
21 sufficiently raised any due process claims.

22 And that's how they get to this -- this -- and that  
23 and the Ben Avon case is how they get to this -- they have  
24 this independent review of constitutional facts that you are  
25 sitting here de novo. That -- that -- that Duquesne -- that

1 -- so that Ben Avon case has been -- the United States  
2 Supreme Court in St. Joseph Stock Yards limited that case and  
3 said we're going to give deference to the Administrative  
4 Agency on the findings of fact.

5           So even if they -- you would somehow -- Ben Avon  
6 hasn't been applied in Nevada, but let's say you would look  
7 to it; you'd have to really look at the St. Joseph Stock  
8 Yards and say you have to give deference to the Agency on  
9 facts.

10           And it also -- the St. Joseph case also said that  
11 if the issue wasn't raised at the Agency level, it can't be  
12 raised as a constitutional issue here. And just so -- we  
13 haven't talked about this yet, but the taking issue was not  
14 raised at the PUC. It was not in the Petition for  
15 Reconsideration. It wasn't raised at the PUC. That's a  
16 magic thing that they've -- they've somehow brought here to  
17 this Court.

18           So there's one more issue I want to address just to  
19 kind of give some context. Southwest Gas on December 27,  
20 2019, less than two weeks ago, filed a letter with the Public  
21 Utilities Commission. It's a publicly filed letter. I have  
22 a copy if you'd like it, that says they're going to file a  
23 new rate case on or before February 26, 2020.

24           I can have -- I can provide a copy --

25           MR. POLSENBERG: This isn't in the record.

1 MS. TERWILLIGER: -- to Counsel. It's not, but  
2 it's important context. I have a copy of the --

3 MR. POLSENBERG: It isn't in the record.

4 MS. DIGESTI: It happened after --

5 THE COURT: What -- what -- why do we need this  
6 now? I mean, we're just talking about --

7 MS. TERWILLIGER: Because what I'm telling you is  
8 that they're filing a new rate case in February.

9 THE COURT: Okay.

10 MS. TERWILLIGER: All of these issues that are on  
11 appeal here will be relitigated.

12 THE COURT: Okay.

13 MS. TERWILLIGER: The Commission specifically said  
14 the challenged work orders were denied without prejudice, so  
15 they can -- they'll refile that -- that.

16 THE COURT: Okay.

17 MS. TERWILLIGER: They can refile for those then.  
18 They can refile and ask their ROE to be changed.

19 THE COURT: Um-h'm.

20 MS. TERWILLIGER: All of this will stuff come back  
21 at the Commission, and they'll get another opportunity to  
22 present evidence when they didn't have it before.

23 THE COURT: Okay.

24 MS. TERWILLIGER: So, yeah.

25 THE COURT: Okay.

1 MS. TERWILLIGER: Thank you.

2 MS. DIGESTI: May I say one thing that --

3 THE COURT: No, we're done.

4 MS. DIGESTI: Just --

5 THE COURT: Mr. Polsenberg, do you have anything  
6 further?

7 MR. POLSENBERG: I'll -- I'll try to be Brief. Let  
8 me take the Bureau's part first because I remember it.

9 They -- they talk about the burden of proof under  
10 the regulations. We've cited a whole bunch of cases -- you  
11 know, they make fun of our Brief, justifiably so, for having  
12 pages of string cites. We -- we -- we -- we give you the  
13 cases that say a -- a burden of proof in -- does not overcome  
14 the presumption of prudence, admittedly, where it exists.

15 And their standard of review, that also wouldn't  
16 apply if the presumption had not been properly mentioned,  
17 properly applied.

18 They say that we're on notice that there was no  
19 presumption from the 2012 proceedings. Well, of course, I  
20 disagree on the legal aspect, and so I didn't waive the  
21 appeal. But I also didn't waive the notice thing because  
22 there's nothing in their -- remember, there are two due  
23 process -- there are more than two. But there are two big  
24 issues that we're talking about, and one of them was whether  
25 we were on notice that we had to come in on -- I'll make it

1 narrow -- the discount rate. Okay?

2 I think even without the presumption, they still  
3 have to let us know what issues they're going to be  
4 concentrating on. But if the presumption does exist, yes,  
5 they have to let us know what issues the hearing's going to  
6 focus on that they --

7 THE COURT: Mr. Polsenberg, what I was talking  
8 about when I was asking a lot of questions, and I know you  
9 were listening here, is that in situations where you're  
10 applying for either changes or -- or a stamp of approval --

11 MR. POLSENBERG: Yeah.

12 THE COURT: -- you have to do something to support  
13 that.

14 MR. POLSENBERG: But they --

15 THE COURT: And --

16 MR. POLSENBERG: We didn't know anybody was going  
17 to challenge that. Now, maybe my argument --

18 THE COURT: I know, but -- but -- but is that --

19 MR. POLSENBERG: Judge, there's -- we didn't just  
20 -- this witness wasn't just coming in and saying I'm here to  
21 say what the discount rate is.

22 THE COURT: Um-h'm.

23 MR. POLSENBERG: The -- the way -- I've been to a  
24 lot of administrative hearings, not in front of the PUCN in  
25 decades, but, I mean, it -- it's not really like a trial.

1           And what happened here was they badgered the  
2 witness to, okay, where did the discount rate come from? And  
3 she says, well, that came from the actuaries. Well, did it  
4 go to top management? I assume it did. Well, what did top  
5 management do about it? She wasn't prepared on all those  
6 things.

7           Now, you can't --

8           THE COURT: I know, but Mr. Polsenberg, if you're  
9 asking for something to be changed, wouldn't you expect that  
10 your witness would be prepared to answer why --

11          MR. POLSENBERG: Not when it wasn't in --

12          THE COURT: -- it should be changed?

13          MR. POLSENBERG: -- dispute with them. Now, my  
14 argument's a lot better with the presumption of prudence,  
15 where if they don't raise it, we don't have to be prepared.  
16 And it goes to challenge versus overcoming. Both you and  
17 Counsel raise that. It goes to challenge versus overcoming.

18                 Raising the questions doesn't overcome the  
19 presumption, and I go so far as to say it doesn't even  
20 challenge the presumptions because it just questions during  
21 the hearing. It's not something that says these are the  
22 things that are going to be in issue.

23                 All right. Let me go back to the beginning. They  
24 -- they were -- yes. I agree with you. There's a Latin  
25 expression, *expressio* something, *exclusio* something else.

1 And -- and that's what I think AB7 is here. They only talked  
2 about one narrow way that presumption of prudence is  
3 excluded.

4 And although Counsel has -- and I said this in my  
5 other argument -- they come in here and say it's nonsensical  
6 for the legislature to have made that distinction, and yet,  
7 that's the distinction the legislature made. And what --

8 THE COURT: But are they really make a distinction  
9 just because they address it in one area? That's what I'm --

10 MR. POLSENBERG: They --

11 THE COURT: -- that's what I'm saying.

12 MR. POLSENBERG: Well, they only addressed it in  
13 one area. So they didn't affect it in the other area.

14 THE COURT: I know, but the other area wasn't at  
15 issue. That's -- I mean, that's -- that's the whole issue in  
16 the case.

17 MR. POLSENBERG: Well, it wasn't issue in the case.

18 THE COURT: It wasn't at issue in the case?

19 MR. POLSENBERG: It wasn't at -- for -- I'm tired,  
20 I'm slurring. It wasn't an issue in the Nevada Power case.

21 THE COURT: Right. And the Nevada Supreme Court  
22 made a determination that it did apply.

23 MR. POLSENBERG: Right.

24 THE COURT: And so then the legislature went and  
25 said it doesn't apply here.

1 MR. POLSENBERG: And both of us acknowledged the  
2 line in the case where it talks about rate cases.

3 THE COURT: Um-h'm.

4 MR. POLSENBERG: I think what -- I think what  
5 Nevada Power did was extend the concept of the presumption of  
6 prudence to even the energy accounting -- deferred energy  
7 accounting cases. And -- and I -- I get reassurance on that  
8 from the fact that the Nevada Supreme Court did address the  
9 presumption of prudence in an earlier case that not only was  
10 a rate case, but it involved pensions.

11 The PUC cut Ely Light & Power's request for  
12 expenditures for pensions by 50 percent. And the Nevada  
13 Supreme Court said no. And in the two sentences before the  
14 one that the Bureau quotes, the Court noted, the presumption  
15 of the proper exercise of judgment by the Utility in matters  
16 which are particularly a function of the management. It is  
17 the Commission's duty to regulate rates, but not to manage  
18 the Utility's business.

19 And I -- I don't just have to rely on the Ely Power  
20 case. I got a two-page string cite from all the cases around  
21 the country, and it is clearly part of the federal common law  
22 that you have a presumption of prudence, and it's adopted by  
23 all these states.

24 I think it is a matter of common law, and I have  
25 argued it is based on the Constitution, not just the 5th

1 amendment, but also the 14th amendment.

2           So I don't think their idea that they disagreed  
3 with us in 2012, whether there's a presumption of -- of --  
4 I'm tired -- a presumption of prudence gets rid of my  
5 estoppel argument. They had never before been in a case  
6 where they said we had to present evidence on discount rates  
7 when it hadn't been challenged.

8           Power plants, they raised power plants. I think  
9 power plants is -- (indecipherable) -- that power plants is a  
10 different issue, and they kind of addressed how.

11           If we were in here doing a power plant, I think  
12 there would be a lot more decision-making to do. What we're  
13 doing is talking about upgrading the software from the 1980s  
14 and handling the pensions that occurred in 2018.

15           Nobody claims that -- that these projects were  
16 unnecessary. They conceded they didn't take the position  
17 that they were unnecessary. Again, their witness who was on  
18 the stand, we were asking them a bunch of questions. These  
19 hearings are a lot of questioning of people stating  
20 positions. It's not quite like a trial.

21           But they never in stating their positions said that  
22 we didn't need these capital projects. They never claimed  
23 that we paid too much for them. They never claimed that we  
24 should have gone about it a different way. They just  
25 questioned that.

1           And none of that works to shift the burden back to  
2 us. They came in with line items. Yeah, I know, they're  
3 embarrassing. Okay? But -- but even the Nevada Power PUC  
4 case cited in the Nevada Power U.S. Supreme Court case talks  
5 about line items are not enough to disqualify other line  
6 items. And -- and that's -- I just say, no, you can't come  
7 in and say you shouldn't have bought a backhoe, and you  
8 shouldn't have gone to the back room at the Brio restaurant  
9 for \$800, and therefore, we're going to cut out everything.

10           Now, whether it's \$50 million or \$7 million, you  
11 don't have to do the math, but it still is a situation where  
12 they can't just wipe out everything we did. And the numbers  
13 they're coming in with aren't in their Brief, so you really  
14 don't have to do the math.

15           They keep coming in here and saying that -- that  
16 the PUC gave us the opportunity to prove our case and --

17           THE COURT: Mr. Polsenberg, let me -- let me stop  
18 you a minute and see if --

19           MR. POLSENBERG: Yeah.

20           THE COURT: -- see -- if -- if for the sake of  
21 argument the Court was of the opinion that -- that you do not  
22 maintain the benefit of a presumption, however, under the  
23 circumstances of this matter and the hearing that was had,  
24 what effect would it be if the Court was to send this back to  
25 a hearing to address just the -- just the calculation of why

1 and -- and addressing --

2 MR. POLSENBERG: I think even --

3 THE COURT: You understand what I'm talking about?

4 MR. POLSENBERG: -- without the presumption, you  
5 need to send them all back because I don't think any of them  
6 were properly addressed. I don't think they've -- I don't  
7 think them raising questions is -- is enough to present -- is  
8 enough to defeat our case with or without the presumption.

9 I think you are focusing on the presumption, so I  
10 am trying to focus on that here. But --

11 THE COURT: No, I'm --

12 MR. POLSENBERG: -- yeah, they would definitely  
13 have to.

14 THE COURT: -- what I'm saying if I'm passed that.

15 MR. POLSENBERG: Right.

16 THE COURT: And --

17 MR. POLSENBERG: I lose, then.

18 THE COURT: -- how do we fashion it to say, you  
19 know, maybe you -- the -- they didn't address this  
20 appropriately to give you an opportunity to -- you know,  
21 almost like your -- your notice due process argument.

22 MR. POLSENBERG: Right. Well, then I --

23 THE COURT: How do I -- how do we fashion that?  
24 What -- what is it that you would be asking for if I was to  
25 accept that?

1 MR. POLSEMBERG: I think their determination is  
2 void --

3 THE COURT: Okay.

4 MR. POLSEMBERG: -- for having denied our due  
5 process right.

6 THE COURT: Well, you say zero. So you start anew?

7 MR. POLSEMBERG: I think you can --

8 THE COURT: You know, I mean, I'm not in a  
9 position --

10 MR. POLSEMBERG: Here's what we've asked for --

11 THE COURT: -- to say, yeah, I'm granting what  
12 you're asking and giving you all of the -- all of the  
13 requests because I -- I don't think I'm -- at this point in  
14 time I could do that. But what I'm saying is that if --

15 MR. POLSEMBERG: I think can you do that.

16 THE COURT: I -- I'm telling you I'm not.

17 MR. POLSEMBERG: Okay.

18 THE COURT: Okay?

19 MR. POLSEMBERG: I -- my primary relief that I've  
20 asked for is you remand to the PUC and instruct them to  
21 accept our positions.

22 THE COURT: Okay. Okay. That's what -- okay.

23 MR. POLSEMBERG: Our -- you seem to be wanting a  
24 backup position. I -- you -- you --

25 THE COURT: Well, I'm saying if I'm not in a

1 position to offer that, what alternative do you have if I was  
2 to accept that they needed to do further -- what would be  
3 further --

4 MR. POLSENBERG: Then, yeah, you --

5 THE COURT: -- invest further -- further hearings  
6 to determine the reasonableness or unreasonableness of your  
7 request.

8 MR. POLSENBERG: Yes. You have the authority to do  
9 that.

10 THE COURT: Okay.

11 MR. POLSENBERG: And I'm only telling you that  
12 because you asked that.

13 THE COURT: Okay.

14 MR. POLSENBERG: Because I'm obligated to say you  
15 can do that.

16 THE COURT: No, I know. I'm just wondering, is  
17 that -- is that something that you're asking for? That's  
18 what I --

19 MR. POLSENBERG: Yeah, I -- right. If I don't --

20 THE COURT: Okay.

21 MR. POLSENBERG: -- get what I want, I'll get what  
22 I can get.

23 THE COURT: Okay.

24 MR. POLSENBERG: So they keep coming in here to say  
25 Southwest Gas had the opportunity to prove its case and that

1 the PUC looked at what we proved, but -- and they talk about  
2 burden of proof and burden of proof and burden of proof, and  
3 all of that means that there wasn't a presumption of prudence  
4 here.

5 And they -- they itemize the things we didn't have.  
6 The least cost option, the best alternative, consultants,  
7 overtime. Yeah, we had overtime because we wanted to get it  
8 done by the end of the year.

9 They questioned why did you need to get it done by  
10 the end of the year? That's exactly the kind of thing  
11 management should be able to determine without having its  
12 judgment questioned and substituted.

13 Yeah, I -- they still submit -- whether they did  
14 it, whether they hinted about it in 2012 with a different  
15 result or really did it here, that really shellacked us.  
16 They did switch methodologies.

17 THE COURT: And -- and that is presumption, no  
18 presumption? Is that what you mean?

19 MR. POLSENBERG: Yes.

20 THE COURT: Okay. So the position that the -- that  
21 the PC -- PUCN takes is that even if there is a presumption,  
22 they -- the evidence is -- is replete -- the record is  
23 replete with evidence that they used to overcome that  
24 presumption?

25 MR. POLSENBERG: No. It's they came in on line

1 items and said these are bad, and if these are bad, your  
2 other stuff must be bad, too.

3 They didn't prove the imprudence of the other  
4 issues. The ones they raised, we conceded.

5 THE COURT: Okay.

6 MR. POLSENBERG: You can't from that speculate that  
7 there's no proof for everything else.

8 THE COURT: That's the extent of your argument that  
9 -- that because of these --

10 MR. POLSENBERG: No, it's not the extent of my  
11 argument, but it's --

12 THE COURT: Okay.

13 MR. POLSENBERG: -- a point in my argument.

14 THE COURT: But because of these bad ones --

15 MR. POLSENBERG: That is what they did, yes.

16 THE COURT: Okay. And that's what you're saying  
17 is --

18 MR. POLSENBERG: And they can't -- and I --

19 THE COURT: -- that --

20 MR. POLSENBERG: -- think I have support for that  
21 in the case law.

22 THE COURT: Yeah, but -- but -- but does the simple  
23 -- simple case involving the question -- I mean, the -- we  
24 got into it, and I don't want to go into every single  
25 witness, but the one witness that they specifically

1 questioned about -- about the discounting rate --

2 MR. POLSENBERG: She wasn't prepared to talk  
3 about --

4 THE COURT: I know, but --

5 MR. POLSENBERG: -- how it was --

6 THE COURT: -- but there was nothing in that  
7 questioning line saying, you know, what I found out that you  
8 guys got a backhoe from us for 90 grand, you know, why don't  
9 you tell me a little bit about the discount rate?

10 MR. POLSENBERG: They didn't --

11 THE COURT: It didn't sound like that at all.  
12 That's what I mean, if they didn't have it, then --

13 MR. POLSENBERG: Well, then, but those are two  
14 different things.

15 THE COURT: I know, but what you --

16 MR. POLSENBERG: Those are the capital projects --

17 THE COURT: -- are saying is that they -- that the  
18 Commission was so upset about the --

19 MR. POLSENBERG: Yeah.

20 THE COURT: -- underhandedness or something that  
21 they -- that maybe that's --

22 MR. POLSENBERG: And that's where I think --

23 THE COURT: -- that might not be the right word to  
24 use, but --

25 MR. POLSENBERG: That's where I think the due

1 process issue has come up.

2 THE COURT: -- but -- I know, but that -- what  
3 I'm --

4 MR. POLSENBERG: They -- they've come in --

5 THE COURT: I know, but Mr. Polsenberg, what I'm  
6 saying is that what you're saying is that they didn't like  
7 this, and because they didn't like it, then they just  
8 basically rubber stamped a no on everything.

9 MR. POLSENBERG: And they can't do that.

10 THE COURT: But -- but I -- no, I agree with you.  
11 I do. But I don't know if I agree with you that that's what  
12 they did, in light of the fact that when I was trying to use  
13 an example is that there was nothing with regards to the  
14 questioning of the witness that wasn't prepared to talk about  
15 the discount rate that had anything to do with the fact that  
16 there was these expenditures, nothing at all.

17 MR. POLSENBERG: I have -- I have three different  
18 buckets --

19 THE COURT: Um-h'm.

20 MR. POLSENBERG: -- I'm talking about here. There  
21 -- on the pensions, they're two different due process issues.  
22 I think the issue there was they started raising questions  
23 that -- that hadn't been raised prior, and they needed to be  
24 raised in advance. You just can't ask a witness about  
25 something that wasn't at issue. I -- I --

1 THE COURT: Well, under both circumstances?  
2 Circumstances that there's a presumption or there's not a  
3 presumption? Under both circumstances?

4 MR. POLSENBERG: I -- I think under both  
5 circumstances.

6 THE COURT: Really?

7 MR. POLSENBERG: But that -- yeah.

8 THE COURT: Well, wouldn't -- well, how? If it's  
9 your burden to establish that -- that you -- that things are  
10 prudent and that things are reasonable, don't they start with  
11 that premise, that it's your burden of establishing that, and  
12 if you --

13 MR. POLSENBERG: I think --

14 THE COURT: -- if you come in and say, this is what  
15 it says, this is why it's established, and then I open it up  
16 and say, okay, looking at the first one, can you tell me why  
17 you chose this particular avenue, and the person --

18 MR. POLSENBERG: And I don't -- right --

19 THE COURT: -- says I don't know --

20 MR. POLSENBERG: -- I don't think that is  
21 appropriate under due process. Now, I clearly win that if  
22 I've got the presumption, but when we have tons and tons --  
23 you yourself have talked about how big this record is.

24 THE COURT: Yeah.

25 MR. POLSENBERG: So if -- if they don't raise the

1 discount rate and I bring somebody in who is just going to be  
2 able to do the prepared testimony on here's the discount rate  
3 our company picked, that's not the person who has to do the  
4 math or understand it, unless somebody tells us in advance.

5 THE COURT: But wasn't the person that -- that  
6 presented the written testimony the same person?

7 MR. POLSENBERG: Yeah.

8 THE COURT: So you were --

9 MR. POLSENBERG: Okay. You know, Judge, you and I  
10 may disagree forever on this point.

11 THE COURT: Okay.

12 MR. POLSENBERG: We should probably move on --

13 THE COURT: Okay.

14 MR. POLSENBERG: -- because I don't want to lose  
15 credibility with you on my --

16 THE COURT: No, you --

17 MR. POLSENBERG: -- better points.

18 THE COURT: No one is. I mean, I --

19 MR. POLSENBERG: Okay.

20 THE COURT: -- I appreciate the intelligence in  
21 this courtroom. I -- I -- I really like hearing this from  
22 ya'll. You're teaching me a lot, and -- and hopefully --

23 MR. POLSENBERG: Well, this case is my first one in  
24 front of you, so I'm having a ball.

25 THE COURT: Okay. Well, I -- I have a tendency to

1 exchange a little bit more, I think, than some Judges do.

2 MR. POLSENBERG: Oh --

3 THE COURT: I do because I want to understand --

4 MR. POLSENBERG: -- the Judges in Reno will -- we  
5 -- I just got out of two days with Judge Breslow --

6 THE COURT: Okay.

7 MR. POLSENBERG: -- so thank you for not keeping --

8 THE COURT: You don't have to say anything more.

9 MR. POLSENBERG: -- us for two days.

10 THE COURT: I -- I -- okay. Go ahead. I'm sorry,  
11 I didn't mean to interrupt you.

12 MR. POLSENBERG: Not a -- I -- I do not mind,  
13 Judge. I enjoy it. It's a lot more fun than sitting and  
14 listening. Okay.

15 So if -- if -- to go to your point, if -- if it is  
16 the presumption in place, they asking what evidence do you  
17 have that this is reasonable doesn't over -- I've already  
18 argued it. I know think it really challenges it, but it  
19 certainly doesn't overcome the presumption.

20 THE COURT: Okay. But if you have -- but if you  
21 don't have the presumption, you would agree with me that you  
22 have the burden of establishing that --

23 MR. POLSENBERG: My due process argument is  
24 different from my burden argument.

25 THE COURT: Okay.

1 MR. POLSENBERG: My due process argument is I need  
2 to know that that point is something that we're going to be  
3 fighting about at the hearing. It's kind of like in  
4 pleadings where you say this is the allegation --

5 THE COURT: Well, I know, but --

6 MR. POLSENBERG: -- this is the allegation.

7 THE COURT: -- but in -- let me do a -- you all  
8 know that my background's criminal.

9 MR. POLSENBERG: And I was just going go to a --

10 THE COURT: Okay.

11 MR. POLSENBERG: -- in terms of the Indictment,  
12 and --

13 THE COURT: Okay.

14 MR. POLSENBERG: -- you know, Abe cringes whenever  
15 I talk about it, because usually I have that discussion with  
16 Judge Gonzalez, who doesn't understand Indictments. Having  
17 it with you kind of terrifies me.

18 THE COURT: Okay.

19 MR. POLSENBERG: So you need to set out what  
20 actually it is that the -- you just can't say, hey, you were  
21 bad.

22 THE COURT: Right.

23 MR. POLSENBERG: And -- and then I have to --

24 THE COURT: Not necessarily an Indictment. You  
25 have to put in -- in the Indictment you have to put in the