Case No. 80911

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.

Electronically Filed
Jan 26 2021 11:40 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

MOTION TO EXCEED WORD LIMIT FOR APPELLANT'S OPENING BRIEF

Appellant Southwest Gas Corporation requests leave under NRAP 28(g) and NRAP 32(a)(7)(D) to exceed the 14,000 word limit for opening briefs in NRAP(32)(a)(7)(A)(ii). Appellant's opening brief contains 15,494 words, 1,494 words over the ordinary type-volume limitations. (Exhibit 1.) This appeal is based on a large record: The administrative record alone exceeded 17,000 pages, and the briefing and argument in the district court was extensive.

One reason for the length is the need to present in context the application of the presumption of prudence in this Court and in other courts across the country.

Notwithstanding the importance of the appeal, Southwest Gas has endeavored to keep the excess to a minimum. Previous drafts topped 22,000 words. This draft could likely be kept within the 14,000 limit by cutting a section that explains the difference between a general rate case and deferred energy accounting. Southwest Gas believes, however, that this uncontroversial background will assist the parties and this Court in understanding the issues here.

Southwest Gas therefore respectfully asks this Court to grant the motion.

Dated this 26th day of January, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Abraham G. Smith*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13250)
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Appellant

DECLARATION OF ABRAHAM G. SMITH IN SUPPORT OF MOTION TO WORD PAGE LIMIT

STATE OF NEVADA)
COUNTY OF CLARK)

1. I, Abraham G. Smith, under penalty of perjury, declare that I am a Nevada licensed lawyer with Lewis Roca Rothgerber Christie LLP and that I am counsel for appellant Southwest Gas Corporation.

2. Appellant requests leave under NRAP 32(a)(7)(D) to file an opening brief that exceeds the type-volume limitation for opening briefs by 1,494 words.

3. This appeal is based on a large administrative record, further augmented by the district court record.

4. I tried diligently to cut the brief down from more than 22,000 words to the 14,000 limit. In choosing to preserve a section explaining the difference between a general rate case and deferred energy accounting, however, I was not able to meet the limit.

5. The additional words are needed to provide this Court with the relevant background and to present the necessary authorities on these issues of statewide importance.

Dated this 26th day of January, 2021.

/s/ Abraham G. Smith
ABRAHAM G. SMITH

CERTIFICATE OF COMPLIANCE

1. I certify that the opening brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that the opening brief exceeds the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 15,494 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 26th day of January, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Abraham G. Smith*

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on January 26, 2021, I submitted the foregoing "Motion to Exceed Word Limit for Opening Brief" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

GARRETT WEIR
DEBREA M. TERWILLIGER
PUBLIC UTILITIES COMMISSION OF NEVADA
1150 East William Street
Carson City, Nevada 89701

Attorneys for Respondent Public Utilities Commission of Nevada

AARON D. FORD
ERNEST D. FIGUEROA
WHITNEY F. DIGEST
STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701

Attorneys for Respondent State of Nevada, Bureau of Consumer Protection

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

EXHIBIT 1

EXHIBIT 1

Case No. 80911

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.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable WILLIAM KEPHART, District Judge
District Court Case No. A791302

APPELLANT'S OPENING BRIEF

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Appellant

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Southwest Gas Corporation is a wholly owned subsidiary of Southwest Gas Holdings, Inc., a publicly-traded corporation. No individual holds more than 10% of the parent's stock.

Southwest Gas has been represented by Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith of Lewis Roca Rothgerber Christie, LLP.

Dated this 26th day of January, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Regulations

JURISDICTION

Southwest Gas appeals from an order denying judicial review. NRS 703.376; NRAP 3A(b)(1). The district court signed the order on March 5, 2020, and Southwest Gas filed a premature notice of appeal on March 25, 2020. (22 App. 5259, 5279, 5283.) Three months later, on June 23, 2020, the clerk of the district court entered the order, and Southwest Gas timely amended its notice of appeal on July 2, 2020. (22 App. 5307, 5327, 5331.)

ROUTING STATEMENT

This Court should retain the appeal to clarify that Nevada continues to recognize the consensus rule that, in a general rate application, a regulated utility enjoys a rebuttable presumption that its expenses were prudently incurred.

This, the first of Southwest Gas's issues, is a question of statewide importance, NRAP 17(a)(12), and will arise in every general rate case filed by a utility. Clarity from Nevada's highest court is needed.

PRINCIPAL ISSUES PRESENTED

1. In a general rate case, is a natural gas utility entitled to a presumption of prudence in its incurred costs?

2. Does the constitutional facts doctrine allow *de novo* review of an agency's allegedly confiscatory rate-setting determinations?

3. Did the Public Utilities Commission's rejection of a presumption of prudence affect the Commission's decision to disallow certain expenses, including

   a. 100% of the expenses associated with five work orders in which just a fraction of the claimed costs (since withdrawn) were shown to be imprudent;

   b. Southwest Gas's actual pension expenses in 2018, to which the Commission applied a discount and 3-year "normalization" schedule?

4. Did the Commission set an unreasonable rate of return on equity in rejecting the recommendations of all parties and instead setting the rate far based on a self-described "zone of reasonableness" far below the average rates both for Southwest Gas's peers and the industry as a whole?

STATEMENT OF THE CASE

This is an appeal from a final judgment entered on a petition for judicial review, the Honorable William Kephart, District Judge of the Eighth Judicial District Court, Clark County, presiding. That judgment affirmed the order of the Public Utilities Commission of Nevada.

Southwest Gas filed a general rate application with the Commission seeking to adjust rates to reflect its current cost of providing safe and reliable service to its customers. The application requested, among other things, approval of work orders for five software projects, approval of pension expenses, and approval of a 10.30% rate of return on shareholder equity. The Commission held hearings on the application over six days.

In general rate cases like this one, the Commission has always applied a rebuttable presumption that a utility has exercised prudent judgment when making expenditures that it later seeks to recover from the ratepayers. In this case, however, the Commission abandoned that presumption and—after Southwest Gas had prepared its case in reliance on that presumption—required Southwest Gas to present evidence

to establish the prudence of its expenditures, even when no party had challenged the expense.

So even though no party had objected to more than 50% of the software project expenses, and no party presented evidence supporting any disallowance of the expenses, the Commission disallowed 100% of the expenses because Southwest Gas purportedly did not prove that it was prudent to incur them. For two of the software projects, the objector only challenged expenses totaling one-half of one percent of the total cost, yet the Commission disallowed all of the expenses.

The Commission also used the average of the prior three years of Southwest Gas's pension costs, instead of using the actual 2018 pension costs, which were not challenged by any party. The Commission had never done that before. And the Commission adopted a lower discount rate for the pension expenses than Southwest Gas requested because Southwest Gas did not present evidence to support its proposed discount rate, which had not been questioned.

The Commission also selected a rate of return on investment that was lower than any party requested, and nearly a full percentage point

percent lower than the return on investment enjoyed by similarly situated gas utilities.

Southwest Gas petitioned for reconsideration, but the Commission reaffirmed these aspects of its order. Southwest Gas timely sought judicial review in the district court, which denied judicial review. The district court believed that substantial evidence supported the Commission's decision and that applying a presumption of prudence would be unfair. (22 App. 5311, 5321.)

Southwest Gas now appeals to this Court.

STATEMENT OF FACTS

A. Based on Past Practice, Southwest Gas Asks the Commission to Increase Rates

In 2018, Southwest Gas Corporation filed a general rate application with the Public Utilities Commission of Nevada. (1 App. 10; 2 App. 376.) The application asked for permission to increase its retail natural gas utility service rates by about 3.8% in Southern Nevada and 1.9% in Northern Nevada. (2 App. 376.) It also sought to reset its gas infrastructure rate. (4 App. 940, 1 ROA 303.) These changes reflected increases in the cost of service over the six years since Southwest Gas's last general

rate case and for projects previously approved by the Commission. (4 App. 940, 1 ROA 303.) The Regulatory Operations Staff of the Commission and the Attorney General's Bureau of Consumer Protection participated in the proceedings. (4 App. 940–41, 1 ROA 303-04.)

Southwest Gas, staff, and the bureau filed prepared direct testimony. Southwest Gas filed prepared rebuttal testimony. (4 App. 942, 1 ROA 305.) The Commission held six days of hearings in October 2018. (4 App. 942, 1 ROA 305.)

B. The Commission's Order

The Commission issued its original order on December 23, 2018. Both Southwest Gas and Staff petitioned for reconsideration and clarification. On February 15, 2019, the Commission granted reconsideration in part and entered a modified order.

Southwest Gas and Staff were satisfied with the Commission's resolution of many of the issues in the 277-page order. Below are the points of dispute remaining on appeal.

1. The Commission Changes Course, Denying a Presumption of Prudence

The Commission concluded that Southwest Gas is not entitled to a presumption of prudence in its expenses because no such presumption exists under Nevada law. (*Id.* at 309-312, 592-99.) Accordingly, the Commission found that Southwest Gas had the burden to affirmatively prove the prudence of each expenditure for which it sought recovery. (*Id.* at 309-312, 592-99.) One of Southwest Gas's witnesses testified that she had worked on general rate applications for over 20 years and had always presented them in the way the Company did in this case. (11 App. 2649, 2676-82, 5 ROA 3852, 3879-85.) The Company had never before been required to produce the volume of information that was demanded in this case to justify the prudence of Southwest Gas's incurred costs. (*Id.*)

Nobody explained before the hearing why the information Southwest Gas had provided was insufficient. (*Id.* at 2681-82, 3884-85.) The Commission's abandonment of the presumption of prudence affected the Commission's analysis of (1) work orders for five software projects that cost $51 million; and (2) pension expenses.

2. Challenged Work Orders

Staff and the Bureau challenged five work orders associated with Southwest Gas's software upgrades:

- *Financial System Modernization Program (FSM).* This replaced Southwest Gas's 1986 accounting system and is integral to all financial and accounting processes at Southwest Gas. (13 App. 3234-35, 8 ROA at 6473-74; 13 App. 3066-67, 7 ROA at 5970-71.)
- *Field Operations Management System (FOMS) Phase 1.* This customer-service software automates and optimizes field-related activities and increases labor efficiencies for dispatch and customer service related field operations. The software generates work orders sent to technicians for customer service. (13 App. 3241, 8 ROA at 6480; 13 App. 3079, 7 ROA at 5983.)
- *FOMS Phase II.* This software designs, tracks, and schedules gas facility installations. It includes an asset-management database that tracks leak surveys, patrols, and other pipeline safety activities. Construction and safety recordkeeping

form the core of Southwest Gas's operations. (13 App. 3243, 8 ROA at 6482; 13 App. 3083-84, 7 ROA at 5987-88.)

- *Geographic Information System Mapping Migration Project.* This replaced a system in use since the late 1980s. (13 App. 3244-47, 8 ROA at 6483-86; 13 App. 3086, 7 ROA at 5990.) This software maps Southwest Gas's facilities, including the underground facilities used to provide service to Southwest Gas's customers.
- *Web Content Management Phase II Project.* (13 App. 3246-47, 8 ROA at 6485-86; 13 App. 3089, 7 ROA at 5993.) This software allows Southwest Gas to publish content on its website and to timely provide safety notices, outage information, and other information customers need.

There was no dispute that the outdated software needed to be replaced. (10 App. 2482, 2486, 5 ROA at 3682, 3686.) And there was no dispute that the software benefits ratepayers. (*Id.* at 1985, 2486, 3185, 3686.) No party asserted that any of the software was overpriced or

failed to perform as designed. Yet while challenging just 0.5% of the expenses, Staff requested that 50% of the software costs be disallowed. (5 App. 1133, 1 ROA at 496.)

Southwest Gas provided both direct and rebuttal testimony explaining the purpose, benefits, project structure, steering and oversight personnel, and project control. (19 App. 4635-68, 13 ROA at 11391-424.) It provided details about the rationale and justification for each of the questioned expenditures. (*Id.*; 13 App. 3066-145, 7 ROA at 5970-6049.)

Southwest Gas provided all invoices, vouchers, and costs, and Staff and the Bureau had an opportunity to ask questions about costs. (8 App. 1965-66, 1986; 11 App. 2675, 2678; 10 App. 2493, 5 ROA at 3165-66, 3186, 3878, 3881, 3693.) Southwest Gas answered all questions; nobody explained why the documents that Southwest Gas provided were insufficient to establish the reasonableness of the costs. (*Id.* at 2680-81, 3883-84.)

Staff's witness questioned whether Southwest Gas had evaluated alternative vendors and considered the cost to ratepayers. (*Id.* at 2482-

83, 3682-83.) But he admitted that Southwest Gas had defined the programs, discussed the need for replacement, provided a roadmap for the replacement, and discussed key roles and team structures. (*Id.* at 2483, 3683.) Staff's witness said that Southwest Gas *might have* spent too much on the projects and that they lacked oversight, even though the FSM program came under budget by $900,000. (*Id.* at 2487, 2078-80, 3687, 3278-80.) He didn't review similar projects for other utilities or determine what a reasonable budget would have been. (*Id.* at 2488, 3688.) He didn't speak with anyone at Southwest Gas about why they chose particular vendors. (*Id.* at 2489-90, 3689-90.) He did not testify that the budget was unreasonable; he merely believed that the costs could have been lower. (*Id.* at 2493, 3693.)

Staff's witness admitted that Southwest Gas had voluntarily removed the costs that he questioned from the case. (*Id.* at 2494, 3694.) And he admitted that he couldn't determine if the other costs were reasonable. (*Id.* at 2494-95, 1974-75, 1979-80-, 3694-95, 3174-75, 3179-80.) He questioned overtime, but couldn't assess whether it was necessary. (*Id.* at 2497, 3697.) For the FOMS Phase 2 project, he didn't even identify any questionable expenses. (*Id.* at 1986, 3186.) He questioned

whether one of the software projects needed to be finished by the beginning of the year, but could not testify that Southwest Gas should have used a different timeline. (*Id.* at 2499, 3699.)

Ultimately, Staff's witness only questioned certain expenses and said that Southwest Gas had not established that they were reasonable. (*Id.* at 1972-82, 1992, 1994, 3172-82, 3192, 3194.) He admitted that he didn't have the expertise to evaluate many of the expenses he questioned. (*Id.* at 1984, 1986, 3184, 3186.) He identified one-half of 1 percent of the costs on two projects as not appropriate for cost recovery, but still asked for a 50% disallowance on the total cost of all five projects. (*Id.* at 1968-70, 1988, 1992, 3168-70, 3188, 3192.)

The Commission found that Staff failed to present evidence supporting a 50% disallowance of the software costs, yet it went further and disallowed 100% of those costs. The Commission concluded that the record showed that there was a systematic lack of accountability and oversight with respect to the work orders. (5 App. 1244, 1 ROA at 607.)

On reconsideration, the Commission maintained its ruling denying 100% of the work order costs, but it stated that this finding was separate from the Commission's denial of the presumption of prudence. (1

App. 45.) The Commission nonetheless criticized Southwest Gas for failing to produce affirmative evidence "that the costs associated with the Challenged Work Orders were prudently incurred," and considered Southwest Gas's alleged "failure" to offer that evidence dispositive. (5 App. 1244–45, 1 ROA at 607-08.) Without concluding one way or another whether Southwest Gas's costs were prudent, the Commission denied them without prejudice to Southwest Gas's right to raise the same software projects in a future general rate case for the amounts of those expenses amortized in future years. (2 App. 284-85.)

3. Pensions

At the hearing, the Commission requested, without prior notice, that Southwest Gas justify a 3.75% discount rate for pensions.

Southwest Gas's witness, Christy Berger, set forth the annual pension expense and applicable discount rates used to establish those expenses, which is determined in consultation with an independent actuary. (9 App. 2104–05, 5 ROA 3304–05.) In pre-hearing written testimony, Staff did not challenge Southwest Gas's 2018 pension expenses but requested a five-year normalization that would be calculated based on the average of Southwest Gas's actual pension expenses for 2014-

2018. (13 App. 3186-89, 8 ROA at 6425-28.) Since no party had challenged the discount rates, Southwest Gas did not prepare a witness from the actuary to testify on that topic. At the hearing, however, the Commission requested, without prior notice, that Southwest Gas justify a 3.75% discount rate for pensions. (9 App. 2102–09, 5 ROA 3302–09.) The Commission took seemed to expect Ms. Berger to perform an on-the-spot analysis of how the discount rate was determined and was dissatisfied with her reliance on the expertise in the actuarial recommendation. (9 App. 2102–09, 5 ROA 3302–09.)

The Commission's order required a three-year normalization plus a downward modification to the 2018 pension expense. (5 App. 1071-74, 6 App. 1254-55, 1 ROA at 434-37, 617-18.) Despite no evidence in the record to support the downward adjustment, the Commission stated that "the corrected rate for 2018 represents a more appropriate period reflective of historical figures." (*Id.* at 437 ¶ 437.) It had never normalized Southwest Gas's pension expenses before. It also modified the discount rate, even though no party had raised the issue. (*Id.* at 434-35.)

4. Return on Investment

A public utility is entitled to a rate that will earn its shareholders a reasonable return on their investment. This rate—known as the "return on equity" or the "return on investment"—is set by the Commission. Southwest Gas proposed a return on investment of 10.30%. (16 App. 3977-78, 3988, 11 ROA at 10148-49, 10159.) Staff recommended a return on investment of 9.40%. (18 App. 4265-67, 12 ROA at 10511-13.) The Bureau requested a return on investment of 9.30% in its written testimony, which it revised upward to 9.40% at the hearing. (4 App. 805, 1 ROA at 159; 18 App. 4265-67, 12 ROA at 10425-27.)

The parties all agreed upon a proxy group of gas utilities that were similar to Southwest Gas. (17 App. 4073, 11 ROA at 10313-17; 17 App. 4228-29, 12 ROA at 10446-47; 18 App. 4272, 12 ROA at 10518.) The average return on investment for the proxy group was 10.23%. (19 App. 4572-88, 12 ROA at 10931-47.) And evidence in the record demonstrated that the broader industry-average return on investment was 9.68%. (18 App. 4458, 4291-92, 4204, 12 ROA at 10705, 10537-38, 10442.)

It was undisputed that Southwest Gas had more debt than the proxy group. (*Id.* at 10701-02, 10436-37.) And credit rating agencies rank Southwest Gas at a higher risk than all but one of the proxy group companies. (*Id.* at 10881-82.) These factors typically justify a higher return on investment.

The Commission selected a return on investment of 9.25%, lower than any other party's proposal. The Commission asserted that a return on investment "of 9.25 percent is commensurate with returns on investments in other enterprises having corresponding risks . . . ." (5 App. 1009, 1 ROA at 372.) And while the Commission provides no specific reference to the evidence it allegedly relied upon, it does not appear to reflect the evidence of authorized industry and proxy group returns, both of which had substantially higher average rates of return.

C. Southwest Gas's Petition for Judicial Review

Southwest Gas petitioned for judicial review. After briefing, the Honorable William Kephart heard oral argument on the petition. (21 App. 5110.) On March 6, 2020, the district court issued an order denying the petition.

1. The District Court Applied a Deferential Standard of Review

The district court deferred to the Commission's decision, reasoning that this Court has adopted an "end result" test to determine whether Commission decisions "are just and reasonable." (22 App. 5309 (citing *Pub. Serv. Comm'n v. Ely Light & Power Co.*, 80 Nev. 312, 322, 393 P.2d 305, 310 (1964)).)

The district court also believed that it lacked authority to alter the return on equity and to order recovery of costs that the Commission disallowed, citing the rule that "[t]he methods used by a regulatory body in establishing just and reasonable rates of return are generally considered to be outside the scope of judicial inquiry." (22 App. 5310 (citing *Nev. Power Co. v. Pub. Serv. Comm'n*, 91 Nev. 816, 826, 544 P.2d 428, 435 (1975)).)

The district court even deferred to the Commission's legal conclusions because "when an agency's conclusions of law are closely related to its view of the facts, those conclusions are entitled to deference, and [the court] will not disturb them if they are supported by substantial evidence." (22 App. 5310–11 (quoting *Fathers & Sons & A Daughter Too v.*

Transp. Services Auth. of Nev., 124 Nev. 254, 259, 182 P.3d 100, 104 (2008)).)

2. Presumption of Prudence

Acknowledging that the Commission "did not apply a presumption of prudence," the district court adopted the Commission's view that no such presumption exists. (22 App. 5311.) According to the Commission and the district court, no statute, regulation, or controlling decision from the U.S. Supreme Court or this Court identifies a presumption of prudence. (22 App. 5316.) The district court held that on the "one occasion" where this Court applied a presumption of prudence in a deferred energy accounting proceeding, the Nevada Legislature "nullified" it by enacting a statute prohibiting such a presumption "in such cases." (22 App. 5316.) The district court acknowledged that other jurisdictions have adopted the presumption of prudence, but the Court did not find those cases controlling. (22 App. 5316.)

The district court held that U.S. Supreme Court cases identified, at most, a presumption of "good faith of the managers of the business," such that a decision to disallow incurred costs "did not second-guess

Southwest Gas's judgment"; rather, in the absence of "sufficient evidence to sustain its burden of proof," Southwest Gas had not shown that "judgment was even exercised." (2 App. 5317 (emphasis omitted).)

The district court likewise dismissed language in *Ely Light* as indicating merely that "if a cost is reasonable and actually incurred by a utility, a regulatory commission cannot arbitrarily disallow a cost simply because it disagrees with the decision to incur the cost," but the burden remains with the utility to establish the prudence and reasonableness of its costs. (22 App. 5318.)

The district court acknowledged that AB 7, the statute overturning the presumption of prudence in deferred energy accounting proceedings, did not apply here. It nonetheless found the statute "instructive" in that a utility would have more incentive to "imprudently inflate" its capital costs recoverable in a general rate case rather than in the "purchase of natural gas" recoverable through deferred energy accounting. (22 App. 5319.)

The district court also believed that a presumption of prudence would be inconsistent with Nevada law because a natural gas utility could supposedly game the system by waiting longer to file a general

rate case, which purportedly would complicate the Commission's ability to challenge imprudent costs. (22 App. 3520–21.)

3. Challenged Work Orders

The district court agreed with the Commission that Southwest Gas had not sustained its burden of proof in "demonstrating why it made the decision to incur the costs associated with the challenged work orders, including information addressing whether the choices made by the utility were the least-cost options or the best available alternatives, and whether the project expenditures were reasonable under the circumstances." (22 App. 5315.) The information that Southwest Gas provided—"the names of and budgets for the projects; invoices or estimates for purchases made; the name and/or signature of the employee or consultant authorizing the expenditures; memos identifying individuals in charge of various projects; and organizational charts for the projects"—was too "limited." (22 App. 5315.) And "Southwest Gas cannot merely rely upon the fact of payment as a demonstration of prudence or reasonableness." Without Southwest Gas's affirmative demonstration of prudence and reasonableness, the Commission's decision to exclude all costs associated with the orders—even those costs that were

unchallenged—was, according to the district court, reasonable. (22 App. 5315–16.)

4. Pensions

The district court also affirmed the Commission's new, discounted calculation of pension expenses. Even though Southwest Gas was unaware of a challenge to its discount rate, the district court believed that unanticipated questions from the presiding Commissioner and her policy advisers on this topic were fair "so long as the proceedings stayed within the scope of Southwest Gas's application." (22 App. 5313.)

5. Return on Equity

The district court agreed with the Commission's assessment that the evidence supported a "range of reasonableness" between 9.10% and 9.70%, such that the 9.25% figure selected by the Commission was also reasonable. (22 App. 5312–13.)

Southwest Gas appeals.

SUMMARY OF THE ARGUMENT

The Presumption of Prudence. Utility rates must account for costs that the utility prudently incurs in providing its essential service. For a

century, courts across the nation have recognized a rebuttable presumption of prudence, such that the utility need not lard already complex rate-setting proceedings with testimony and evidence to justify every dollar spent. In *Public Service Commission v. Ely Light & Power Co.*, this Court did, too, using language and citing cases long understood to encapsulate this presumption. 80 Nev. 312, 322, 393 P.2d 305, 310 (1964).

The presumption of prudence is more than a convenience. The presumption arises from the U.S. Supreme Court's review of state regulatory decisions, where the Court's job is not to advocate best practices, but to police constitutional violations. *W. Ohio Gas Co. v. Pub. Utils. Comm'n*, 294 U.S. 63, 72 (1935).

Yet the Commission casts all that history aside by misreading the impact of a 2007 statute, Assembly Bill 7 (AB 7). That statute surgically overruled this Court's decision in *Nevada Power Co. v. Public Utilities Commission*, 122 Nev. 821, 138 P.3d 486 (2006), which had extended the presumption to a streamlined proceeding known as deferred energy accounting. While the Commission concedes that the neither *Nevada Power* nor AB 7 says or changes anything about general rate cases such

as this, the Commission nonetheless now mistakes the Legislature's precision for a license to act as though the presumption of prudence never existed, at all.

The Application. The presumption matters, as does its correct application. While Southwest Gas knew about specific challenges to 0.5% of costs associated with five work orders (much of which Southwest Gas agreed to withdraw from its application), the Commission shifted the burden on a categorical basis, disallowing the other 99.5% of costs. Likewise, Southwest Gas could not be expected to put on detailed actuarial testimony and evidence about pension costs whose prudence was never challenged.

Though couched in terms of consumer protection, the Commission's disregard of the presumption is likely to make general rate cases far more expensive, with those costs borne by rate payers.

Return on Equity. Finally, the Commission acted arbitrarily and capriciously is slashing the rate of return for Southwest Gas's shareholders far below that of Southwest Gas's peers, below what any party in this case asked for.

This Court should reverse.

ARGUMENT

PART ONE:

THE PRESUMPTION OF PRUDENCE

I.

STANDARD OF REVIEW: THE PRESUMPTION OF PRUDENCE IS REVIEWED AFRESH

"[T]his court's role in reviewing an administrative agency's decision is identical to that of the district court. *Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Human Services, Div. of Pub. & Behavioral Health*, 134 Nev. 129, 132–33, 414 P.3d 305, 308 (2018) (quoting *Poremba v. S. Nev. Paving*, 133 Nev. 12, 15, 388 P.3d 232, 235 (2017)).

Legal questions "are reviewed without any deference whatsoever to the conclusions of the agency." *Manke Truck Lines, Inc. v. Pub. Serv. Comm'n of Nev.*, 109 Nev. 1034, 1036-37, 862 P.2d 1201, 1203 (1993) (emphasis added); *see also O'Keefe v. Dep't of Motor Vehicles*, 134 Nev. 752, 755, 431 P.3d 350, 353 (2018) (court reviews "pure legal questions" decided by agency hearing officer *de novo*). The question of whether the

agency applied the wrong standard (such as the failure to apply a rebuttable presumption) is a legal question that this Court reviews de novo.[1] *See Staccato v. Valley Hospital*, 123 Nev. 526, 530 & n.4, 170 P.3d 503, 506 & n.4 (2007). Likewise, the application of a standard of proof is subject to *de novo* review. *J.D. Constr. v. IBEX Int'l Grp.*, 126 Nev. 366, 379, 240 P.3d 1033, 1042 (2010).

The Commission also cannot engage in *ad hoc* rulemaking; so no deference is owed to the Commission's opinion on whether Nevada law allows or requires it to apply a presumption of prudence. *Silverwing Dev. v. Nev. State Contractors Bd.*, 136 Nev., Adv. Op. 74, 476 P.3d 461, 464 n.2 (2020); *Pub. Serv. Comm'n of Nevada v. Sw. Gas Corp.*, 99 Nev. 268, 273, 662 P.2d 624, 627 (1983).

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

II.

THE COMMISSION ERRED BY ABANDONING THE PRESUMPTION OF PRUDENCE

A. The Commission Must Approve a Just and Reasonable Rate

The Legislature created the Commission to "supervise and regulate the operation and maintenance of public utilities." NRS 703.150. A utility has the authority to set its own rates, subject to approval by the Commission. *Steamboat Canal Co. v. Garson*, 43 Nev. 298, 185 P. 801, 805 (1919); *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113 (1958) (gas company "has the right in the first instance to change its rates as it will," subject to review by regulatory commission); 73B C.J.S. *Public Utilities* § 23 (updated Dec. 2020) ("Primarily, the right to prescribe rates for the product or service of a public utility belongs to the utility itself.").

In setting rates, the Commission must "balance the interests of customers and shareholders of public utilities by providing public utilities with the opportunity to earn a fair return on their investments while providing customers with just and reasonable rates." NRS

704.001(5); *see also* 73B C.J.S. *Public Utilities* § 21 (updated Dec. 2020) ("In utility rate making, the primary objective is to allow the company sufficient revenues to meet its operating expenses, provide its shareholders with a reasonable rate of return, and attract new capital.").

Commission staff is supposed to be an independent entity that may appear in contested rate-changing proceedings before the Commission. NRS 703.301(1); NRS 704.100(1)(h). Commissioners may not discuss any substantive issue of fact or law with Staff except upon notice to affected parties and an opportunity to participate. NRS 703.301(2). The Bureau is a division of the Nevada Attorney General's office that may petition to intervene in rate-change proceedings. NRS 704.012 (establishing Consumer's Advocate division); NRS 704.746(2) (allowing a governmental entity to petition for leave to intervene as a party).

At hearings on contested matters, the Commission is not allowed to raise new issues. It is only allowed to ask questions to "clarify testimony provided by witnesses." NAC 703.695.

B. A Presumption of Prudence Applies in General Rate Cases

It is universally recognized that the Commission's duty is "to regulate rates but not to manage the utility's business." *Pub. Serv. Comm'n v. Ely Light & Power Co.*, 80 Nev. 312, 324, 393 P.2d 305, 311 (1964); *see also Mo. ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Mo.*, 262 U.S. 276, 289 (1923) ("It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utilities companies, and is not clothed with the general power of management incident to ownership."). A public service commission, "under the guise of establishing a fair rate, may not usurp the functions of the company's directors and in every case substitute its judgment for theirs as to the propriety of contracts entered into by the utility." *United Fuel Gas Co. v. R.R. Comm'n of Ky.*, 278 U.S. 300, 320 (1929); *see also* 14 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 6684 (updated Sept. 2020) ("Under the guise of rate regulation, the government cannot take over the management of the corporation or unreasonably interfere with such management." (citing cases, including *Ely Light & Power*)).

So in setting rates, a commission must ensure that "the utility is compensated for *all prudent investments* at their actual cost . . . , irrespective of whether individual investments are deemed necessary or beneficial in hindsight." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 (1989); *see also id.* at 317 (Scalia, J., concurring) (observing that while "no single ratemaking methodology is mandated by the Constitution," "all prudently incurred investment may well have to be counted" to determine whether the rate allows "a fair return on investment").

This general principle is enforced by a presumption that a utility's business decisions are prudent.

1. The U.S. Supreme Court Recognized the Presumption a Century Ago

The United States Supreme Court established the presumption in 1923, holding that a utilities commission cannot substitute its judgment for the utility's judgment and cannot ignore operating expenses "unless there is an abuse of discretion in that regard by the corporate officers." *Sw. Bell*, 262 U.S. at 289 (quoting *States Pub. Utils. Comm'n ex rel. Springfield v. Springfield Gas & Elec. Co.*, 125 N.E. 891, 901 (Ill. 1919));

id. at 289 n.1 (Brandeis, J., concurring) ("Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown."). The Court reaffirmed this in 1935:

> Good faith is to be presumed on the part of the managers of the business. . . . In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay.

W. Ohio Gas Co. v. Pub. Utils. Comm'n, 294 U.S. 63, 72 (1935).

This presumption of prudence flows directly from the principle that the state cannot manage the utility. *See Denver Union Stock Yard Co. v. United States*, 57 F.2d 735, 748 (D. Colo. 1932) (noting that cases applying the presumption "do no more than apply the rule long settled that the power to regulate rates does not confer the power to manage").

2. This Court Recognized the Universal Rule in Ely Light & Power

This Court cited both U.S. Supreme Court opinions in *Ely Light*, which followed the consensus in recognizing the presumption in this state nearly six decades ago. *Ely Light*, 80 Nev. at 324, 393 P.2d at 311.[2]

[2] Other courts have also followed the U.S. Supreme Court's lead. The presumption is a principle of common law recognized "*in all of the cases*." *In re New Engl. Tel. & Tel. Co.*, 66 A.2d 135, 145-46 (Vt. 1949)

(emphasis added) (citing *W. Ohio Gas*, 294 U.S. 63); *see also Mountain States Tel. & Tel. Co. v. F.C.C.*, 939 F.2d 1021, 1034 (D.C. Cir. 1991) ("'Good faith is to be presumed on the part of the managers of a business.'" (quoting *W. Ohio Gas*, 294 U.S. at 72)); *Office of the Consumers' Counsel v. F.E.R.C.*, 914 F.2d 290, 292 (D.C. Cir. 1990) ("Generally, the reasonableness of the costs incurred by the pipeline is presumed, unless a protestant raises a serious doubt about them, in which case the pipeline must establish the prudence of its expenditures." (citing *Sw. Bell Tel. Co.*, 262 U.S. at 289)); *Pac. Tel. & Tel. Co. v. Whitcomb*, 12 F.2d 279, 288 (W.D. Wash. 1926) ("In the absence of evidence to the contrary, investments may reasonably be assumed to have been made in the exercise of reasonable judgment."), *aff'd* 276 U.S. 97 (1928); *Ala. Pub. Serv. Comm'n v. S. Bell Tel. & Tel. Co.*, 42 So.2d 655, 674 (Ala. 1949) ("Only where affirmative evidence is offered challenging the reasonableness of the operating expenses incurred, on the ground that they are exorbitant, unnecessary, wasteful, extravagant, or incurred in the abuse of discretion or in bad faith . . . has the commission a reasonable discretion to disallow any part of the expenses actually incurred."); *In re Wilmington Suburban Water Corp.*, 211 A.2d 602, 608-09 (Del. 1965) (legitimate expenses "are allowed as a matter of course" unless there is "proof that the expense was not actually legitimately incurred"); *Boise Water Corp. v. Idaho Pub. Utils. Comm'n*, 555 P.2d 163, 169 (Idaho 1976) (citing *Ely Light* and holding that a utility establishes a *prima facie* case for reasonableness of expenses by showing "actual incurrence" and the burden shifts to the commission to show "by substantial, competent evidence that the expenditures were unreasonable by reason of inefficiency or bad faith"); *S. Cent. Bell Tel. Co. v. La. Pub. Serv. Comm'n*, 594 So.2d 357, 366 (La. 1992) (utility was "entitled to be compensated for all qqments at their actual cost when made . . . irrespective of whether individual investments are deemed necessary or beneficial in hindsight" and "the utility is entitled to the presumption that the investments were prudent, unless the contrary is shown"); *Gulf States Utils. Co. v. La. Pub. Serv. Comm'n*, 578 So. 2d 71, 85 (La. 1991) ("[A] utility's investments are presumed to be prudent and allowable."); *Havre de Grace & Perryville Bridge Co. v. Towers*, 103 A. 319, 321 (Md. 1918); *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 405 A.2d 153, 177 (Me. 1979) (citing *W. Ohio Gas*, 294 U.S. at 72); *K N Energy, Inc. v. Cities of Alliance &*

Oshkosh, 670 N.W.2d 319, 324 (Neb. 2003) (quoting Brandeis concurrence in *Southwestern Bell Telephone*); *Long Island Lighting Co. v. Pub. Serv. Comm'n*, 523 N.Y.S.2d 615, 620 (N.Y. App. Div. 1987) ("Staff is obliged to demonstrate a tenable basis for raising the specter of imprudence before the utility can be called upon to defend its conduct . . . ."); *Turpen v. Okla. Corp. Comm'n*, 769 P.2d 1309, 1330 (Okla. 1988) ("Since good faith is presumed on the part of public utility managers, their judgment about prudent outlays, including outlays for capital, should not be overruled unless inefficiency or improvidence on their part is shown."); *Pa. Pub. Util. Comm'n v. Phila. Elec. Co.*, 460 A.2d 734, 737 (Pa. 1983) (utility commission "is powerless to interfere with the general management decisions of public utility companies"); *Hamm v. S.C. Pub. Serv. Comm'n*, 422 S.E.2d 110, 112 (S.C. 1992) ("Although the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility's expenses are presumed to be reasonable and incurred in good faith." (citing *Sw. Bell Co.* and *W. Ohio Gas Co.*)); *Logan City v. Pub. Utils. Comm'n of Utah*, 296 P. 1006, 1007-08 (Utah 1931) (utility's business decision "should not be interfered with by the commission unless it is made to appear that the policy and consequent expenditure is actuated by bad faith, or involves dishonesty, wastefulness, or gross inefficiency"); *City of Norfolk v. Chesapeake & Potomac Tel. Co. of Va.*, 64 S.E.2d 772, 784 (Va. 1951) (quoting language from *Ala. Pub. Serv. Comm'n*, 42 So.2d at 674, quoted above); *State ex rel. Pac. Tel. & Tel. Co. v. Dep't of Pub. Serv.*, 142 P.2d 498, 527 (Wash. 1943) ("In the absence of any showing that such officers have abused their discretion or acted arbitrarily, illegally, or beyond their lawful authority, courts will seldom interfere in the financial arrangements or methods of management of a business."); *Waukesha Gas & Elec. Co. v. R.R. Comm'n of Wis.*, 194 N.W. 846, 855 (Wis. 1923) ("In the absence of satisfactory proof to the contrary, it must be presumed that the investment was prudently made."); 73B C.J.S. *Public Utilities* § 134 (updated Dec. 2020) ("A utility is entitled to a presumption in a ratemaking proceeding that its expenditures were reasonable and incurred in good faith . . . ."); 2 LEONARD SAUL GOODMAN, THE PROCESS OF RATEMAKING 860 (1998), *available at* 2005 WL 998309 (hereinafter, "GOODMAN") ("A legal presumption

There, the Commission disallowed recovery of half the cost of an employee pension plan because it "fe[lt] that for the Company to pay such a high cost for the plan is not in the best interest of the rate payers." 80 Nev. at 324, 393 P.2d at 311. The Commission then defended its decision by "constantly" referring "to the presumption of the legality of its orders" and a statutory provision "throwing the burden of proof upon any party attacking the order of the commission, to show by clear and satisfactory evidence that the order is unlawful or unreasonable." *Id.* This Court disagreed, holding that there is a "presumption of the proper exercise of judgment by the utility in matters which are particularly a function of management." *Id.* "In the absence of an abuse of discretion on the part of the utility and in the absence of showing lack of good faith, inefficiency or improvidence, and if the amounts in question are actually paid . . . , the commission should not substitute its judgment for that of management." *Id.* (citing *W. Ohio Gas*, 294 U.S. 63; *Sw. Bell*,

---

that utility management has acted prudently surrounds their investment decisions. In the absence of specific evidence of imprudence, the investment . . . must be included in rate base.").

Some states have codified the presumption of prudence and defined its scope. Except in the special case of deferred energy accounting discussed below, Nevada has not.

262 U.S. 276; *Cent. Me. Power*, 109 A.2d at 520; *State v. Tri-State Tel. & Tel. Co.*, 284 N.W. 294, 316 (Minn. 1939)).

This "proper exercise of judgment" is virtually identical to the "exercise of reasonable judgment" in Justice Brandeis's concurrence. *See Sw. Bell*, 262 U.S. at 289 n.1 (Brandeis, J., concurring) ("Every investment may be assumed to have been made in the *exercise of reasonable judgment*, unless the contrary is shown." (emphasis added)). Authorities uniformly treat Justice Brandeis's formulation as one of the first articulations of the presumption of prudence. 2 GOODMAN, *supra*, at 860 (citing Justice Brandeis's concurrence as original source for presumption of prudence, which is still applied today); ROBERT E. BURNS ET AL., NAT'L REG. RES. INST., THE PRUDENT INVESTMENT TEST IN THE 1980S iv, 55–56 (1985) (quoting Justice Brandeis and observing that "[c]ommissions have interpreted this as requiring a rebuttable presumption of prudence"), *available at* https://ipu.msu.edu/wp-content/uploads/2016/12/Burns-Prudent-Investment-Test-84-16-85-1.pdf (cited at 20 App. 4877 n.156, 4998, 21 App. 5008).[3]

[3] *See also Kelly-Nevils v. Detroit Receiving Hosp.*, 526 N.W.2d 15, 20 (Mich. Ct. App. 1994) ("'[P]rudent' means 'exercising good judgment or common sense' . . . ."; *Elio v. Akron Transp. Co.*, 71 N.E.2d 707, 711

Ely Light's citation in other cases confirms that it recognizes the presumption of prudence. The Idaho Supreme Court, for example, cited *Ely Light*, along with cases like *West Ohio Gas*, for the proposition that a utility establishes a "prima facie case for the reasonableness of its operating expenses to non-affiliates by showing actual incurrence." *Boise Water Corp.*, 555 P.2d at 169.[4]

3. This Court Has Applied the Presumption of Prudence in Many Contexts

This Court has reinforced and even expanded the presumption beyond the general rate case in which it originally applied.[5]

(Ohio 1947) ("The Century Dictionary defines 'prudence' as 'good judgment.' Under synonyms, in the definition of 'prudence,' Webster's New International Dictionary uses the quotation 'a sane and temperate judgment.'"); *Westbrook v. Watts*, 268 S.W.2d 694, 698 (Tex. Ct. App. 1954) ("Prudence has been further defined as 'exercising sound judgment; recognized by practical wisdom.'"); ROGET'S II: THE NEW THESAURUS 359 (Office ed. 1984) (defining "prudence" as "[t]he exercise of good judgment or common sense in practical matters").

[4] *Cf. also Jager v. State*, 537 P.2d 1100, 1113 n.44 (Alaska 1975) (citing *Ely Light* as an example of "deference to management judgment," though declining to extend that deference to "bald assertions" about the threat of competition, unrelated to the utilities' expenditures).

[5] As discussed below, the Legislature curtailed the presumption of prudence in the specialized context of deferred energy accounting proceedings, which is not at issue here.

a. GENERAL RATE CASES: *ZEPHYR COVE*

In *State v. Zephyr Cove Water Co.*, a general rate case like *Ely Light*, this Court chided the Commission for excluding recovery for the water company's insurance and fringe benefits for employees, despite "nothing in the record to support a finding that such expenses would be *unreasonable*." 94 Nev. 634, 639 n.1, 584 P.2d 698, 701 n.1 (1978) (emphasis added). The support for this statement was the part of the *Ely Light* opinion recognizing the presumption of prudence. *Id.* (citing *Ely Light*, 80 Nev. at 323-24, 393 P.2d at 311).

b. CURTAILMENT: *SOUTHWEST GAS*

A few years later, this Court reiterated a utility's "management prerogatives" outside the rate-setting context altogether, in a battle over whether Southwest Gas in the absence of contrary regulation could curtail certain high-priority gases as a protective measure. *Sw. Gas Corp. v. Pub. Serv. Comm'n*, 98 Nev. 404, 407, 651 P.2d 95, 97 (1982). Although the Commission argued that it alone could implement curtailment practices, this Court disagreed, again citing the same passage in *Ely Light*: absent regulation denying curtailment authority, "it was well within the management prerogatives of Southwest to *exercise its best*

judgment regarding the provision of adequate service to priority end users through husbanding the [high-priority] gas." *Id.* (citing *Ely Light*, 80 Nev. at 324, 393 P.2d at 311).

c. DEFERRED ENERGY ACCOUNTING: *NEVADA POWER*

In 2006, this Court applied the presumption in yet another context: the unique "deferred energy accounting" proceedings for electric utilities. *Nev. Power Co. v. Pub. Utils. Comm'n*, 122 Nev. 821, 834-35, 138 P.3d 486, 495 (2006). There, instead of debating whether *Ely Light* itself extended to such proceedings, this Court relied on the Commission's own adoption of such a presumption in *Re Nevada Power Co.*, 74 Pub. Util Rep. 4th (PUR) 703 (Nev. Pub. Serv. Comm'n May 30, 1986). *See Nev. Power Co.*, 122 Nev. at 834–35, 138 P.3d at 495. Under the Commission's framework, "a utility requesting a customer rate increase enjoys a presumption that the expenses reflected in its deferred energy application were prudently incurred and taken in good faith." *Id.* The Commission in turn had "adopted and refined the rebuttable prudence presumption analysis previously stated in a Federal Energy Regulatory Commission [FERC] opinion." *Id.*[6]

[6] Although an agency is not bound by *stare decisis*, "after judicial review

But although this Court's decision in that case was specific to an electric utility's deferred energy accounting proceedings, the underlying FERC decision was not: There FERC set a gas utility's rates based not on "industry-wide average losses," as staff recommended, but on "the company's actual cost of storage gas losses." *Re Midwestern Gas Transmission Co.*, 65 P.U.R.4th 508, 30 FERC 61,260, 61,542 (F.E.R.C. 1985). FERC reasoned that "[i]t is presumed, where there is no evidence to the contrary, that actual expenses contained in a cost of service study reflect good faith and prudent management decisions." *Id.*, 30 FERC at 61,543. The staff's showing that the utility's actual costs were 16 times the industry average was not, by itself, enough to dispute the prudence of those costs. *Id.*, 30 FERC at 61,543–44.

FERC itself relied on a U.S. Supreme Court decision, again concerning a proceeding akin to a general rate case: "In the absence of a showing of ineffficiency or improvidence, a court will not substitute its

---

of an administrative decision, the administrative agency is bound to follow the law as laid down by the court." E.H. Schopler, *Comment Note: Applicability of Stare Decisis Doctrine to Decisions of Administrative Agencies*, 79 A.L.R.2d 1126 § 8 (1961).

judgment for theirs as to the measure of a prudent outlay." *W. Ohio Gas*, 294 U.S. at 72 (per Cardozo, J.).

C. The Presumption of Prudence Is Broad and Not Easy to Refute

In its various contexts, the presumption of prudence has been broadly applied. It has been held to cover all expenditures and costs, even when that cost arises from a decision *not* to enter into a transaction. *Nev. Power Co. v. Pub. Utils. Comm'n of Nev.*, 122 Nev. at 835 n.30, 138 P.3d at 495 n.30 ("Even though the language focuses on 'expenditures,' the prudence presumption analysis applies with equal force to costs incurred when a utility declines to enter into a transaction and incurs costs as a result.").

A finding that a decision was not prudent cannot be "speculative" and must be supported by "*evidence* in the record." *Nev. Power Co.*, 122 Nev. at 840, 138 P.3d at 499 (emphasis added). Someone objecting to an expense must provide "evidence showing that the cost . . . was capricious or arbitrary, or an abuse of discretion, or would place an unfair burden upon any group of consumers, and beyond the function of the utility in exercising its powers of management." *Ely Light*, 80 Nev. at

330, 393 P.2d at 315; *see also Nev. Power Co.*, 122 Nev. at 834-35, 138 P.3d at 495 (under rebuttable prudence presumption framework, an "intervener bears the initial burden of overcoming the prudence presumption by presenting evidence that creates a serious doubt as to the prudence of the utility's expenditure," and burden only shifts back to the utility after the presumption is rebutted). Staff and intervenors opposing an application "must accept a burden in commission proceedings." *In re Nev. Power Co.*, 74 P.U.R.4th 703 (1986). It is their "task" and obligation "to rebut the presumption that the applicant's filing is sound." *Id.*

The Commission acts arbitrarily, capriciously, and unreasonably if it fails to apply the presumption of prudence. *S. Cent. Bell*, 594 So. 2d at 366. And requiring a utility to defend its practices violates the presumption of prudence. *Nev. Power Co.*, 122 Nev at 829 n.15 138 P.3d at 492 n.15 ("Nevada Power's defense of its purchasing practices was contrary to the rebuttable prudence presumption framework that the [Commission] proceedings should have followed.").

D. The Presumption Is a Common-Law Rule with Roots in the Constitution

Below, the Commission argued that a presumption of prudence must be created by statute. But that has never been the case. The presumption is rooted in the common law and the United States Constitution, not a statute. *See Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 409 S.W.3d 371, 376 (Mo. 2013) ("The presumption of prudence is not a creature of statute or regulation.").

This Court has consistently found the presumption in common-law sources. *Ely Light* relied on caselaw, including *Southwest Bell Telephone* and *West Ohio Gas*. *Nevada Power* relied on the Commission's own decision in *Re Nevada Power Co.*, which, in turn, relied on the Federal Energy Regulation Commission opinion in *Re Midwestern Gas Transmission Co.*, 65 P.U.R.4th 508, 510 (F.E.R.C. Mar. 7, 1985).[7] And *Midwestern Gas Transmission* relied on the U.S. Supreme Court's opinion in *West Ohio Gas Co. See Midwestern Gas Transmission*, 65

[7] *Midwestern Gas Transmission* is hornbook law. GOODMAN, *supra*, at 861 & n.2.

P.U.R.4th 508 (1985). None of these cases cite a statute as the basis for the presumption.

Rather, the presumption of prudence is the common-law principle against which the statutory scheme must be read. *See Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016) ("this court strictly construes statutes in derogation of the common law"). In fact, *Ely Light* treats the presumption of prudence as a backstop to agency overreach: it applies *despite* a Nevada statute placing the burden of proof on the party attacking an order from the Commission (then NRS 704.550, now NRS 703.373(9)) and the common-law presumption that the Commission's orders are presumed valid. *Ely Light*, 80 Nev. at 324, 393 P.2d at 311; *see also Nev. Power Co.*, 122 Nev. at 834-36, 138 P.3d at 495-96 (applying presumption of prudence and reversing Commission order, despite general rule of deference to the Commission); *Nat'l Fuel Gas Distr. Corp. v. Pub. Serv. Comm'n*, 947 N.E.2d 115, 120-21 (N.Y. 2011) (reversing commission's order because it failed to rebut presumption of prudence, despite "deferential standard of review" of commission's orders). This Court held, a century ago, that

"[t]he rates fixed by the commission are not conclusive." *Steamboat Canal*, 43 Nev. 298, 185 P. at 807.

The presumption limits the Commission's discretion precisely because it carries constitutional weight. Take for example, the U.S. Supreme Court, whose jurisdiction to review decisions of state regulatory commissions is limited to securing rights under the Fifth and Fourteenth Amendments—to determine "whether the action of the state officials in the totality of its consequence is consistent with the enjoyment by the regulated utility of a revenue something higher than confiscation." *W. Ohio Gas*, 294 U.S. at 70.[8] Without a constitutional basis, the presumption could not be invoked as a basis for overruling state utility regulators. *See id.* ("This court does not sit as a board of revision with power to review the action of administrative agencies upon grounds unrelated to the maintenance of constitutional immunities."). But it is. *See*

[8] *Pub. Serv. Comm'n v. Cont'l Tel. Co. of Cal.*, 94 Nev. 345, 348, 580 P.2d 467, 468 (1978) ("The district court and supreme court should not interfere with the commission's rulings or review its determinations, further than to keep it within the law and *protect constitutional rights* of the public service agencies over which control is exercised." (emphasis added)).

id. at 73 (managers' good faith is presumed and "a court will not substitute its judgment" for management's "[i]n the absence of a showing of inefficiency or improvidence"); *Ely Light*, 80 Nev. at 324, 393 P.2d at 311.

The constitutional guaranty is sometimes expressed in terms of due process or equal protection, and sometimes in terms of the takings clause.[9] In any case, it ensures that the utility's rights—to carry on its business, deal with its property, and recover its prudently incurred costs of providing service—are not erased under the guise of ratemaking. *See United Fuel Gas Co.*, 278 U.S. at 320.[10] "The guiding principle

---

[9] *See Duquesne Light*, 488 U.S. at 307–12 (referring to due process and the takings clause); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936) ("But the Constitution fixed limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation."); *Covington & L. Turnpike Rd. Co. v. Sandford*, 164 U.S. 578, 592-94 (1896) (power to regulate is subject to the takings clause and equal protection clause).

[10] *Accord Pac. Gas & Elec. Co. v. City & Cnty. of San Francisco*, 265 U.S. 403, 415 (1924) (in rate making cases, courts are concerned with "confiscation," and constitutional guaranty "inhibit[s] the taking of private property for public use without compensation under any guise"); *Pac. Tel.*, 12 F.2d at 288 ("The right of a public utility corporation honestly and in good faith to carry on its business and direct its affairs must not be wrested from it under the guise of rate making."); *New. Eng. Tel. & Tel. Co. v. Dep't of Pub. Utils.*, 97 N.E.2d 509, 514 (Mass.

has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." *Duquesne Light*, 488 U.S. at 307; *see also id.* at 306, 308, 310 (examining jurisdiction and noting that the "partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment," and that the question of whether a rate is "so low as to be confiscatory" had "constitutional overtones"). Thus, "[a]s to all disbursements actually made within the limits of good faith, the managers' discretion must stand, unless it is abused" and that "the constitutional guaranty is not to be avoided merely because the management is less than perfect." *Monroe Gaslight & Fuel Co. v. Mich. Pub. Utils. Comm'n*, 11 F.2d 319, 325 (E.D. Mich. 1926).[11]

1951) ("[W]e agree of course that a public regulatory board cannot assume the management of the company and cannot under the guise of rate making interfere in matters of business detail with the judgment of its officers reached in good faith and within the limits of a reasonable discretion."); *Springfield Gas*, 125 N.E. 891 (utility "rests secure under the constitutional protection, which extends, not merely to the title, but to the right to receive just compensation for the service given to the public"); 73B C.J.S., *Public Utilities* § 14 (updated Dec. 2020) ("Any regulation, therefore, which operates as a confiscation of private property or constitutes an arbitrary or unreasonable infringement of personal or property rights is void because it is repugnant to the constitutional guaranties of due process and equal protection of the laws.").

[11] This Court cited *Monroe Gaslight & Fuel* in *Ely Light & Power*, 80

The presumption of prudence is the primary bulwark against the Commission's substituting its judgment for the utility's. Without the presumption, the Commission could always resort to the expedient that the utility has not met its burden of proof. *See* Frank P. Darr, *A State Regulatory Strategy for the Transitional Phase of Gas Regulation*, 12 YALE J. REG. 69, 89 (1995) ("Inherent in the determination that a capital item or expense is too high is a rejection of the management decision to incur that cost."). That's exactly what the Commission did in this case, despite the absence of evidence showing imprudence.

E. AB 7 Applies Only to Deferred Energy Accounting

The Commission denied Southwest Gas the presumption of prudence in this general rate case because of a 2007 statute, Assembly Bill 7 (AB 7). *See* 2007 Nev. Stat. 550, ch. 163 (AB 7) But by the Commission's own admission, AB 7's amendments only apply to the expedited proceedings known as "deferred energy accounting," not to general rate

---

Nev. at 324-25, 393 P.2d at 311-12.

cases like this one. The common-law presumption in general rate cases remains intact, as constitutionally it must.

1. A General Rate Case Differs from Deferred Energy Accounting

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

a. GENERAL RATE CASES ARE COMPREHENSIVE

"Few types of legal proceedings are more complex, intricate and expensive than the full-blown utility rate case, with its myriad problems in valuation, economics, accounting, law and engineering." Joe H. Foy, *Cost Adjustment in Utility Rate Schedules*, 13 VAND. L. REV. 663, 663 (1960). A general rate application "traditionally covers all facets of a utility's operations, finances, rate design, and rate of return." 73B C.J.S. *Public Utilities* § 21 n.5 (database updated Dec. 2020).

In Nevada, a general rate case is governed by NRS 704.110. A general rate application must include "a statement showing the recorded results of revenues, expenses, investments and costs of capital for

its most recent 12 months for which data were available when the application was prepared." NRS 704.110(3).

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

b. DEFERRED ENERGY ACCOUNTING PROCEEDINGS DEAL WITH WHOLESALE PRICE SWINGS

Deferred energy accounting addresses a specific problem: fluctuations in wholesale natural gas (or electricity) prices. Those fluctuations can cripple utilities because of their immediate impact on the utility coupled with the delay inherent in regulatory approval of rate changes.

"Natural gas prices have historically been volatile." Jonas J. Monast, *Electricity Competition and the Public Good: Rethinking Markets and Monopolies*, 90 U. COLO. L. REV. 667, 684 n.73 (2019); *see also Hunt Oil Co. v. Batchelor*, 644 So. 2d 191, 204 (La. 1994). This is be-

cause "demand shifts quickly in response to weather changes and natural gas often cannot be moved to areas where there are unexpected increases in demand." *In re Borden Chems. & Plastics Operating Ltd. P'ship*, 336 B.R. 214, 222 (Bankr. D. Del. 2006). At times, a regulated utility must purchase the commodity it is selling "on the wholesale market at prices higher than [it] could charge [its] customers in the retail market." *Nev. Power Co.*, 122 Nev. at 824, 138 P.3d at 488. "Because the cost of gas changes frequently and gas utilities continuously purchase gas, the cost of gas to the customer usually changes in the time between rate cases." *Purchased Gas Adjustments*, AMERICAN GAS ASSOCIATION, https://www.aga.org/research/policy/purchased-gas-adjustments/. Unable to change its rates at will, the utility may suffer losses that unregulated businesses would not. *Nev. Power Co.*, 122 Nev. at 824, 138 P.3d at 488. "[F]ormal rate hearings become inadequate as a means of ensuring a fair rate of return because of the delay inherent in them." *People's Counsel of D.C. v. Pub. Serv. Comm'n of D.C.*, 472 A.2d 860, 863-64 (D.C. Ct. App. 1984).

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

Every state has a mechanism like deferred energy accounting for dealing with fluctuations in fuel costs. Liam Holland, Note, *Footing the Bill for Natural Gas Leaks: Why States Should Limit Cost Recovery of Lost and Unaccounted for Gas*, 58 B.C. L. REV. 317, 326 (2017). They go by different names, such as "fuel adjustment clauses," "purchased gas

adjustments," or "gas cost adjustments." *See id.*; 73B C.J.S. *Public Utilities* § 87 (updated Dec. 2020) ("'Fuel adjustment clauses' are widely accepted rate making tools utilized to allow a utility to recoup fluctuating fuel costs on an ongoing basis."). "Commissions employ such clauses when they encounter an item of expense, such as fuel costs, that tends to be more volatile in comparison to the utility's other costs." *Daily Advertiser v. Trans-La*, 612 So. 2d 7, 22 (La. 1993). They have been in use since the 1920s, but became very popular after fuel costs soared during the 1973 Arab oil embargo, which utilities could not quickly recoup. 12 MARC E. LEWIS, EASTERN MINERAL LAW FOUNDATION, PROCEEDINGS OF THE 12TH ANNUAL INSTITUTE § 8.06 (1991).

Fuel adjustment clauses thus address an "acute problem," *Re Cent. Me. Power Co.*, 22 P.U.R.3d 466 (Me. Pub. Util. Comm'n Jan. 31, 1958), with a specialized proceeding that saves "the time of regulatory bodies." Foy, *supra*, at 668.

c. DIFFERENT STATUTES AND REGULATIONS GOVERN THE TWO PROCEEDINGS

Because of their intentionally different functions, Nevada general rate cases and deferred energy accounting proceedings follow different

rules. They are filed under different statutes—NRS 704.110(1)-(7) for general rate cases; NRS 704.185 for deferred accounting in natural gas utilities; and NRS 704.187 for deferred accounting in electric utilities.

The statutes recognize the difference between the two types of proceedings: a utility may file an application "to recover the increased cost of purchased fuel, purchased power, or natural gas purchased for resale," "while a general rate application is pending" before the Commission. NRS 704.110(6).

The regulations recognize the difference, too. *See* NAC 703.2201-703.2481 (general rate cases); NAC 704.023-704.195 (deferred energy proceedings); *see also Re Nev. Power Co.*, 74 P.U.R.4th 703 (noting that different regulations in general rate cases versus deferred energy proceedings). That is why deferred energy accounting *cannot* be included in a general rate case. *See* NAC 703.2261 ("Any information submitted that relates to deferred energy accounting must be prepared and filed in accordance with NAC 704.023 to 704.195, inclusive.").

d. DEFERRED ENERGY ACCOUNTING SPARES THE COST OF GENERAL RATE CASES

The whole point of deferred energy accounting is *to avoid* a costly and time-consuming general rate case:

> By electing to follow [deferred energy] accounting methods established by [the Commission], a utility is enabled to recover these increased costs *without having to go through the ordinary and relatively cumbersome rate increase process*.

Sierra Pac. Power, 97 Nev. at 481, 634 P.2d at 1201 (emphasis added). If the cost of fuel were recoverable only in a general rate case, the utility would go months paying more than it could recover from its customers. *See id.*; *Daily Advertiser*, 612 So. 2d at 22, 24 & n.24 (discussing "regulatory lag"). And "'[l]ittle purpose is served by requiring the commission to hold a general rate proceeding, recalculating all expenses, revenues, rate base, and rate of return, when the only substantial issues are extraordinary changes in fuel costs . . . .'" *J.R. Simplot Co. v. Intermountain Gas Co.*, 630 P.2d 133, 134 (Idaho 1981) (quoting *Cal. Mfrs. Ass'n v. P.U.C.*, 595 P.2d 98, 101 (Cal. 1979)).

A gas cost adjustment proceeding "is not intended to serve as a substitute for a general rate proceeding, but is rather intended to be a

summary proceeding to determine gas cost adjustments." *Teledyne Portland Forge v. Ohio Valley Gas Corp.*, 666 N.E.2d 1278, 1280 (Ind. Ct. App. 1996); *see also Consol. Gas Supply Corp. v. F.E.R.C.*, 745 F.2d 281, 285 n.9 (4th Cir. 1984) (charges for cost of gas under a purchased gas adjustment clause are "recovered separately from general rate charges").

e. OTHER COURTS SEE THE SEPARATENESS BETWEEN THE TWO REGIMES

Courts in other jurisdictions likewise recognize the difference between a general rate case and a proceeding to recover the increased costs of purchasing energy.[12]

[12] *See, e.g.*, *In re Tenn. Gas Pipeline Co.*, 21 FERC ¶ 61,004, 61,010 (Oct. 1, 1982) (noting that purchased gas adjustment "proceedings serves limited purposes and has an inherently limited scope" compared to general rate case in which "all elements of pipeline costs are scrutinized and system-wide issues involving inter-customer equity, such as cost allocation and rate design are fully explored"); *S. Edison Co. v. Pub. Utils. Comm'n*, 576 P.2d 945, 953 (Cal. 1978) ("[E]mphasiz[ing] the difference between a true ratemaking proceeding, in which many variables are taken into account and broad policies are formulated, and the narrowly restricted and semi-automatic functioning of an adjustment cause."); *In re Interstate Power Co.*, 500 N.W.2d 501, 505 (Minn. Ct. App. 1993) ("Because rate proceedings are generally slow and cumbersome, automatic fuel adjustment clauses allow for fluctuations in fuel costs that could either drive a utility out of business or result in windfall profits.");

2. The Two Cases Are Different for Purposes of the Presumption

The summary nature of deferred energy accounting proceedings also informs how to view and apply the presumption of prudence. This Court in *Nevada Power* treated as "an issue of first impression" whether the presumption applies in that context. 122 Nev. at 834, 138 P.3d at 495. That is not because *Ely Light* did not recognize a presumption of prudence at all, as the Commission now contends. Rather, regardless of the presumption of prudence in a "more complex, intricate and expensive" general rate case,[13] a reasonable jurist might hesitate to extend that privilege to proceedings where the utility already enjoys expedited review of a limited issue—particularly when the market for wholesale energy presents a special temptation for the utility to "engage[] in price speculation" to make a profit. *Nev. Power*, 122 Nev. at 830, 138 P.3d at 492–93.

Richard J. Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 HARV. L. REV. 345, 350 (1983) ("[g]as acquisition costs are singled out for separate regulatory treatment" via purchase gas adjustments).

[13] *See* Foy, *supra*, at 663.

So it is important that in recognizing the presumption of prudence even in deferred energy accounting proceedings, this Court leaned on the Commission's own decision applying that presumption. *Id.* at 834–35, 138 P.3d at 495. The Commission was content to borrow the presumption framework from general rate cases, *Re Midwestern Gas Transmission Co.*, 65 P.U.R.4th 508, 30 FERC at 61,542; *W. Ohio Gas*, 294 U.S. at 72, and apply it to deferred energy accounting proceedings. *Re Nevada Power Co.*, 74 P.U.R.4th 703.

This Court, in turn, agreed that the presumption made sense based on economic principles that apply to *all* aspects of a utility's operation:

> The reasoning behind granting a utility a presumption of prudence is rooted in economics. Because a regulated utility is required, by law, to advance costs for purchased power before knowing whether any increased costs will be reimbursed through a rate increase, we recognize that this analytical approach protects a utility's economic interests.

Nev. Power, 122 Nev. at 835–36, 138 P.3d at 496. Of course, it is not just the cost of power that a utility must advance "before knowing whether" that cost will be reimbursed. All of a utility's operational expenses that

it seeks to recover in a general rate case are, by definition, costs that it is uncertain to recoup.

3. The Parties Agree: AB 7 Does Not Affect General Rate Cases

A year after the *Nevada Power* decision, the Legislature enacted AB 7 to overrule its holding. But the Commission and Southwest Gas agree on one thing: the text of AB 7 does not apply to general rate cases. (20 App. 4878.)

AB 7 was targeted solely at recovery of costs for purchasing fuel and natural gas. It was entitled

> AN ACT relating to public utilities; providing that certain electric and natural gas utilities applying to the [Commission] to clear deferred accounts or to recover costs for purchased fuel and power have the burden of proving reasonableness and prudence in such applications; prohibiting the Commission from allowing natural gas utilities to recover costs for purchases made imprudently; and providing other matters properly relating thereto.

2007 Nev. Stat. 550.

The bill added two sentences to NRS 704.185, which is entitled "[u]se of deferred accounting by certain natural gas utilities; procedure; limitations":[14]

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

2007 Nev. Stat. 556 (AB 7, § 3) (emphasis added).

The statute only applies to deferred energy accounting.[15]

---

[14] At the time, the new subsection appeared as NRS 704.185(4). With the repeal of subsection 2 in 2011, 2011 Nev. Stat. 393 (AB 215), the language in AB 7 now appears as NRS 704.185(3).

AB 7's only other change was a parallel limitation in deferred energy accounting proceedings for *electric* utilities, added to NRS 704.110(10): "There is no presumption that any practice or transaction was undertaken, managed or performed prudently by an electric utility applying to the Commission to clear its deferred accounts or to recover costs for purchased fuel and purchased power, and the electric utility has the burden of proving that the practices and transactions of the electric utility were reasonable and prudent." 2007 Nev. Stat. 555 (AB 7, § 2).

[15] The statute was subsequently amended in 2011 to change terminology. *See* A.B. 94, 76th Leg. (Nev. 2011). The statute now provides that "[w]hen a public utility which purchases natural gas for resale files an

4. The Commission Kept Applying the Presumption after AB 7

After AB 7, the Commission remained obligated to apply the rebuttable presumption in general rate cases, as it itself acknowledged in such a case two years after the statute's passage. *In re Nev. Power Co.*, 2009 WL 1893687, at *75 (Nev. Pub. Utils. Comm'n June 24, 2009) (recognizing Nevada Power's "rebuttable presumption that the expenses reflected in its rate applications are prudently incurred" but holding the presumption to have been rebutted).[16]

---

annual rate adjustment application or an annual deferred energy accounting adjustment application," there is no presumption of reasonableness or prudence. NRS 704.185(3). An "annual deferred energy accounting adjustment application" is only filed by electric utilities. NRS 704.110(6); NRS 704.187(5). And an "annual rate adjustment application" relates solely to deferred energy accounting, NAC 704.031, not a "general rate application" under NRS 704.110. *See* NRS 704.062(1), (4); NRS 228.360(1)(a)(2).

[16] The Commission asserts that Southwest Gas was "on notice" of the Commission's decision to begin ignoring the presumption of prudence based on Southwest Gas's 2012 general rate application, *In Re Sw. Gas Corp.*, 12-02019, 2012 WL 7170426 (Nev. P.S.C. Dec. 19, 2012). But although Southwest Gas argued there that "the Commission used its own varied standards in place of the appropriate legal standard" (including that "only where interveners raise 'serious doubt' as to the prudency of that expenditure does the utility have the burden to dispel the doubt"), the Commission did not clearly reject such a presumption as a matter of law. Rather, the Commission supported its findings with the anodyne observation that "[w]hile the Commission may not completely disregard

F. The Presumption of Prudence Avoids Practical Problems

Unlike relatively simple deferred accounting proceedings, general rate cases are unmanageable without the presumption of prudence. *See In re Pac. Gas & Elec. Co.*, 165 FERC ¶ 63,001 (Oct. 1, 2018) ("[T]o ensure that rate cases are manageable, a presumption of prudence applies until the challenging party creates a serious doubt as to the prudence of an expenditure."). Requiring witnesses and other evidence for minor, uncontested expenses would not just encumber the utility; as a utility is allowed to recover the expenses related to the rate proceeding from ratepayers, *W. Ohio Gas*, 294 U.S. at 72-73, denying the presumption

---

uncontroverted testimony from the parties, where substantial evidence exists to support a conclusion different from the position of the parties, the Commission may use its own expertise and judgment in making such findings." *Id.*

This is hardly notice that the Commission was reversing decades of practice and purporting to overrule this Court in *Ely Light*. Indeed, none of the cases cited by the Commission—two of which are not even public-utility cases—comment on the presumption of prudence at all. *See id.* (citing *Heidtman v. Nev. Indus. Comm'n*, 78 Nev. 25, 368 P.2d 763 (1962); *Pub. Serv. Comm'n v. Cont'l Tel. Co. of Cal.*, 94 Nev. 345, 580 P.2d 467 (1978); *Intermountain Gas Co. v. Idaho Pub. Utilities Comm'n*, 540 P.2d 775, 788-89 (Idaho 1975); *State, Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608 n.1, 729 P.2d 497, 498 n.1 (1986)).

would have the perverse consequence of increasing the costs that we, the rate payers, bear.

PART TWO:

APPLICATION OF THE PRESUMPTION

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

III.

STANDARD OF REVIEW CONSTITUTIONAL FACTS ARE REVIEWED *DE NOVO*

A. The Doctrine of Constitutional Facts

Although agency factfinding is ordinarily entitled to deference, *Nuleaf CLV Dispensary*, 134 Nev. at 132–33, 414 P.3d at 308, in rate-setting cases where confiscation is alleged, facts of constitutional magnitude are reviewed *de novo*. *See Ohio Valley Water Co. v. Borough of Ben Avon*, 253 U.S. 287, 289 (1920) (requiring submission "to a judicial tribunal for determination upon its own independent judgment as to both law and facts"). The judiciary must "pass upon the fact of confiscation." *Opinion of the Justices*, 106 N.E.2d 259, 263 (Mass. 1952).

B. De Novo Review Protects the Separation of Powers

Undue deference to agencies undermines the separation of powers. *Bixby v. Pierno*, 481 P.2d 242, 249 (Cal. 1971). "The venerable doctrine of constitutional fact evinces fundamental mistrust of the ability of agencies to judge constitutional challenges to their authority, and with

good reason." Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, 94 NOTRE DAME L. REV. 297, 322 (2018). If the agency's "findings of fact may be made conclusive where constitutional rights or liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded," then those rights exist "at the mercy of administrative officials," without judicial oversight. *Bixby*, 481 P.2d at 247.

"[S]ubstituting administrative for judicial adjudication" threatens the legitimacy of our constitutional design: the constitutional fact doctrine is the antidote. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 262 (1985). "The problem of maintaining objectivity is far greater when an external constitutional challenge to the exercise of agency authority is presented." Redish & McCall, *supra*, at 322. So if a fundamental right is at stake, "the courts have held the loss of it is sufficiently vital to the individual to compel a full and independent review." *Bixby*, 481 P.2d at 252.

This is of particular concern in Nevada, where "[t]he separation of powers doctrine is *the most important foundation* for preserving and

protecting liberty by preventing the accumulation of power in any one branch of government." *Berkson v. LePome*, 126 Nev. 492, 498, 245 P.3d 560, 564 (2010) (emphasis added). This Court has "been especially prudent to keep the powers of the judiciary separate from those of either the legislative or the executive branches." *Id.* at 498, 245 P.3d at 565-66.[17] This Court has inherent power to do what is necessary "'so as not to become a subordinate branch of government.'" *Id.* at 498, 245 P.3d at 564 (quoting *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 439 (2007)).

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

C. The Doctrine of Constitutional Facts Is Good Law

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

The Commission wrongly argues that *Ben Avon* is bad law. *Ben Avon* has never been overruled; courts have held that the constitutional facts doctrine is still good law.[18] Likewise, the U.S. Supreme Court has

---

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

not overruled *Crowell v. Benson*, holding that an agency cannot be given the "final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." 285 U.S. 22, 56 (1932). Nor has it overruled *St. Joseph Stock Yards Co. v. United States*, observing that "to say that [agencies'] findings of fact may be made conclusive where constitutional rights of liberty and property are involved" would "place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards." 298 U.S. at 52.

Ben Avon, *Crowell*, *St. Joseph Stock Yards*, and the constitutional facts doctrine have been reaffirmed repeatedly.[19] The Court has also

---

576-77 & n.22 (Tex. 2012) (noting that the U.S. Supreme Court recently "reinvigorated the constitutional fact doctrine").

[19] *See United States v. Raddatz*, 447 U.S. 667, 683 (1980) (reaffirming "that administrative agencies cannot finally determine 'constitutional fact,'" and that the ultimate decision must be made by a court); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81-83 (1982) (reaffirming *Crowell* and *Raddatz*); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984) (reaffirming the Court's duty to "review the evidence to make certain that those principles have been constitutionally applied," which requires an "independent examination of the whole record" (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958), and *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963))); *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (citing *Crowell* and reaffirming that the Court "retains an independent constitutional duty to review factual

noted that even a mixed question of fact and constitutional law demands de novo review "to pass upon the Federal question." *Bose*, 466 U.S. at 508 n.27 (quoting *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927)).

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

D. *Hope* Did Not Displace the *Ben Avon* Doctrine of Constitutional Facts

The Commission argues that *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), overruled *Ben Avon*, and that after *Hope*, the Constitution imposes no restraints on utility commissions'

---

findings where constitutional rights are at stake").

ratemaking decisions. (20 App. 4828, 4870.) But *Hope* dealt with a question not presented in this appeal: what method a state may use to determine the *value* of property. Before *Hope*, the Court limited regulators to using the "fair value" standard for valuing property. *See Smyth v. Ames*, 169 U.S. 466, 544 (1898). *Hope* overruled *Smyth* and held that the Constitution does not dictate any particular valuation method. 320 U.S. at 602.

This appeal does not involve valuation of property; it involves the complete disallowance of expenses, the imposition of a pension discount rate that is arbitrary, and the erroneous setting of a rate of return on equity. The prudent investment test is a "concept useful in determining what facility costs should be allowed, rather than how costs for specific facilities should be calculated." BURNS REPORT, *supra*, at 55–56. The U.S. Supreme Court recognized this in *Verizon Communications* by citing Justice Scalia's concurrence in *Duquesne*, which states that "'all prudently incurred investment may well have to be counted' to determine 'whether the government's action is confiscatory.'" 535 U.S. at 527 n.37 (quoting *Duquesne Light Co. v. Barasch*, 488 U.S. at 317 (Scalia, J., concurring)) (emphasis added).

This Court in *Ely Light* highlighted the same thing: although the Commission was free to use a different method to determine the value of property, 80 Nev. at 321-23, 393 P.2d at 310-11, it was *not* free to disregard—by denying the presumption of prudence—the utility's incurred pension costs, *id.* at 324, 393 P.2d at 311.

IV.

SOUTHWEST GAS'S WORK ORDERS ON SOFTWARE PROJECTS SHOULD HAVE BEEN APPROVED

The existence of a presumption and the attendant burden of proof can be dispositive, as they are here. *See Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 190, 209 P.3d 271, 274 (2009) (whether Nevada recognizes a heeding presumption in failure-to-warn cases "may . . . be determinative"). It was legal error for the Commission to place the burden on Southwest Gas to defend its purchasing and other business practices in the absence of evidence that they were made in bad faith or imprudently.

A. The Presumption Is Rebutted on an Expense by Expense Basis

Where a presumption of prudence applies, the Commission must "engage in an analysis that considers each practice or transaction separately when deciding whether an allowance or disallowance is warranted for that particular practice or transaction." *Nev. Power Co.*, 122 Nev. at 837, 138 P.3d at 497. Even a "finding of 'colossal management mistakes' cannot operate as a ground for denying the entire" application. *Id.* Instead, if a party through evidence establishes the imprudence of one expense, the presumption is rebutted as to that expense, but not others.

B. The Commission Erred in Rejecting the Software Work Orders Wholesale

Although Staff and the Bureau challenged some costs associated with five work orders for Southwest Gas's software projects, no one asked the Commission to disapprove 100% of those orders. Even adopting the 50% reduction urged by Staff would have been confiscatory. *See Ely Light*, 80 Nev. at 323-24, 393 P.2d at 311 ("[T]o delete 50% of such

cost from the rate base computations was arbitrary, confiscatory and erroneous, requiring reversal."). But the denial of *all* of the work order expenses was doubly so. The Commission violated the presumption of prudence when it disapproved unchallenged expenses and substituted its judgment for Southwest Gas's.

1. The Commission Second-Guessed Southwest Gas's Management Judgment

The Commission ignored evidence proffered by both Southwest Gas and the other parties that substantiated the expenses. And it disregarded that "the market tends to force the price of the item to competitive levels," which is typically sufficient to ensure that a utility does not pay too much. Darr, *supra*, at 89.

Instead, the Commission asserts that it needed to evaluate whether Southwest Gas showed that "the choice made by the utility was the least-cost option or the best available alternative project, or that the project expenditures were reasonable under the circumstances." (20 App. 4859.) And the Commission states that Southwest Gas was required to "produce a witness who was personally involved in or could

meaningfully speak to the execution of the Challenged Work Orders." (20 App. 4855.)

2. Southwest Gas Agreed to Remove from its Application Costs Perceived as Improper

The Commission's finding that there was a lack of oversight is not supported by substantial evidence. And more important, no party introduced evidence to demonstrate that any lapse in oversight rendered the work orders imprudent in total. Even Staff's witness admitted that he was only challenging one-half of one percent of the software expenses, yet he still fought for disallowance of 50% of those expenses. At most, Staff's witness questioned a miniscule amount of the expenses, much of which were voluntarily withdrawn by Southwest Gas. "While the [Commission] was highly critical of some of [Southwest Gas's] . . . practices, the [Commission] stopped short of labeling those practices imprudent." *Nev. Power*, 122 Nev. at 838, 138 P.3d at 497.

3. The Commission Never Determined that these Costs Were Imprudent

Indeed, the Commission itself now concedes that

> Southwest Gas perhaps exercised prudent judgment with regard to the disallowed costs associated with the Challenged Work Orders, which is why the costs were denied without prejudice. The PUCN did not find that the costs were imprudently incurred; rather, it simply found that Southwest Gas failed to provide sufficient evidence to sustain its burden of proof.

(20 App. 4869.) In fact, it allowed Southwest Gas to seek recovery for amortized costs associated with same the work orders in a subsequent general rate case. (1 App. 49, 3 App. 570.) But that is insufficient: criticizing Southwest Gas's evidence and speculating about whether the projects could have cost less is not enough to overcome the presumption. Staff was required to "present facts, not merely opinion." BURNS REPORT, *supra*, at 71. Suspicion, speculation, and criticism are not evidence. *See Gramanz v. T-Shirts & Souvenirs, Inc.*, 111 Nev. 478, 485, 894 P.2d 342, 347 (1995) (speculation is not substantial evidence).

C. The Findings Reflect the Denial of a Presumption of Prudence

The Commission's findings on the challenged work orders are inseparable from its view on the presumption of prudence. The Commission's initial order admits as much, citing the denial of the presumption as the basis for rejecting Southwest Gas's expenses. (2 App. 283.) The

modified order tries to walk that back, claiming that the finding is independent of the presumption. (1 App. 45; 5 App. 1243, 1 ROA 606.) But that is untenable: the Commission's decision rested on Southwest Gas's alleged "failure" to offer affirmative evidence that its investments "were prudently incurred and were the product of reasonable management practices." (5 App. 1244–45, 1 ROA at 607-08.)[20]

And again, even if the Commission's decision is read as shifting the burden to Southwest Gas only after Staff challenged expenses within the work orders, that does not rebut the presumption as to the *entire* work orders. The Commission's finding that it does amounts to a denial of the presumption for the 99.5% of expenses not challenged.

[20] According to the Commission, "there is no standard—presumed, rebuttable, or otherwise—in the laws of any jurisdiction that would have been able to cure SWG's consistent *failure to provide any evidence* that its investments related to the Challenged Work Orders were prudently incurred and were the product of reasonable management practices." (1 App. 45 (emphasis added).)

V.

EMPLOYEE PENSION EXPENSES NOT CHALLENGED SHOULD HAVE BEEN APPROVED

A. The Prudence of these Pension Costs Was Unquestioned

Likewise, no witness challenged the accuracy of Southwest Gas's pension expenses. The Commission admits that "the question of prudent decisionmaking on the part of Southwest Gas's management was not a factor in the [Commission's] decision." (20 App. 4845.) In the absence of evidence showing imprudence, the presumption applies, and those expenses should have been approved. This was the precise question in *Ely Light*:

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

80 Nev. at 323, 393 P.2d at 311 (emphasis added). Because there was "no competent evidence before the Commission to support [a] finding that the cost of the pension plan was unreasonable," the Commission's decision to award less than the full amounts expended was "arbitrary,

confiscatory and erroneous, requiring reversal." *Id.* at 324, 393 P.2d at 311.

B. Normalization Violated Southwest Gas's Due Process Rights

Relying on its supposedly plenary power to use any ratemaking method to arrive at a just and reasonable rate, the Commission rejected Southwest Gas's proposal for addressing the volatility of pension expenses (a pension tracker) and instead opted to normalize those expenses over an arbitrary three-year period, on top of an arbitrary downward adjustment to the 2018 discount rate.

This violated not just the presumption of prudence, but also Southwest Gas's due process rights. It was deprived of the opportunity to submit testimony or other evidence relating to the Commission's decision to normalize and reduce the pension expenses. The Commission also violated Southwest Gas's due process rights by requiring it to justify a 3.75% discount rate without prior notice.

PART THREE:

RETURN ON EQUITY

VI.

SOUTHWEST GAS DESERVED A HIGHER RATE OF RETURN ON EQUITY

A. A Just Return on Investment Should Match that of Peer Utilities

Regulators of public utilities cannot simply decide for themselves what sort of return on investment a utility's shareholders deserve. *See Metro. Dade Cnty. Water & Sewer Bd. v. Cmty. Utils. Corp.*, 200 So. 2d 831, 833 (Fla. Dist. Ct. App. 1967) ("The Board's opinion as to what is a proper rate of return is not a valid substitute for evidence." (citing *Ely Light*). That discretion is limited by the utility's right to a return commensurate with its peers:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties . . . .

Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n, 262 U.S. 679, 693 (1923). Regulators who substitutes their own judgment about a range of reasonable rates imperil both the utility's financial health and its service:

> Regulation which adversely affects the financial integrity of the utility affects not only the present quality of service rendered but also discourages future capital investment and expenditure. Unreasonable, arbitrary, or capricious regulation which fails to provide a sufficient return to induce the utility to perform completely and effectively its function for the public is to be condemned.

Zephyr Cove Water, 94 Nev. at 639, 584 P.2d at 701 (internal quotation marks omitted); *see also Springfield Gas*, 125 N.E. at 902 *(*"It is equally important to the public and the utility that the rates established be just and reasonable.").

The return on investment "'should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.'" *Id.* (quoting *Bluefield*, 262 U.S. at 693). It is this Court's duty to remedy an unreasonable rate "to prevent what the courts unanimously agree to be confiscation of the company's

property." *Bell Tel. Co. v. Pub. Serv. Comm'n*, 70 Nev. 25, 34, 253 P.2d 602, 606 (1953).

B. The Commission's Rate of Return on Equity Was Confiscatory

The Commission confiscated Southwest Gas's property here by selecting a return on investment that was lower than what anyone requested. No evidence to support the Commission's arbitrary selection of 9.25% as a return on investment commensurate with Southwest Gas's peers. The Commission ignored the undisputed proxy group rate of return of 10.23%, and evidence of an industry average rate of return of 9.68%, both substantially higher than 9.25%. It also disregarded evidence that Southwest Gas's higher risk rating justified the rate of 10.30% that Southwest Gas requested. The record belies the Commission's assertion that 9.25% "is commensurate with returns on investments in other enterprises having corresponding risks." (5 App. 1009, 1 ROA at 372 ¶ 195.) Indeed, such a rate of return was in no way "equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings

which are attended by corresponding risks and uncertainties." *Bluefield*, 262 U.S. at 692. The Commission's self-described "range of reasonableness" was arbitrary and capricious. The Commission's *ipse dixit* that the return is "commensurate with returns on investments in other enterprises having corresponding risks" does not excuse the constitutional violation.

At the very least, as the Commission did not find that Southwest Gas faced *less* risk than the proxy group, a rate of return closer to the middle of the rates suggested by the parties—rather than lower than any party's proposal—would have better reflected the record. 1 GOODMAN, *supra*, at 213 (an "agency that is satisfied that opposing views are both well supported in the record may adopt the midpoint," but may "reject outright positions outrageously stated or unfounded in logic or the evidence").

CONCLUSION

The Commission's right to set a reasonable rate is broad, but it is not plenary. The suggestion that this Court abandon a six-decade commitment to the presumption of prudence—even though no statute requires it to—would put Nevada in an unconstitutional class by itself. Far from excusing a utility's improvidence, the presumption allocates the burden efficiently to keep the cost of general rate cases down.

For these reasons, this Court should reverse the judgment and remand with instructions that the Commission approve the challenged work orders, the pension expenses, and the return on equity proved by Southwest Gas.

Dated this 26th day of January, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)

By: */s/Abraham G. Smith*
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief exceeds with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 15,494 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 26th day of January, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Abraham G. Smith*

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on January 26, 2021, I submitted the foregoing "Appellant's Opening Brief" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

GARRETT WEIR
DEBREA M. TERWILLIGER
PUBLIC UTILITIES COMMISSION OF NEVADA
1150 East William Street
Carson City, Nevada 89701

Attorneys for Respondent Public Utilities Commission of Nevada

AARON D. FORD
ERNEST D. FIGUEROA
WHITNEY F. DIGEST
STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701

Attorneys for Respondent State of Nevada, Bureau of Consumer Protection

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