IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHWEST GAS CORPORATION, Appellant, *v.* PUBLIC UTILITIES COMMISSION OF NEVADA, STATE OF NEVADA, BUREAU OF CONSUMER PROTECTION Respondents.	)	CASE NO. 80911

MOTION TO EXCEED WORD LIMIT FOR RESPONDENT PUBLIC UTILITIES COMMISSION OF NEVADA'S ANSWERING BRIEF

The Public Utilities Commission of Nevada ("PUCN"), as Respondent, requests leave under NRAP 28(g) and NRAP 32(a)(7)(D) to exceed the 14,000-word limit for answering briefs in NRAP(32)(a)(7)(A)(ii). The PUCN's Answering Brief contains 19,224 words, which is 5,224 words over the extended type-volume limitation. (Exhibit 1.)

As Appellant noted in its Motion to Exceed Word Limit, filed contemporaneously with its Opening Brief, this appeal is based on a large underlying record. The administrative record consists of nearly 20,000 pages, not counting confidential materials, which included testimony from 36 different witnesses and transcripts from six days of hearing. The PUCN's Modified Order on appeal is 277 pages long. (4 Joint Appendix ("JA") 932 through 5 JA 1208.)

There also was extensive briefing at the District Court. As evidence of the complicated nature of the issues on appeal, the oral argument at the District Court lasted over two hours. (21 JA 5110-5257.)

One reason for this Motion is that the facts of this case, which inform much of the PUCN's determination on the law, are complicated and require additional explanation given the specialized nature of public utility rate-making. The PUCN's Answering Brief contains a lengthy (over 10-page) recitation of the facts to inform the Court's decision-making on issues related to the PUCN's findings of fact and whether there was substantial evidence supporting the challenged Modified Order. While Appellant's Opening Brief only exceeded the word limit by approximately 1,500 words, the PUCN requests additional allowance to first explain Appellant's arguments before rebutting them.

Additionally, the PUCN Answering Brief had to address the broader impact of the relief requested by the Appellant, Southwest Gas Corporation ("SWG"). SWG asks this Court to find that a presumption of prudence is rooted in the Constitution, which means that the presumption would apply more broadly than to natural gas utilities. In doing so, a presumption of prudence would contradict existing resource planning law for electric and water utilities. Many of SWG's other arguments, such as its contention that the PUCN is not permitted to raise concerns as to the evidence *sua sponte*, have major implications on the PUCN's

ability to fulfill its legislatively-mandated obligation to ensure just and reasonable utility rates and prudent utility operations. It is important that this Court fully understand the ramifications of SWG's ask.

As stated by the Appellant, the subject of this appeal is of great importance to all Nevada ratepayers, not just SWG's ratepayers. The PUCN, which is charged with balancing the interests of the customers and the shareholders of the utility, is compelled to address all of the facts and law at issue in this case to provide the Court with the information and context it needs to make a reasoned judgment on this matter of significant importance to Nevada.

The PUCN files its Answering Brief on March 1, 2021, in accordance with the Court's Order Granting Motion, issued on January 29, 2021. No extensions have been requested by the PUCN. The Appellant, by contrast, filed its original notice of appeal with this Court on April 2, 2020, but did not file its Opening Brief until January 26, 2021, seeking four extensions of the briefing cycle in the process. SWG had nearly ten months to draft and refine an Opening Brief, compared to the PUCN's one-month timeframe.

The PUCN has diligently attempted to keep the excess words in this brief to a minimum and to cut redundant or extraneous arguments. An initial draft of the Answering Brief exceeded 25,000 words. The draft could be cut significantly if the PUCN's recitation of the facts at issue were stripped to a minimum, but due to

the complexity and importance of the issues on appeal, the PUCN believes good cause exists for leave to exceed the word limit.

The PUCN, as Respondent, respectfully requests that the Court grant this Motion to Exceed Word Limit.

Dated this 1st day of March, 2021.

THE PUBLIC UTILITIES COMMISSION OF NEVADA

By: */s/ DEBREA M. TERWILLIGER, ESQ.*_

GARRETT WEIR, ESQ.
Nevada Bar No. 12300
DEBREA M. TERWILLIGER
Nevada Bar No. 10452
1150 East William Street
Carson City, NV 89701
Tel: 775-684-6132
Fax: 775-684-6186
dterwilliger@puc.nv.gov
Attorneys for Respondent

DECLARATION OF DEBREA M. TERWILLIGER
IN SUPPORT OF MOTION TO EXCEED WORD LIMIT

STATE OF NEVADA)
)
COUNTY OF CARSON CITY)

1. I, Debrea M. Terwilliger, under penalty of perjury, declare that I am a Nevada licensed attorney with the Public Utilities Commission of Nevada ("PUCN") and serve as counsel for the PUCN as Respondent.

2. The PUCN requests leave pursuant to NRAP 32(a)(7)(D) to file an Answering Brief that exceeds the type-volume limitation for such briefs by 5,224 words.

3. The administrative record consisted of nearly 20,000 pages, not counting confidential materials, which included testimony from 36 different witnesses and transcripts from six days of hearing. The PUCN's Modified Order on appeal is 277 pages long.

4. I made diligent efforts to cut the Answering Brief from an initial draft of over 25,000 words to the 14,000-word limit.

5. The additional words are needed to fully explain the underlying facts at issue in this appeal; these facts frame and inform many of the decisions on the law made by the PUCN in the underlying case. Additional words are also required

to explain that SWG's request before this Court would affect regulation for other public utilities, including up-ending existing resource planning laws.

6. Given the import of this case and the complicated nature of public utility rate-making, I believe there is good cause to grant the PUCN's Motion to Exceed Word Limit.

Dated this 1st day of March, 2021.

By: */s/ DEBREA M. TERWILLIGER, ESQ.*
Debrea M. Terwilliger

CERTIFICATE OF COMPLIANCE

1. I certify that the PUCN's Answering Brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared in Microsoft Word 2013 with a proportionally spaced typeface in 14-point, double-spaced, Times New Roman font.

2. I certify that the Answering Brief exceeds the type-volume limitations of NRAP 32(a)(7), because it contains 19,224 words, not including the portions of the Answering Brief that are not counted pursuant to NRAP 32(a)(7)(C).

3. I certify that I have drafted and reviewed the Answering Brief. The Answering Brief 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 comply with the applicable rules, I may be subject to sanctions.

Dated this 1st day of March, 2021.

THE PUBLIC UTILITIES COMMISSION OF NEVADA
By: */s/ DEBREA M. TERWILLIGER, ESQ.*
GARRETT WEIR, ESQ.
Nevada Bar No. 12300
DEBREA M. TERWILLIGER
Nevada Bar No. 10452
1150 East William Street
Carson City, NV 89701
Tel: 775-684-6132
dterwilliger@puc.nv.gov
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that I am an employee of the Public Utilities Commission of Nevada and that on this date I electronically filed and served copies of the **Motion to Exceed Word Limits** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF filing system to the following:

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
dpolsenberg@lrrc.com
jhenriod@lrrc.com
asmith@lrrc.com
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, NV 89169
Attorneys for Southwest Gas Corporation

Aaron D. Ford, Esq.
Ernest D. Figueroa, Esq.
Whitney F. Digesti, Esq.
bcpserv@ag.nv.gov
efigueroa@ag.nv.gov
wdigesti@ag.nv.gov
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701
Attorneys for the State of Nevada, Bureau of Consumer Protection

Dated this March 1, 2021.

__/S/ *SHAYLA HOOKER*___
SHAYLA HOOKER

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHWEST GAS CORPORATION, Appellant, *v.* PUBLIC UTILITIES COMMISSION OF NEVADA, STATE OF NEVADA, BUREAU OF CONSUMER PROTECTION Respondents.	)	CASE NO. 80911

APPEAL

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

RESPONDENT'S ANSWERING BRIEF

GARRETT WEIR, ESQ.
Nevada Bar No. 12300
DEBREA M. TERWILLIGER, ESQ.
Nevada Bar No. 10452
1150 East William Street
Carson City, NV 89701
Tel: (775) 684-6132
gweir@puc.nv.gov
dterwilliger@puc.nv.gov

Attorneys for the Public Utilities Commission of Nevada

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Regulations:

Other Authorities:

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court of Nevada because it is a case involving a determination of the Public Utilities Commission of Nevada. *See* NRAP 17(a)(8). This Court should retain this appeal and find that a public utility is not entitled to a presumption of prudence in a general rate case, as a presumption of prudence is not constitutionally guaranteed and such a presumption is not mandated by Nevada case law, statute, or regulation.

STATEMENT OF THE ISSUES

(1) Whether Southwest Gas Corporation ("SWG") presents any valid constitutional claims that permit *de novo* review of the fact-finding conducted by the Public Utilities Commission of Nevada ("Commission" or PUCN").

(2) Whether a public utility is entitled to a rebuttable presumption of prudence in a general rate case in Nevada and whether such a presumption would require the PUCN to allow SWG to recover the costs at issue in this appeal.

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

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

(5) Whether the PUCN acted within its authority when it denied SWG's request to recover from its customers the costs associated with the Challenged Work Orders ("CWOs").

STATEMENT OF THE CASE

The PUCN is charged with balancing the interests of utility shareholders with the interests of utility ratepayers. The case on appeal is a near-perfect example of the PUCN balancing these interests to ensure ratepayers are protected from a utility's incompetence and mismanagement.

At the core of this appeal is a deficient regulatory filing that lacked key details and contained multiple errors and indefensible costs that SWG sought to recover through rates charged to its customers. SWG did not justify the rates that it wanted the PUCN to approve, nor did it provide sufficient evidence to support why its proposals in the case were just and reasonable. Upon filing its deficient application, SWG was not prepared to move forward with the necessary discovery process to allow intervening parties to review the filing and prepare for hearing. SWG's witnesses were unprepared at hearing to answer questions regarding their own filed written testimony or on issues raised by the other parties to the proceeding prior to hearing. Worse yet, SWG presented witnesses at hearing who lacked knowledge or a depth of understanding as to their own testimony.

SWG was given every opportunity in discovery, in rebuttal testimony, and at hearing to rehabilitate its application and ensure that the evidence before the PUCN supported its requests. However, for the issues on appeal, the PUCN found

that SWG failed to provide evidence to support its requests or that the weight of the record evidence did not support SWG's requests.

In a final effort to escape the consequences of its failure to sustain its burden, SWG asks this Court to 1) apply a presumption of prudence that does not exist in Nevada law; 2) fundamentally restrict the PUCN's authority to exercise discretion in setting just and reasonable utility rates; and 3) improperly substitute its judgment for that of the PUCN as to the weight of evidence on questions of fact.

SWG presents a patchwork of court cases that it claims establishes a constitutionally-protected "presumption of prudence" that allows monopoly utilities such as SWG to avoid having to justify the costs that they intend to recover through rates charged to their captive customers. SWG argues that its regulator, despite being empowered with plenary ratemaking authority and a statutory obligation to ensure prudent utility operations, is somehow prohibited from asking about the costs underlying a request to increase customers' rates. SWG's arguments attempt to complicate this Court's review of the case and obscure SWG's utter failure to engage in the regulatory process and provide the most basic of information. But, ultimately, this case is nothing more than a plain vanilla review of the PUCN's application of law to the facts set forth in the record before this Court.

STATEMENT OF THE FACTS

On May 29, 2018, SWG filed with the PUCN its general rate application, designated as Docket No. 18-05031, requesting approval to increase retail natural gas service rates. SWG filed written direct and rebuttal testimony. The interveners to the proceeding, including the Attorney General's Bureau of Consumer Protection ("BCP") and the Regulatory Operations Staff of the Commission ("Staff"), filed written direct testimony prior to SWG's rebuttal testimony being filed. A hearing was held in late October 2018.

On February 15, 2019, the PUCN issued an Order on Petitions for Reconsideration and Clarification and a Modified Order, which was issued after granting reconsideration.

SWG's last general rate case before this one was approximately six years prior and was litigated in consolidated Docket Nos. 12-02019 and 12-04005. SWG raised the issue of a presumption of prudence in its 2012 rate case; the PUCN did not apply the proposed presumption, finding that prudence was a step that would have to be proven to arrive at just and reasonable rates. *Re Southwest Gas* Corp, Docket Nos. 12-02019 and 12-04005, 2012 WL 7170426, at ¶¶ 25, 45 (Dec. 19, 2012) ("2012 SWG GRC Order").

SWG appeals the District Court Order Denying Petition for Judicial Review ("District Court Order"), which denied SWG's challenge to the PUCN's Modified

Order.

1. Return on Equity.

Return on equity ("ROE"), or return on investment, is the amount that public utilities are permitted to earn on the equity that they spend on investments in infrastructure to serve their customers. In setting ROE, the PUCN determines a percentage that the public utility is permitted to earn on its investment; the specified percentage is based upon an approved range of reasonableness. (5 Joint Appendix ("JA") 1004-05.)

In the rate case on appeal, SWG recommended an ROE of 10.30 percent within a range of 10.00 to 10.50 percent, Staff recommended an ROE of 9.40 percent within a range of 9.10 to 9.70 percent, and BCP recommended a 9.30-percent ROE within a range of 9.00 to 9.50 percent. (*Id.* at 1005.) The PUCN found that a 9.25-percent ROE, within the range of reasonableness of 9.10 to 9.70 percent, balances the interests of the utility's ratepayers and shareholders. (*Id.* at 1007, 1009.)[1]

A proxy group assists the PUCN in performing its evaluation consistent with the seminal U.S. Supreme Court decision, *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944), which mandates that the ROE be

[1] 5 JA 1004 ("In establishing a zone of reasonableness and determining an ROE within that range, the [PUCN] relies upon expert testimony and evidence which applies principles of finance, accounting, and economics …").

commensurate with the returns of investments in other enterprises having corresponding risks. In this rate case, the proxy group consisted of a group of seven comparable natural gas utilities that were selected based on criteria that make them similar to SWG, namely size, operations, and credit metrics. (5 JA 1004.) No party challenged the proxy group used by SWG, and both Staff's and the BCP's expert witnesses ran their models using SWG's proffered proxy group. (*Id*.)

The PUCN's evaluation of the evidence presented on ROE focused on the ROE model analyses; macroeconomic conditions; and SWG's risk relative to the proxy group companies. As to the model analyses, the PUCN found Staff's and BCP's use of actual, historical, and published data for the models more defensible than SWG's approach, which relied upon forecast estimates. (20 JA 4836 (citing 5 JA 1006-07).) By merely replacing SWG's inflated forecast estimates with either Staff's or BCP's data, the PUCN found that SWG's average ROE modeling results would fall from 11.10 percent to 9.10 percent or 9.30 percent, respectively. (*Id*.)

As to macroeconomic conditions, the PUCN found that the evidence did not indicate significant increases in federal interest rates in the near term that would justify the prospective increase in ROE recommended by SWG. (5 JA 1007.)

Finally, the PUCN found that SWG does not face more risk than its proxy group. (20 JA 4836-37 (citing 5 JA 1007-09).) BCP argued that a small upward

adjustment was needed (20 basis points, which is less than a quarter of a percent) given SWG's debt levels compared to its proxy group. The PUCN found BCP's adjustment unnecessary, relying on the following evidence: (1) the credit rating agencies had improved SWG's credit rating since its last rate case in 2012; and (2) the credit rating agencies viewed SWG's regulatory environment as credit supportive, given the PUCN's approval of various rate mechanisms, infrastructure cost recovery programs, and corporate restructuring to use a holding company to create more separation between regulated and unregulated operations. (5 JA 1008.) SWG was found to have as many rate mechanisms that support cash flow or reduce risk, like full revenue decoupling, as the other utilities in its proxy group. (20 JA 4837 (citing 5 JA 1008-09).)

As support for a higher ROE in its Petition for Reconsideration before the PUCN, SWG stated that the average return on investment for the proxy group was 10.23 percent, while the industry-average ROE was 9.68 percent. (Br. at 13.) Both percentages were soundly refuted by the other parties to the case. In fact, the 10.23-percent figure appeared to be new evidence presented for the first time in the reconsideration proceedings, which is not permitted under the PUCN's regulations.[2] (7 JA 1590-91.)

[2] NAC 703.801(1)(b) states that a petition for reconsideration "may not contain additional evidentiary matter or require submission or taking of new evidence."

SWG cites to one of its witness's exhibits to support the 10.23-percent average. (7 JA 1614 (citing 19 JA 4572-88).).) But the 10.23-percent figure is not explicitly identified in the referenced exhibit. (*Id.* at 1590-91.) The exhibit includes a list of the ROEs authorized by various state commissions for ***all natural gas utilities across the country since 1980***. (*Id.* at 1590.)

2. Pension Expenses

SWG challenges two of the PUCN's decisions regarding pension expenses: (1) normalization[3] of SWG's pension expenses over a three-year period; and (2) the 2018 discount rate that is used to determine pension expenses. (Br. at 11-12.)

In the PUCN case on appeal, SWG proposed an $11.7-million increase in pension costs. (5 JA 1070.) SWG stated that since 2011, pension costs have fluctuated significantly. (*Id.* at 1069-72; 16 JA 3893.) To address this volatility, SWG proposed a pension tracker, which is a ratemaking mechanism that tracks the difference between pension expenses included in rates and the level of expense incurred by SWG. (*Id.* at 1072.) The other parties to the proceeding raised concerns as to the functionality of SWG's proposed pension tracker; BCP stated that a pension tracker did not provide SWG with an incentive to control pension

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

costs. (*Id.* at 1070 (citing 11 JA 2722-23); *see also* 13 JA 3184-86 (noting Staff's concerns with tracker).)

Recognizing the volatility of the pension expenses, Staff proposed a five-year normalization of pension expenses in its filed testimony. (13 JA 3186-89 (citing historical figures to support its position and stating normalization is common rate-making practice).)

The PUCN agreed that SWG's pension expenses were volatile and determined that Staff's proposal to address volatility by normalizing was more appropriate than the pension tracker proposed by SWG. (5 JA 1073-74) The PUCN found a three-year average was more appropriate than Staff's proposed five years. (*Id.* at 1073-74).

Normalization is a common ratemaking tool used to arrive at just and reasonable rates. In fact, SWG recommended normalization of variable compensation and its uncollectible (unpaid bills, etc.) expense in this very case. (16 JA 3885, 3933.)

A discount rate is used to estimate the existing liability for future pension benefits. (5 JA 1069-70.) SWG proposed a reduction in its discount rate from 4.50 percent to 3.75 percent. A decrease in the discount rate will increase the following year's pension expense. (16 JA 3894.)

SWG filed testimony on the discount rate, addressing how the discount is

determined and the effect of the discount rate on pension costs. (*Id.* at 3893-95.) At hearing, the PUCN asked clarifying questions of SWG's witness on how the rate is determined and what influence SWG's management had on that discount rate. (5 JA 1076.) SWG's witness testified that a determination of the discount rate is made based on recommendations from SWG's actuary, but the witness could not state how the actuary made recommendations (*i.e.*, whether a range was provided to management) or how management made its decision based on recommendations from the actuary. (9 JA 2105-07.). A PUCN policy advisor asked if another witness was available to provide additional information, giving SWG ample opportunity to clarify how and why the proposed discount rate was selected; SWG did not offer another witness to answer the PUCN's clarifying questions. (*Id.*)

The evidence on the record indicated that from 2011 through 2017, the annual discount rate averaged 4.75 percent and never dropped below 4.25 percent. (5 JA 1071.) The SWG witness was unable to explain how senior management came to the decision to decrease SWG's discount rate so significantly in 2018, in light of the other evidence presented. (9 JA 2105-07.) It is reasonable for the PUCN to ask SWG's witness clarifying questions to ascertain the reasonableness of SWG's proposed discount rate. Given SWG's inability to explain what role management had in the decision on the discount rate, the PUCN found that SWG

failed to provide evidence in support of its proposed dramatic change in the discount rate. (5 JA 1071.) Rather than adopting SWG's unsupported reduction to the existing discount rate, the PUCN relied on evidence of historical discount rates.

3. Challenged Work Orders

Staff identified concerns with five of SWG's nine "system allocable" capital projects; these five projects, each of which concerned software development, are referred to as the "Challenged Work Orders" or "CWOs." (8 JA 1912.)[4]

In SWG's initial application, the entirety of the evidence presented for the CWOs was in Exhibit 42, the prepared direct testimony of one SWG witness. (5 JA 1131 (citing 16 JA 3916-3970).) Exhibit 42 provide no details, and instead only mentions an exhibit to testimony without any further explanation. (16 JA 3938). The exhibit referenced in testimony, Exhibit No. RLC-4, merely provides a very brief description of the work orders. (21 JA 5009, 5013-18.) Importantly, this brief summary of the CWOs in Exhibit No. RLC-4 was not even included in SWG's initial application or direct testimony. (11 JA 2649.) SWG stated that the omission was inadvertent.

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

Even though SWG's initial application did not provide the evidence necessary to demonstrate that the CWO costs were reasonable, Staff worked with SWG to illicit that information via discovery or other means, propounding numerous data requests and having discussions with SWG personnel. (8 JA 1957-58; 10 JA 2490-91.) However, SWG's counsel acknowledged that it was slow to respond to Staff's discovery requests.[5] And Staff itself noted concerns conducting its audits given that it seemed SWG was not prepared to support its case after the application was filed and did not provide Staff with the necessary data in a timely fashion. (13 JA 3231-32.)

Through the discovery process, Staff concluded that SWG had provided documentation as follows for the CWOs: 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. (8 JA 1912.) Staff testified that SWG had not provided evidence indicating that the projects, authorized budgets, or expenditures were prudent investments, the least-cost option, the best available alternative project, or reasonable under the

[5] 8 JA 1957. Under PUCN regulations (NAC 703.680(7)), parties have 10 business days to respond to discovery requests. SWG took **98 days** to provide some responses to Staff regarding certain work orders. 13 JA 3231-32 ("It appears to me that SWG was not expecting that the $600 plus million in capital costs it is requesting be placed into rates would be vetted/examined in detail …").

circumstances. (*Id*.) SWG never identified potential "alternatives to the software or the companies [used to develop the software] ... It doesn't lay out risks associated with any alternatives, … budgets, cost data, any other pertinent information that you would see typically in a business case." (10 JA 2481.) Staff argued that little or no evidence was provided to indicate why various costs were incurred by SWG, including costs for consultants, expert fees or services, personnel overtime, rental car fees, and daily meals or refreshments. (8 JA 1912.) The PUCN agreed with Staff, finding that Staff had offered "substantial evidence" of SWG's failure to adequately support its case. (5 JA 1132.)

At hearing, the one witness sponsoring testimony on the CWOs in the initial application stated she was not involved in the execution of any of the projects included in the CWOs, did not review any of the charges made to the CWOs, and did not possess any personal knowledge to support the underlying cost data. More importantly, the witness was not able to provide to the PUCN at hearing any information demonstrating why SWG made the decision to incur the costs associated with the software projects. (*Id.* at 1131-32 (citing 11 JA 2653-56, 2697-98, 2701).) The PUCN also found that the rebuttal witness offered by SWG to dispute Staff's testimony on the CWOs could not provide the PUCN "with any evidence regarding the prudence of the expenditures associated with the Challenged Work Orders," particularly because that witness was not directly

involved in the execution of any of the projects at issue and had not started working with SWG until after the projects were completed. (*Id.* at 1133.)

In its Modified Order, the PUCN found that SWG failed to sustain its burden of proof for establishing that the proposed rate changes associated with the CWOs were just and reasonable and not unduly discriminatory or preferential. (*Id.* at 1130 (citing NAC 703.2231).)

In questioning the prudence of the CWOs, the parties identified the following problematic expenditures that SWG included in its application and attempted to recover through rates charged to its customers:

- Financial System Modernization ("FSM") Program –one voucher included, without explanation, a Casio Digital Piano, a Yamaha 7.2-channel home theater system, a Broil King natural gas grill, multiple Bose wireless speaker systems, multiple JBL Bluetooth headphones, all totaling $7,568.39. SWG also booked approximately $41,000 in non-travel meals to this program. Staff found two vouchers from Deliotte and Touche LLP related to professional services rendered in connection with the NPL Construction Co. Cyber Risk Assessment (totaling $40,000) that were erroneously booked to the FSM Program. (13 JA 3236-37, 3239-40.)

- Field Operations Management ("FOMS") System Phase I, Customer Service – SWG leased office space just for this project at a price of $6,183 per month, also spending an estimated $94,000 in tenant improvements. (*Id.* at 3242.) SWG did not explain why it needed to lease office space for this project and why its own corporate office could not be used. (*Id.*)
- GIS Mapping Migration Project – SWG paid its consultants to attend seminars or conferences, even though SWG's Consulting Services Agreement contains language representing that consultants must have the expertise, experience, personnel, and resources to perform the consulting services. (*Id.* at 3245-46.)
- Web Content Management Phase II Project – Invoices included, without explanation, purchases for an Apple Mac computer and multiple Apple iPads, totaling $4,000. Staff also identified instances where multiple consultants billed excessive amounts of time when SWG did not provide any justification as to why the project was time-sensitive. (*Id.* at 3248.)
- $90,000 for a backhoe that SWG had previously agreed to remove from rates as part of a civil penalty stipulation for a pipeline safety

violation; the stipulation was approved by the PUCN in Docket No. 17-08020. (*Id.* at 3230-31.)

- Bi-weekly or weekly massages from the European Massage Therapy School during 2015. (*Id.* at 3230.)
- A consultant charge for just one project team meeting that cost $800 and took place at Brio in Las Vegas. (*Id.*)
- Expenditures for bartender costs and a golf course membership. (*Id.*)

Once these costs were identified by the parties as inappropriate inclusions, SWG did not even argue that they should be recovered through rates and instead voluntarily removed the costs from various work orders before hearing. Other than stating that mistakes were made or that the problematic costs were inadvertently included, SWG never offered an explanation as to how any of these questionable costs ever made it into work orders that were to be charged to ratepayers. (*See, e.g.*, 9 JA 2152.)[6] SWG also admitted that no internal audit of the costs in its work orders was conducted prior to filing the rate case. (11 JA 2658.)

[6] It should be noted that SWG's internal procedures mandate that before any particular charge can be included in a capital work order, someone at the utility has to review and determine that the purchase qualifies for assignment to a particular work order. By SWG's own admission, for each of the more problematic costs identified by Staff in its audit, someone at SWG authorized that cost/purchase to be charged to a work order that would be collected from ratepayers. 11 JA 2657.

STANDARD OF REVIEW

The PUCN is responsible for supervising and regulating the operation and maintenance of public utilities, including "provid[ing] for the safe, economic, efficient, prudent, and reliable operation and service of public utilities." *See* NRS 703.150 and 704.001. With regard to the PUCN's statutory authority and duty to regulate utility rates, the Supreme Court of Nevada has described the PUCN's power as "plenary," meaning that it is "broadly construed." *Nev. Power Co. v. Eighth Judicial Dist. Court of Nev.*, 120 Nev. 948, 957, 102 P.3d 578, 584 (2004) (hereinafter "*Nev. Power v. Eighth JD*"); *Consumers League v. Sw. Gas,* 94 Nev. 153, 157, 576 P.2d 737, 739 (1978); NRS 704.040.

The PUCN's decisions are "prima facie lawful." NRS 704.130.[7] Therefore, this Court must "not interfere with [PUCN] decisions other than to keep them within the framework of the law." *Nev. Power Co. v. Public Service Comm'n of Nev.*, 105 Nev. 543, 545, 779 P.2d 531, 532 (1989).

PUCN decisions must be based on substantial evidence. *Nev. Power Co. v. Pub. Utils. Comm'n of Nev.*, 122 Nev. 821, 834, 138 P.3d 486, 495 (2006) (citation omitted) (hereinafter "*Nev. Power*"). Legal questions are reviewed *de novo. Id.* (citation omitted).

[7] NRS 703.373(9) states that "[t]he burden of proof is on the petitioner to show that the final decision is invalid."

The Supreme Court of Nevada has emphasized the PUCN's broad discretion in setting utility rates and practices, stating, for example, that "[t]he only limit on the PUC[N]'s authority to regulate utility rates is the legislative directive that rates charged for services provided by a public utility must be 'just and reasonable' and that it is unlawful for a public utility to charge an unjust or unreasonable rate." *Nev. Power v. Eighth JD*, 120 Nev. at 957, 102 P.3d at 584 (citing NRS 704.040).

NRS 703.373(11) requires that this Court, in reviewing a PUCN decision, shall not substitute its judgment for that of the PUCN as to the weight of the evidence on questions of fact and shall affirm the decision of the PUCN unless the petitioners rights have been prejudiced by a final decision that is:

> (a) In violation of constitutional or statutory provisions; (b) In excess of the statutory authority of the [PUCN]; (c) Made upon unlawful procedure; (d) Affected by other error of law; (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) Arbitrary or capricious or characterized by abuse of discretion.

The Supreme Court of Nevada has similarly established that it "...will not reweigh evidence or witness credibility, nor will [it] substitute [its] judgment for the administrative judge's." *Bisch v. Las Vegas Metro Police Dep't*, 129 328, 342, 302 P.3d 1108, 1118 (2013) (citation omitted). "Furthermore, when an agency's conclusions of law are closely related to its view of the facts, those conclusions are entitled to deference, and [the court] will not disturb them if they are supported by substantial evidence." *Fathers & Sons & A Daughter Too v. Transp. Services*

Auth. of Nevada, 124 Nev. 254, 259, 182 P.3d 100, 104 (2008). When specifically addressing "an exercise of the [PUCN's] ratemaking authority," the Supreme Court of Nevada has found that "such judgment is not for the courts to question." *Saguaro Power Co. v. Pub. Utils. Comm'n of Nev.*, 128 Nev. 931, *5, 381 P.3d 658, 2012 WL 1572112 (2012).

SUMMARY OF ARGUMENT

SWG presents a story that does not hold up to scrutiny. This is not a case of a regulator imposing unconstitutional, unreasonable, or unmanageable demands upon a regulated entity. Rather, this is a case of a monopoly utility simply being required to justify its proposals to increase captive customers' rates. The decision by the PUCN exemplifies the type of regulatory oversight necessary to carry out its statutory duties to ensure just and reasonable rates and the prudent operation of public utilities.

No constitutional rights or binding legal precedents have been violated. A rebuttable presumption of prudence, which does not exist in controlling case law, statute, or regulation, is not guaranteed by the U.S. Constitution. While some jurisdictions apply a presumption of prudence as a "practice," such a practice has not been adopted by the PUCN. The presumption has not been applied at all in the last decade, and SWG was forewarned in its last rate case that the PUCN would consider prudence in determining whether rates were just and reasonable. SWG's

other constitutional claims – confiscation and violation of due process – have no merit. The U.S. Supreme Court has established a three-part standard that must be met to demonstrate confiscatory rates, and SWG has never tried to satisfy any part of that standard. Moreover, SWG's due process arguments ignore that SWG had ample opportunity to support its case in rebuttal testimony or at hearing.

Without a constitutional hook, SWG is left arguing that a rebuttable presumption of prudence was first adopted by this Court in *Pub. Serv. Comm'n v. Ely Light & Power Co.*, 80 Nev. 312, 393 P.2d 305 (1964). But *Ely Light* does not mandate a burden-shifting, rebuttable presumption of prudence; it merely stands for the proposition that there needs to be substantial evidence supporting a disallowance of costs incurred by utility management.

The record demonstrates that the PUCN had substantial evidence in the record to support its decisions regarding the issues on appeal. The PUCN adopted an ROE within the zone of reasonableness supported by two parties, and used modeling and other analysis to ensure that SWG was no riskier than its peers in determining the appropriate return on investment. The normalization (or averaging) of pension expenses over a three-year period was supported by the record. The PUCN appropriately rejected SWG's proposed change to the pension discount rate because the SWG witness supporting the proposal could not inform the PUCN as to how the proposed discount rate was calculated or why a change to

the existing rate was appropriate. Finally, the record supports disallowance of 100 percent of the CWOs, as SWG failed to support its requests for cost recovery after serious doubts were raised regarding the prudence of the costs. For example, not only is there substantial evidence of SWG's management exercising poor judgment with regard to specific costs included in the CWOs, there is also substantial evidence raising questions as to whether SWG prudently explored alternatives to its decisions to incur the costs associated with the CWOs. There is record evidence of SWG's inability to identify potential alternatives to the software or the vendors used, and of SWG's inability to explain how the CWOs compared to other options in terms of price and risk. SWG was also unable to explain the need for accelerated timelines for projects.

It cannot be emphasized enough how dramatic the change is that SWG is asking this Court to inflict upon Nevada's carefully-designed statutory and regulatory framework for utility regulation. Ruling in SWG's favor would fundamentally diminish the PUCN's regulatory authority and exponentially increase the risk that utility customers will be charged for excessive, imprudently-incurred costs. This Court should therefore deny SWG's requested relief, which has no basis in law or public policy, and affirm the decision of the District Court.

ARGUMENT

I. THERE ARE NO CONSTITUTIONAL ISSUES AT STAKE IN THIS CASE.

SWG offers this Court, without any relevant legal or factual backing, a menu of purported constitutional violations by the PUCN, all to further its efforts to have this Court believe it must conduct a full and independent review of the facts in this case. (*See, e.g.*, Br. at 59-60, 74.)

There are no valid constitutional claims before this Court. First, a rebuttable presumption of prudence is not rooted in the Constitution. The simple truth is that none of the precedent cited by SWG indicates that a monopoly utility is constitutionally guaranteed a burden-shifting presumption of prudence. While other jurisdictions might apply a presumption of prudence, the presumption arises out of a commission practice or out of specific statutes and regulations.

Second, any arguments of confiscation or a taking must be supported by actual facts that the net effect or end result of the PUCN's rate order is unjust and unreasonable and would harm SWG's financial integrity. SWG never made any attempt at the PUCN, in District Court, or here to satisfy this test.

With regard to SWG's argument that its due process rights were violated, SWG asks this Court to ignore the evidentiary record and require specific notice of the questions that will be asked at hearing. The fact that SWG's witness was not prepared to answer questions does not amount to a due process violation.

The evidence also supports that SWG was given opportunities, both in rebuttal and at hearing, to address the issues under consideration by the PUCN in testimony or via cross examination at hearing.

A. A presumption of prudence is not a constitutional requirement that must be applied by this Court.

SWG states that the source of its alleged constitutionally-mandated rebuttable presumption of prudence is the U.S. Supreme Court decision in 1923 in *Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276 (1923) (hereinafter "*Sw. Bell*"). (Br. at 27.)[8]

As a starting point, the *Sw. Bell* case does not actually discuss a "rebuttable presumption of prudence." The *Sw. Bell* opinion states that "[t]he commission … is not empowered to substitute its judgment for that of the directors of the corporation … unless there is an abuse of discretion in that regard by the corporate officers." *Sw. Bell*, 262 U.S. at 289 (quotation omitted). A footnote in Justice Brandeis' concurrence also is noted by SWG in its Brief for the idea that "prudent investment" should not exclude "investments which, under ordinary circumstances,

[8] SWG also cites to *Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 409 S.W.3d 371, 376 (Mo. 2013), for the idea that "[t]he presumption is rooted in the common law and the United States Constitution, not a statute." Br. at 39. The *Office of Pub. Counsel* says no such thing, instead arguing that a presumption of prudence is a matter of practice in Missouri. 409 S.W.3d at 376. We explain in greater detail *infra* why the rebuttable presumption of prudence cannot be found to be practice in Nevada.

would be deemed reasonable" but will exclude "what might be found to be dishonest or obviously wasteful or imprudent expenditures." (Br. at 28). *Sw. Bell,* 262 U.S. at 289 n.1 (Brandeis, J., concurring). Justice Brandeis added that "[e]very investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown." *Id.*

SWG mischaracterizes both the majority and concurring opinions in *Sw. Bell* as requiring the use of a rebuttable presumption of prudence. SWG argues that the *Sw. Bell* majority opinion mandates a rebuttable presumption of prudence in that the "presumption of prudence flows directly from the principle that the state cannot manage the utility." (Br. at 28 (citing *Denver Union Stock Yard Co. v. United States*, 57 F.2d 735, 748 (D. Colo. 1932).) And SWG argues that the "prudent investment" test that Justice Brandeis created in his concurrence also mandates a rebuttable presumption of prudence. (*Id.* at 27-28, 32). *See also Sw. Bell*, 262 U.S. at 289 n. 1 (Brandeis, J., concurring). Neither of SWG's readings of these opinions is correct.

1. The directive that regulators not substitute their judgment for management does not equate to a constitutionally-guaranteed, burden-shifting mechanism to be applied in utility rate cases.

SWG argues that the presumption of prudence flows directly from the principle espoused in *Sw. Bell* that a commission cannot substitute its judgment for that of the management of the utility. (Br. at 28.) SWG cites *Denver Union* for

this principle, but this case does not discuss a rebuttable presumption of prudence. Rather, noting the same language in *Sw. Bell* that SWG does, the *Denver Union* court states that "[t]hese cases do no more than to apply the rule long settled that the power to regulate rates does not confer the power to manage." 57 F.2d at 748 (citing *Sw. Bell*, 262 U.S. at 288). Certainly, the *Denver Union* case does not support SWG's contention that utility regulatory commissions must apply a presumption of prudence to avoid substituting their judgment for utility management's.

SWG suggests that a presumption of prudence was applied whenever a court states that regulators cannot substitute their judgment for utility management's. This theme is carried out in SWG's lengthy footnote 2, which portends to cite cases that followed the "U.S. Supreme Court's lead" in recognizing the presumption of prudence. Instead, this footnote includes cases that repeat *Sw. Bell's* directive. In *New England Tel. & Tel. Co.*, 66 A.2d 135, 145-46 (Vt. 1949), for example, there is no mention of a presumption of prudence, but instead the court recognized the general rule that regulation should not "obtrude itself into the place of management." (citation omitted). Also, in *Mountain States Tel. and Tel. Co. v. F.C.C.*, the court echoes the principles stated in *W. Ohio Gas Co. v. Pub. Utils. Comm'n* that "[g]ood faith is to be presumed on the part of the managers of business" and "'[i]n the absence of a showing of inefficiency or improvidence, a

court will not substitute its judgment for theirs as to the measure of a prudent outlay.'" 939 F.2d 1021, 1034 (D.C. Cir. 1991) (citing *W. Ohio Gas Co. v. Pub. Utils. Comm'n*, 294 U.S. 63, 72 (1935)). However, there is no mention in *Mountain States* of a rebuttable presumption of prudence.[9] In fact, the issue in that case was an adverse presumption, applied against Mountain States, wherein the FCC presumed that antitrust litigation expenses were illegitimate or "below the line." The *W. Ohio Gas Co.* holding that good faith on the part of managers is presumed was discussed in reaction to the application of the adverse presumption to Mountain States, not in support of a presumption of prudence that would benefit Mountain States.

Even the *W. Ohio Gas Co.* case, oft-cited in SWG's Brief, does not mandate that a burden-shifting rebuttable presumption of prudence be applied or find that such a presumption is constitutionally guaranteed. In *W. Ohio Gas Co.*, the utility sought to recover an average cost of $12,000 per year for advertising expenses incurred in procuring or trying to procure new business. *W. Ohio Gas*, 294, U.S. 63 at 72. The state commission cut down the allowance to $5,000 per year, stating

[9] In its footnote 2, SWG also cites to *Office of the Consumers' Counsel, State of Ohio v. F.E.R.C.*, 914 F.2d 290, 292 (C.A.D.C. 1990), which does state the FERC practice that reasonableness of pipeline costs are to be presumed unless serious doubt is raised. SWG claims that this case cites to *Sw. Bell*, but it does not. As is discussed in more detail *infra*, a FERC or other commission practice of applying a rebuttable presumption of prudence is not the same thing as a constitutional requirement to apply such a presumption.

that "anything more was unnecessary and wasteful." *Id.* The Supreme Court found that ***there was no basis in evidence, either direct or circumstantial***, for the state commission to find that the costs were "unnecessary and wasteful." *Id.* (emphasis added). In so finding, the U.S. Supreme Court held that the good faith of the managers of the business were to be presumed, and "[i]n the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay." *Id.* The Supreme Court did not find that a utility is entitled to a presumption of prudence – only that the managers of the business were presumed to have acted in good faith in the absence of inefficiency or improvidence. As is discussed in more detail *infra* in reference to *Ely Light*, 80 Nev. 312, 393 P.2d 305, collectively, *Ely Light*, *Sw. Bell*, and *W. Ohio Gas* provide that the PUCN should base its decisions on the evidence before it, including determining whether a showing of inefficiency or improvidence has overcome assumed good faith or reasonable judgment on the part of utility managers. In other words, the U.S. and Nevada Supreme Court's rulings stand for the proposition that a state commission must base its findings on the evidentiary record. The U.S. Supreme Court has never found that a rebuttable presumption of prudence is required in utility rate cases.

SWG also wants this Court to believe that "the presumption of prudence is the primary bulwark against the Commission's substituting its judgment for the

utility's." (Br. at 44.) Such a bulwark is not needed. The PUCN, in carrying out its statutory duty, is already obligated to "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; *see also Hope*, 320 U.S. at 603 (stating that "[t]he rate-making process …, *i.e.*, the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."). In applying this statutorily-mandated balance, the PUCN should not substitute its judgment for the utility, particularly if the utility has acted in good faith and there is no countervailing evidence of improvidence or inefficiency.

SWG refers to *W. Ohio Gas* to argue that "[t]he 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." (Br. at 20 (citing *W. Ohio Gas Co.*, 294 U.S. at 72).) SWG's efforts to transform the presumption of prudence into a constitutional requirement reflect SWG's acknowledgement that "[w]ithout a constitutional basis, the presumption could not be invoked as a basis for overruling state utility regulators." (Br. at 41 (citing *W. Ohio Gas*, 294 U.S. at 70).) While the *W. Ohio Gas* Court did note that it "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 amenities,"

the constitutional issue at stake there was a denial of due process – not a denial of a presumption of prudence. *W. Ohio Gas*, 294 U.S. at 70. Moreover, the constitutional issue at stake in *Sw. Bell*, which concerned a U.S. Supreme Court review of a decision of the Public Service Commission of Missouri, was confiscation in conflict with the Fourteenth Amendment. *Sw. Bell*, 262 U.S. at 282. The U.S. Supreme Court cases cited by SWG reviewed state commission decisions based on due process or confiscation, not on the idea that management's judgement was a constitutionally-protected ideal.

2. No single rate-making method is constitutionally required.

To the extent that SWG is also arguing that the rebuttable presumption of prudence arises out of Justice Brandeis's concurrence in *Sw. Bell* (Br. at 32), that argument fails based on a number of U.S. Supreme Court decisions. Justice Brandeis in *Sw. Bell* was not proposing that utilities be granted a presumption of prudence but, rather, was proposing a more practical methodology for determining a fair return on the amounts prudently invested by utilities. *Sw. Bell*, 262 U.S. at 306-12 (Brandeis, J., concurring); *see also* Venessa Korzan and Moin A. Yahya, *A Requiem for the Presumption of Prudence after OPG and ATCO*, 4 ENERGY REGULATION QUARTERLY, No. 4, Nov. 2016, at 1. At the time when the *Sw. Bell* case was decided, the legal test for determining a fair return was whether the rates allowed by a utility were based on the fair value of a utility's property. *Smyth v.*

Ames, 169 U.S. 466 (1898). Justice Brandeis argued that such a test was "legally and economically unsound." *Sw. Bell*, 262 U.S. at 290 (Brandeis, J., concurring). Thus, his "prudent investment" analysis was intended to shift the focus from a fair market valuation analysis to historical costs.

Justice Brandeis's campaign against a fair market valuation came to fruition in *Hope*. *Verizon Comms. v. FCC*, 535 U.S. 467 (2002) (citing *Hope*, 320 U.S. at 601-02). The U.S. Supreme Court in *Hope* moved away from using the fair market value of property to determine rates and held that a regulator is not bound by any single formula in determining rates. *Hope*, 320 U.S. at 602. Notably, the *Hope* Court did not adopt any presumption of prudence for historically-incurred costs.

Subsequently, the U.S. Supreme Court reiterated this notion that there is no single ratemaking theory mandated by the Constitution in the case of *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989). In fact, the *Duquesne* Court makes it clearer that the prudent investment rule that emerged from Brandeis concurrence[10] is not a constitutionally guaranteed standard. In that case, one of the amicus parties argued that the prudent investment rule should be adopted as a constitutional standard. The *Duquesne* Court fully rejected this notion and warned of unintended consequences, stating:

[10] The *Verizon* Court explains how the prudent investment rule emerged after Brandeis's concurrent in *Sw. Bell*. *Verizon*, 535 U.S. at 485-86.

> We think that the adoption of any such rule would signal a retreat from 45 years of decisional law in this area which would be as unwarranted as it would be unsettling. … The designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors. The Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public.

Duquesne, 488 U.S. at 315-16 (internal citations omitted).

Rather than focusing on the rate-setting methodologies for determining constitutionality, the Supreme Court looks to the rates themselves. *Verizon*, 535 U.S. 467 at 525. Parties seeking to overturn a rate order pursuant to constitutional claims have a "heavy burden of making a convincing showing that [the order] is invalid because it is unjust and unreasonable ***in its consequences***." *Hope*, 320 U.S. at 602 (emphasis added). This "end result" test adopted in *Hope* mandates that so long as the consequences of the PUCN's order permit SWG to earn a just and reasonable return, the methods used by the PUCN to arrive at the rates set in the order are "outside the scope of judicial inquiry." *Nev. Power Co. v. Public Serv. Comm'n*, 91 Nev. 816, 826, 544 P.2d 428, 435-36 (1975) (citing *Hope*, 320 U.S. 591) (other citations omitted) (hereinafter "*Nevada Power Co.*"). This "end result" test has been subsequently adopted by the Nevada Supreme Court to determine whether PUCN decisions are just and reasonable. *Id.; see also Ely Light*, 80 Nev. at 322, 393 P.2d at 310 (quoting *Hope*, 320 U.S. 591, and *Bell Tel. Co. of Nev. v. Public Serv. Comm'n*, 70 Nev. 25, 253 P.2d 602 (1953)).

Despite the U.S. Supreme Court decisively rejecting any notion that a single ratemaking methodology is required, SWG nevertheless argues that *Hope* is irrelevant to this case. (Br. at 65-66.) SWG argues that *Hope* is irrelevant because it concerned the valuation of property, while this case concerns "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." (Br. at 66.)

SWG does not argue that the *Duquesne* holding is irrelevant to this case. The U.S. Supreme Court in *Duquesne*, addressing the disallowance of costs similar to those at issue here, reached the same conclusion as *Hope* that no one single ratemaking methodology is required. *Duquesne*, 488 U.S. at 303-05, 310. Moreover, as noted *supra*, this Court has clearly stated that *Hope* is relevant to the PUCN's determination of ROE.

Rather than applying the foundational principles of *Hope*, SWG asks this Court look to the "prudent investment test" as espoused in the Burns Report by the National Regulatory Research Institute. (Br. at 66.) *See* Robert E. Burns, et. al., *The Prudent Investment Test in the 1980s*, THE NATIONAL REGULATORY RESEARCH INSTITUTE, Apr. 1985, *at* https://ipu.msu.edu/wp-content/uploads/2016/12/Burns-Prudent-Investment-Test-84-16-85-1.pdf (hereinafter "Burns Report"). But even the Burns Report determined that the outer limit of the prudent investment test was the end-result test adopted by *Hope*. Burns Report at 184-85 (emphasis added).

Hope, and the cases that follow it, are relevant to the entirety of the PUCN's ratemaking decision. As directed by *Hope*, in assessing SWG's constitutional claims, what matters for this Court is how the final rates, or end results, adopted by the PUCN affect the financial health of SWG. As we note *infra*, SWG has not ever attempted, at the PUCN, in District Court, or before this Court, to argue that the final rates adopted by the PUCN affected its financial integrity. (Br. at 33, 36-37.)

3. FERC and other state commission "practices" that apply a presumption of prudence are not constitutionally guaranteed.

SWG cites a FERC decision to support its argument that the presumption of prudence is applied in many contexts and that the presumption is tied to the idea that the Commission must not substitute its judgment for utility management's judgment. As a starting point, decisions by the FERC are not binding precedent on the PUCN or this Court. Also, the FERC explicitly states that it applies a presumption "'[a]s a matter of practice …'" in its cases. *Re Midwestern Gas Transmission Co.*, 65 P.U.R.4th 508, 30 FERC 61,260, 61,543 (F.E.R.C. 1985) (citing *Minnesota Power & Light*, 11 FERC 61,312, 61,645 (F.E.R.C. 1980). If the presumption is applied as a matter of practice, this does not mean that the law or Constitution entitles utilities to a presumption of prudence as SWG has attempted to argue. (7 JA 1574.) In fact, the FERC states that it retains authority to require utilities to demonstrate the prudence of their expenditures when ordering that a case be set for hearing, or in any later FERC order. *Minnesota Power & Light*, 11

FERC at 61,645 n.44.

The FERC is not the only tribunal to apply a presumption of prudence as a matter of practice. The Missouri Public Service Commission also applies a presumption of prudence as a practice. *Office of Pub. Counsel*, 409 S.W.3d at 376. The Missouri Supreme Court nowhere indicates that its "practice" of applying a presumption is somehow rooted in the Constitution.

Importantly, when this Court found that there was a rebuttable presumption of prudence in *Nev. Power*, the Court stated that the "[r]easoning behind granting a utility a presumption of prudence is rooted in economics." *Nev. Power*, 122 Nev. at 835, 138 P.3d at 496. The *Nev. Power* Court did not indicate that the presumption of prudence was rooted in the Constitution.

4. The presumption of prudence has been abandoned or modified, reflecting that it is not a constitutional mandate.

In the jurisdictions where a presumption of prudence exists, it is not a static concept. For example, the record indicates that the FERC has well-developed case law indicating when a presumption of prudence does and does not apply. (7 JA 1574.) Also, in *Office of Pub. Counsel* cited *supra*, the Supreme Court of Missouri found that a presumption of prudence should not exist in transactions between affiliates because such transactions are "'not arm's length … As such they are subject to suspicion and therefore present dangerous potentialities.'" *Office of Pub. Counsel*, 409 S.W.3d at 377 (citation omitted).

Moreover, the record indicates that states that do apply a presumption in rate cases often have statutes or regulations that explicitly provide for such a presumption, specifying where the presumption is applied (or not) and what standards are required to overcome the presumption. (7 JA 1577, 1579.) Nevada enacted Assembly Bill ("AB 7") in 2007, finding that a presumption of prudence could not exist in deferred energy accounting proceedings. If courts and commissions can abandon the presumption, and state legislatures can limit when the presumption is applied, the presumption of prudence cannot be rooted in the Constitution.

B. SWG has not met the U.S. Supreme Court test applied to claims of confiscatory rates.

SWG appears to be arguing that the Commission's decisions related to both the ROE and the disallowance associated with the CWOs are confiscatory. (Br. 68, 77.) To overturn a rate-setting order that is alleged to be confiscatory, SWG is obligated to demonstrate that the net effect of the rates jeopardize its financial integrity. This demonstration must show that: (1) SWG has insufficient operating capital; (2) the final rates impeded SWG's ability to raise future capital; or (3) the rates were inadequate to compensate current equity holders for the risk associated with their investments. *Duquesne*, 488 U.S. at 312. In fact, the *Duquesne* Court found that piecemeal claims of constitutional violations were insufficient because the appellants in that case, Duquesne and Penn Power, did not demonstrate that the

total effect of the rate order was unjust and unreasonable. *Id*. at 313. "The Constitution protects the utility from the net effect of the rate order on its property." *Id.* at 314.

SWG ***never alleged*** a takings or confiscatory claim before the PUCN, thus never providing the PUCN with the opportunity to address whether the net effect of its rate order jeopardized SWG's financial integrity.[11] SWG also has not attempted in its pleadings before this Court to describe the net effect of the PUCN's Modified Order, other than to make conclusory claims of a confiscation or taking. At the District Court level, SWG claimed that the PUCN confiscated $51 million of its property related to the Challenged Work Orders,[12] but this figure has no support in the record. To the best of the PUCN's understanding, the $51 million represents all of the costs that SWG incurred across all of its jurisdictions for the CWOs, meaning at least two-thirds of that $51 million will be at issue in rate cases in the other two states where SWG provides service, California and Arizona. Moreover, some of the items associated with the CWOs had already

[11] It would have been difficult for SWG to demonstrate that its financial integrity was threatened by the 2018 SWG GRC Order, especially given that SWG's credit "ratings benefit[ed] from" the PUCN's decision, which was viewed as "balanced" and reflective of "a relatively constructive regulatory environment." *See* 20 JA 4996.

[12] 20 JA 4966. Notably, SWG provided no citation to the Certified Record for this $51 million figure.

depreciated prior to SWG filing its rate case with the PUCN; that is, SWG's voluntary delay in filing the rate case resulted in a further decrease in the amount of CWO costs even eligible for recovery from Nevada customers. SWG's failure both at the PUCN and during this appeal to demonstrate that the total effect of the rate order harmed its financial integrity invalidates any claims SWG raises as to a taking.

SWG also seemingly argues confiscation in that the PUCN made "opportunistic changes in ratesetting methodologies just to minimize return on capital investment …" (Br. at 63 (citing *Verizon*, 535 U.S. at 527).)[13] A switch of rate-setting methodologies is not at issue in this case. By SWG's own admission, a presumption of prudence has never been applied in any of its prior rate cases.[14] Furthermore, as discussed in more detail *infra*, SWG was specifically put on notice in its 2012 SWG GRC Order that the PUCN would inquire as to whether the costs

[13] The U.S. Supreme Court addressed a similar issue in *Duquesne*. *Duquesne*, 488 U.S. at 315. But, in both *Duquesne* and *Verizon*, the U.S. Supreme Court found that an arbitrary switching back and forth between methodologies did not actually occur and returned to the principle espoused in *Hope* that the effect of the final rate is key to the constitutionality issue. *Verizon*, 535 U.S. at 527-28; *Duquesne*, 488 U.S. at 315.

[14] 7 JA 1603-04 (noting the three PUCN cases cited by SWG that have applied a presumption of prudence). In its Order on Petitions for Reconsideration and Clarification, the PUCN fully addressed why these prior Commission cases could be relied upon. 5 JA 1234-36.

included in a rate case were prudently incurred. The PUCN has not modified its ratemaking methodologies between SWG's rate cases.

C. SWG's due process rights were not violated.

SWG is attempting to turn its lack of preparedness and inability or unwillingness to address concerns raised in filed testimony into due process violations. (Br. at 59, 74.) The facts, however, indicate that for every issue on appeal, the PUCN provided SWG an opportunity to answer questions at hearing and to justify its positions in testimony.

In its Brief, SWG states that the PUCN violated SWG's due process rights by (1) requiring it to justify a 3.75-percent discount rate without prior notice; and (2) denying SWG an opportunity to submit testimony or other evidence on the PUCN decision to normalize pension expense. (Br. at 74.) The applicable facts for these issues are discussed in detail *supra* in the Statement of Facts and reveal that SWG's claims of due process violations are completely unfounded.

Regarding the discount rate, SWG filed direct testimony with its application specifically proposing the 3.75-percent discount rate, but its witness could not tell the PUCN why SWG was proposing a change to the discount rate or the extent to which management modified or ratified the discount rate suggestions made by SWG's actuary. (9 JA 2105-07.) PUCN rules mandate that "[a]n applicant must be prepared to go forward at a hearing on the data which have been submitted …"

NAC 703.2231. Witnesses must be prepared at hearing to respond to questions about their written testimony. NRS 233B.123(4). The fact that SWG's witness was not prepared to answer questions does not amount to a due process violation. The PUCN even offered SWG the opportunity to provide another witness who could provide supplemental testimony addressing the unanswered questions. (9 JA 2105-07.)

For the normalization of pension expense, the record clearly indicates that the normalization of pension expense first was raised by Staff in its intervener testimony. (13 JA 3186-89.) In other words, SWG was fully-apprised of Staff's position and had more than adequate opportunity, both through filed rebuttal testimony and at hearing, to address normalization.

SWG also suggests that the PUCN violated its due process rights in setting an ROE. (Br. at 59.) As stated *supra*, Staff recommended a ROE of 9.40 percent within a range of 9.10 to 9.70 percent, and the BCP recommended a 9.30-percent return on equity within a range of 9.00 to 9.50 percent. (5 JA 1005.) Testimony was presented that any number within the zone was reasonable. (6 JA 1251; 12 JA 2904.) SWG's due process concerns lack any merit, as the PUCN chose an ROE that was within the range of reasonableness proposed by two parties in testimony that was filed in advance of SWG filing rebuttal and in advance of hearing.

D. The "constitutional facts doctrine" is irrelevant to this appeal.

As discussed in detail *supra*, SWG presents no valid constitutional claims in this case. However, SWG argues that the mere allegation of confiscation requires this Court to conduct a *de novo* review of all aspects of the PUCN's decision, including fact-finding, because it involves "constitutional facts." (Br. at 60 (citing *Ohio Valley Water Co. v. Borough of Ben Avon*, 253 U.S. 287, 289 (1920).) The PUCN acknowledges that the "constitutional facts doctrine" adopted in *Ben Avon* is "still followed in a minority of the states,"[15] but no Nevada court has ever cited to *Ben Avon*. The other cases that SWG relies upon, *Crowell v. Benson*, 285 U.S. 22 (1932) and *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936),[16] have been cited once by Nevada courts, but only in a dissent (*Crowell*) or in a case where the Court did not adopt a *de novo* standard of review (*St. Joseph*).[17]

[15] Asimow, Michael, et al., STATE AND FEDERAL ADMINISTRATIVE LAW, § 9.1.2 (West Group, 2d Ed. 1998).

[16] In *St. Joseph*, the U.S. Supreme Court affirmed the *Ben Avon* decision but restricted its holdings significantly by giving presumptive weight to the fact findings of the agency and precluding the company from introducing evidence in court that could have been introduced at the agency hearing. STATE AND FEDERAL ADMINISTRATIVE LAW at § 9.1.2a.

[17] *Checker Inc. v. Public Serv. Comm'n*, 84 Nev. 623, 446 P.2d 871 (1968), cites another case that cites *St. Joseph*. While due process was at issue in *Checker*, there is no indication from the Nevada Supreme Court's decision that a *de novo* standard of review was applied to fact-finding.

By contrast, the U.S. Supreme Court's three-part test in *Duquesne* for overturning a rate order is directly on point with regard to allegations of confiscatory rates by a public utility. In *Duquesne*, the U.S. Supreme Court specifically found that the disallowance of costs associated with four nuclear plants was not confiscatory, in part because no argument had been made that the net effect of the rates post-disallowance resulted in harm to the financial integrity of the appellant utilities. 488 U.S. at 312-15. SWG has never alleged, at the PUCN, at District Court, or to this Court, that the net effect of the rates adopted by the PUCN in 2018 harmed its financial integrity.

In the public utility context, the constitutional facts doctrine found in *Ben Avon* is not relevant. STATE AND FEDERAL ADMINISTRATIVE LAW at § 9.1.2a ("[T]he very issue on which the *Ben Avon* and *St. Joseph* cases turned … need no longer be judicially reviewed in detail. Any method of valuation is permitted, provided that the final result of the ratemaking process is reasonable in the sense that the rates cover the utility's costs.") (citing *Hope*, 320 U.S. 591)).

SWG's Brief also cites a number of cases to suggest that the "constitutional facts doctrine" has been reaffirmed repeatedly. (Br. at 64 n.19.) The PUCN detailed at the District Court that the cases cited by SWG have nothing to do with public utility claims of confiscation of property. (20 JA 4999-5000 n.28.)

II. IN THE ABSENCE OF ANY VALID CONSTITUTIONAL CLAIMS, THERE IS NO OTHER LEGAL OR FACTUAL BASIS FOR THIS COURT TO APPLY A BURDEN-SHIFTING, REBUTTABLE PRESUMPTION OF PRUDENCE OR OTHERWISE REVERSE THE PUCN'S DECISION.

As addressed previously, the application of a rebuttable presumption of prudence is not required or mandated by the U.S. Constitution. Without a constitutional hook that would require this Court to mandate a presumption in a public utility rate case, there is nothing else requiring its application. SWG argues that it enjoys a presumption of prudence under Nevada law, without citing to any statute, regulation, or case that says so. SWG resorts to using synonyms and similar language in an effort to find a presumption where one does not exist. The presumption of prudence described by SWG would allow a regulated public utility to escape its fundamental obligation to justify the costs that it passes along to its captive ratepayers.

If this Court finds that utilities in Nevada are entitled to a presumption of prudence in rate cases, the decision would render several statutes and PUCN regulations meaningless. In particular, applying the presumption of prudence to all utilities as SWG argues, not just natural gas utilities, will require the Nevada Legislature and the PUCN to revisit important statutes and rules that directly affect nearly all Nevada residents, businesses, and visitors. Such an interpretation of the law would represent a drastic departure from Nevada's existing regulatory framework, which protects customers of utilities by requiring an affirmative

demonstration that significant project costs were prudently incurred before the costs can be recovered through rates.

Finally, SWG's arguments regarding the existence of a presumption of prudence are not only wrong—they're irrelevant. The existence of a presumption of prudence was not determinative in this case.

A. The PUCN did not base its decision on the existence or non-existence of a presumption of prudence.

SWG incorrectly argues that if the PUCN had "properly applied the presumption of prudence, it would have approved the work orders and pension expenses." (Br. at 59.) However, the PUCN's finding that SWG does not enjoy a presumption of prudence[18] did not affect the PUCN's decisions on the costs at issue, as none of those decisions turn on the existence or nonexistence of a presumption of prudence. Rather, the PUCN weighed the evidence in the record, took into account the lack of evidence presented by SWG, and issued a decision that resulted in just and reasonable rates charged for SWG's service.

Regarding the CWOs, the Modified Order explains that the decision to disallow 100 percent of the costs associated with them was separate from the PUCN's finding that SWG does not enjoy a rebuttable presumption of prudence. (5 JA 1130-31.) The decision to reject cost recovery for the CWOs was based on

[18] 5 JA 1130-31.

the underlying record wherein, upon questions being raised regarding the prudence of the CWOs, SWG did not meet its burden of proof as set forth in NAC 703.2231. (*Id.* at 1130-34.) The agency's conclusions of law that are closely related to the agency's view of the facts are entitled to dereference and should not be disturbed so long as they are supported by substantial evidence. *Clements v. Airport Authority of Washoe County*, 111 Nev. 717, 722, 896 P.2d 458, 461 (1995).

Ultimately, the PUCN determined that there was no standard, "presumed, rebuttable or otherwise," that would have cured SWG's failure to provide any evidence as to the prudence of the CWOs. (5 JA at 1130-31.) The PUCN found that even if a presumption applied, such a presumption was clearly rebutted by evidence of SWG's management exercising poor judgment with regard to specific costs included in the CWOs and evidence raising questions as to whether SWG prudently explored alternatives to its decisions to incur the costs associated with the CWOs. For example, SWG was unable to identify potential alternatives to the software or the vendors used, and SWG was unable to explain how the CWOs compared to other options in terms of price and risk. SWG was also unable to explain the need for accelerating timelines and incurring costs of overtime pay. (*Id*. at 1245-48.)

As described in more detail *infra*, the PUCN's decisions regarding pension expenses did not turn on the presumption of prudence. The PUCN was free to

choose between ratemaking methodologies – normalization versus a pension tracker – to address SWG's volatile pension expenses. As to the rejection of SWG's proposed lower discount rate, the PUCN found that SWG failed to provide evidence in support of its proposed change, even after an opportunity was provided at hearing to present such evidence. (*Id.* at 1071.) The PUCN based none of its decision-making on an existence or nonexistence of a presumption of prudence. Thus, this Court need not even address the presumption of prudence in this appeal.

B. SWG is not entitled to a rebuttable presumption of prudence in rate cases.

The PUCN has never applied a burden-shifting rebuttable presumption of prudence in a SWG general rate case. SWG argues that the PUCN has always applied such a presumption, but it is unclear what SWG relies upon to make such a sweeping statement. The PUCN did apply a presumption of prudence to other utilities in the three cases cited by SWG – in 1986, 1988, and 2009 – but as the PUCN explained in its Order on Reconsideration, those cases should not be relied upon for numerous reasons outlined below. Moreover, when SWG argued in its 2012 rate case that it enjoys a presumption of prudence, the PUCN gave no credence to SWG's arguments and, instead, clearly stated that examining prudence is the one step in determining whether a utility's proposed rates are just and reasonable. *Re Southwest Gas Corp.*, 2012 WL 7170426, at ¶¶ 25, 45. Thus, past PUCN decisions do not entitle SWG to a burden-shifting presumption.

SWG's reliance on case law is also misplaced. The cases cited by SWG provide that the PUCN cannot substitute its judgment for utility management in the absence evidence of certain bad actions on the part of the utility, but this precedent does not translate into a burden-shifting presumption that would completely excuse a monopoly utility from meeting it burden of proof.

Finally, there is no basis for SWG's assertion that a parade of horribles will follow from not applying a rebuttable presumption of prudence. Rather, application of a rebuttable presumption of prudence would up-end existing law that applies more broadly and would affect how rate cases are litigated for other public utilities. Moreover, given unique constraints in Nevada with a statutorily-mandated, non-waivable 210-day clock for general rate cases, a rebuttable presumption of prudence would provide SWG with unlimited opportunities to leverage its position as the information gatekeeper to ensure it is always the winner in the burden-shifting tug-of-war.

1. The PUCN has not applied a presumption of prudence in over a decade, and in SWG's most recent rate case prior to the instant case, the PUCN explained that SWG would have to demonstrate prudence as a step in proving its rates were just and reasonable.

SWG opens its brief by falsely stating that "the Commission has always applied a rebuttable presumption that a utility has exercised prudent judgement …" (Br. 2.) SWG does not provide a citation to support this statement because no such support exists. The truth is that during the underlying proceedings at the PUCN

and before the District Court, SWG could cite to just ***three instances*** where the PUCN applied a presumption of prudence in the past.[19]

Even assuming, *arguendo*, that the Commission had more broadly applied a rebuttable presumption, administrative agencies in Nevada are not bound by *stare decisis*.[20] There is no binding effect of a prior PUCN decision on future cases. In its Order on Reconsideration and Modified Order, the PUCN distinguished the instant case from the cases cited by SWG and explained why those cases were irrelevant, in error, or superseded. (5 JA 1234-36.). *See also Modesto Irr. Dist. v. Gutierrez*, 619 F.3d 1024, 1034 (9th Circ. 2010) ("So long as the agency 'fully explain[s] how its new construction is permissible …,' a previous position is 'no obstacle' to adoption of new course.").

For example, the PUCN found that *In Re Nevada Power Co.*, which was decided in 1986 and later relied upon by this Court in *Nev. Power*, 122 Nev. at 834-35, 138 P.3d at 495-96, concerned deferred energy accounting proceedings

---

[19] 7 JA 1603-04 (citing *In Re Nevada Power Co.*, 1986 WL 1301282, 74 P.U.R.4th 703 (Nev. PSC 1986); *In Re Sierra Pacific Power Co.*, 1988 WL 391152, 96 P.U.R.4th 1 (Nev. PSC 1988); *Application of Nevada Power Co.*, 2009 WL 1893687 (Nev. PUC 2009)).

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

and preceded AB 7. AB 7 was enacted in 2007 in response to the *Nev. Power* case to clarify that a presumption of prudence does not apply to expenditures that utilities attempt to recover through deferred energy accounting adjustments. AB 7, in nullifying *Nev. Power*, therefore also supersedes any PUCN decision finding a presumption of prudence in deferred energy proceedings. (5 JA 1235.)

To distinguish the 1988 *In Re Sierra Pacific Power Co.* decision, a general rate case that also preceded AB 7, the PUCN leaned on the legislative intent in AB 7. In sponsoring AB 7, Assemblywoman (and, at the time, Speaker of the Assembly) Barbara Buckley stated, "There is no presumption favoring a public utility when it files a rate change. We do not burden Nevada consumers for mistakes. [Utilities] must demonstrate that any cost they seek to recover was reasonably and prudently incurred."[21] While AB 7 was not directly relevant, the PUCN found the intent of the legislation an important consideration. (5 JA 1235.)

The PUCN also acknowledged in its Order on Reconsideration that, in 2009, the presumption of prudence was applied in *Application of Nevada Power Co.*, a general rate case proceeding. In that Order on Reconsideration, the PUCN states that the 2009 case erroneously relied upon the *Re Nevada Power Co.*, which as

[21] Minutes of the Meeting of the Assembly Committee on Commerce and Labor, March 7, 2007 at 8, A.B. 7, 2007 Leg., 74th Sess., at https://www.leg.state.nv.us/Session/74th2007/Minutes/Assembly/CMC/Final/454.pdf. 5 JA 1229-30.

noted above, had already been superseded by AB 7 in 2007.[22] (*Id.* at 1235-36.)

SWG cites the Commission's 2009 decision in *Application of Nevada Power Co.* for the proposition that the PUCN "remained obligated to apply the rebuttable presumption in general rate cases" even after AB 7 was passed. (Br. at 57.) However, the PUCN clearly distinguished this case in the Order on Reconsideration, finding that a prior Commission had relied upon *In Re Nevada Power Co.* in error.

In addition to falsely claiming that the PUCN has always applied a presumption of prudence, SWG ignores that it was expressly put on notice in 2012 that the PUCN would not apply a rebuttable presumption of prudence in its rate cases. *Re Southwest Gas Corp.*, 2012 WL 7170426, at ¶¶ 25, 45. SWG states that the PUCN's 2012 SWG rate case decision did not put it on notice that it would be expected to demonstrate prudence. (Br. at 57-58, n.16.) However, the PUCN addressed prudence in paragraph 45 of the 2012 SWG GRC Order, finding it had an obligation to ensure that SWG's rates were just and reasonable in accordance with NRS 704.040 and 704.120, and that there are ***several steps*** to determining whether a rate is just and reasonable. *Re Southwest Gas Corp.*, 2012 WL 7170426, at ¶ 45. "Whether a cost was prudently incurred" was one step. *Id.* The next step

[22] It should be noted that none of the PUCN's three orders that directly apply a presumption of prudence relied upon the *Ely Light* decision.

was to apply the tests set forth in NRS 704.001, which includes a balancing test for shareholder and ratepayer benefits. "All of which leads to the Commission's ultimate charge to ensure a decision results in just and reasonable rates. …. If including a cost would result in unjust and unreasonable rates[,] the cost cannot be included in rates." *Id.*

2. Ely Light and the other cases cited by SWG do not establish a presumption of prudence.

Ely Light is good law that prohibits the PUCN from substituting its judgement for that of the management of the utility in the absence of an abuse of discretion, or in the absence of a demonstration of lack of good faith, inefficiency, or improvidence.[23] *Ely Light* also explicitly requires that the amounts (or costs) in question ***be reasonable and*** actually paid when the PUCN considers whether cost recovery should be permitted. *Ely Light*, 80 Nev. at 324, 393 P.2d at 311 (emphasis added).

In other words, *Ely Light* requires that where the costs actually incurred by a utility are found to be reasonable via the evidence considered, then without

[23] *Ely Light* holds:

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

Ely Light & Power Co., 80 Nev. at 324, 393 P.2d at 311.

contrary evidence of an abuse of discretion, a showing of a lack of good faith, inefficiency or improvidence, the PUCN should not substitute its judgment for that of management of the utility. Also, 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. (*See* 7 JA 1573.)

This Court has found that the PUCN's decision must be based on substantial evidence. *Nev. Power*, 122 Nev. at 824, 138 P.3d at 488, 495. "Substantial evidence" is defined by this Court as being "that which a 'reasonable mind might accept as adequate to support a conclusion.'" *Id.*, 122 Nev. at 834, 138 P.3d at 495 (citation omitted). *Ely Light* stands for the proposition that the PUCN must base its decision on substantial evidence. In other words, when the PUCN carries out its duty to weigh the evidence before it, the PUCN should not assume that it knows better than management unless there is countervailing, substantial evidence in the record to indicate to a reasonable person that the management's judgment should not be trusted.

SWG at pages 31 to 33 of its Brief tries some mental gymnastics to read into *Ely Light* the rebuttable presumption of prudence. Specifically, SWG argues that the *Ely Light* decision uses "language and cit[es] cases long understood to encapsulate" the rebuttable presumption of prudence. (Br. at 20 (citing *Ely Light*, 80 Nev. at 322, 393 P.2d at 310).) For example, SWG states that the "proper

exercise of judgment" terminology used in *Ely Light* is "virtually identical" to the "exercise of reasonable judgment" in Brandeis's concurrence in *Sw. Bell*, 262 U.S. at 289 n.1. (Br. at 32.) SWG goes on to state that Brandeis's concurrence is treated as the first articulation of the presumption of prudence in other cases. (*Id*.) Thus, by SWG's own arguments, we have to take at least two or three steps to get to SWG's conclusion that *Ely Light* must stand for a rebuttable presumption of prudence.

Of the nine court cases that cite *Ely Light*, only one, from the Idaho Supreme Court, applies something like a presumption of prudence.[24] None of the other court cases that cite *Ely Light* have law that stand for a presumption of prudence – probably because *Ely Light* should not be read to mean that a presumption of prudence must be applied. It is also worth noting that ***no PUCN case*** that cites *Ely Light* mentions a presumption of prudence or even hints that a rebuttable presumption of prudence exists for public utilities in Nevada.[25]

---

[24] *Boise Water Corp. v. Idaho Public Utils. Comm'n*, 97 Idaho 832, 838, 555 P.2d 163, 169 (Id. 1976). The statement that nine court cases cite to *Ely Light* refers to the fact that in Westlaw's citing references for *Ely Light*, it lists only 9 court cases.

[25] *Ely Light* is cited six total times in PUCN cases, with one of those cases being the Order on Reconsideration issued in the instant case. The statement that *Ely Light* is cited only six times by the PUCN is in reference to the "administrative decisions & guidance" category listed in Westlaw's citing references. There are eight citing references in the "administrative decisions & guidance" category, but one cite is for the California Public Utilities Commission and another cite is for the Wyoming Public Service Commission.

SWG also cites *State v. Zephyr Cove Water Co.*, 94 Nev. 634, 584 P.2d 698 (1978) and *Sw. Gas Corp. v. Pub. Serv. Comm'n*, 98 Nev. 404, 651 P.2d 95 (1982) for the argument that this Court has applied a presumption of prudence in many contexts. (Br. at 34.) *Zephyr Cove* found that the PUCN refused to allow recovery of certain items of expense, even though there is nothing in the record to support a finding that expenses were unreasonable. *Zephyr Cove*, 94 Nev. at 639 n.1, 584 P.2d at 701 n.1 (citing to *Ely Light*, 80 Nev. at 323-24). Citation to this case does not evidence continued application of a presumption of prudence after *Ely Light*. This case, much like *Ely Light*, is simply another example of application of the substantial evidence standard.

Regarding the *Sw. Gas Corp.* case, this Court recognized the prerogative of SWG's management to act quickly to ensure adequate service to priority end-users through the husbanding of 800-B gas. 98 Nev. at 407, 651 P.2d at 97. There are no facts in *Sw. Gas Corp.* that indicate inefficiency, bad faith, or improvidence on the part of SWG. *Sw. Gas Corp.* exemplifies the holding in *Ely Light* perfectly, in that without evidence of an abuse of discretion, a showing of a lack of good faith, inefficiency or improvidence, the PUCN should not substitute its judgment for that of management of the utility.

3. *If a rebuttable presumption of prudence did exist, it would not be a wholesale burden shift requiring the other parties to prove imprudence.*

To be clear, a presumption of prudence in utility rate cases does not exist in any form in Nevada. However, in jurisdictions where presumptions of prudence are applied, they are not applied in the manner proposed by SWG. The presumption of prudence described SWG requires other parties to prove imprudence to overcome the presumption. (Br. at 44, 59, 67, 70, 73.) What SWG is advocating for is not a rebuttable presumption, ***but a wholesale burden shift***.[26] SWG also argues that the presumption is "broad and not easy to refute." (Br. at 37.)

Requiring the other parties to prove imprudence and making it difficult to refute, particularly when the monopoly utility controls the information needed to do so, would be a dangerous outcome that this Court should not support. In such a scenario, the monopoly could file limited amounts of information in its application, stall during the discovery process, put up witnesses who lack knowledge of useful information, and run the 210-day clock out until the case is over. This is not an unimaginable scenario given SWG's conduct in the underlying case. As explained

[26] When this Court in *Nev. Power* found that a rebuttable presumption of prudence existed for deferred energy proceedings, the presumption was rebutted by creating serious doubt. *Nev. Power*, 122 Nev. at 835, 138 P.3d at 495-96.

in the Statement of Facts, SWG filed a skeletal spreadsheet with numbers and one-sentence explanations of the projects in its application, delayed or obfuscated in the discovery process, put up witnesses who were unprepared or had no personal knowledge of the costs at issue, and then, as its Brief before this Court indicates, points the finger at the other parties or the PUCN when imprudence is not determined to overcome its "not easily refuted" rebuttable presumption of prudence.

Furthermore, SWG continues to incorrectly assert that the PUCN cannot find that a utility's actions were imprudent unless an intervening party raises the issue, even if there is evidence in the record of such imprudence. (*See* Br. at 2, 12.) In other words, despite there being blatant evidence in the record of imprudence in the utility's actions, if an intervening party does not specifically address such imprudence in its testimony, the PUCN is powerless to address the imprudence or prevent a finding of prudence. This argument, however, eviscerates the Legislative mandates that the PUCN establish just and reasonable rates and that unjust and unreasonable rates are unlawful. *Nevada Power Co.*, 91 Nev. at 825, 544 P.2d at 434 (citing NRS 704.040 and NRS 704.120). It also conflicts with the PUCN's statutory duty and authority "[t]o provide for the safe, economic, efficient, ***prudent*** and reliable operation and service of public utilities." NRS 704.001(3) (emphasis added).

4. The Commission did not rely on AB 7 as the basis for finding that there is no presumption of prudence in utilities' general rate cases in Nevada.

SWG tries a new approach before this Court as to how the *Nev. Power* case, and its subsequent nullification by AB 7, should be interpreted. (Br. at 20-21, 35.) At the PUCN and in District Court, SWG argued that *Nev. Power* was precedent that this Commission had to follow as to whether a presumption of prudence exists in general rate proceedings. (20 JA 4979.) Given that the District Court soundly rejected that argument based on the plain language in that case,[27] in its Brief submitted to this Court, SWG finally admits that the *Nev. Power* case concerns only deferred energy accounting proceedings. However, to make this admission fit with the rest of SWG's arguments, SWG has to try on some arguments that are nonsensical, at best.

The *Nev. Power* Court found that whether a rebuttable presumption of prudence existed in Nevada was an issue of first impression. Given that SWG states that *Ely Light* was this Court's first application of a rebuttable presumption of prudence, SWG needs a reason why the presumption was treated as an issue of first impression in *Nev. Power*. So, SWG now argues that *Nev. Power* was considering a "unique" application of the presumption to deferred energy

[27] *Nev. Power*, 122 Nev. at 834-36, 138 P.3d at 495-96 ("[W]e conclude that a utility enjoys a rebuttable prudence presumption as to its incurred costs in deferred energy accounting proceedings.").

accounting proceedings. (Br. at 35.) SWG also argues that the summary nature of deferred energy accounting proceedings is why this Court did not look to its first purported application of the presumption in *Ely Light*. (Br. at 53.) The other new twist is that SWG now argues that the Legislature in enacting AB 7 "surgically overruled" *Nev. Power*, such that the common law presumption stated in *Ely Light* remains intact. (Br. at 21, 44-45.)

First, the PUCN agrees with SWG that neither *Nev. Power* nor AB 7 are directly relevant to whether a presumption of prudence exists in a general rate proceeding. However, there is no evidence to support the notion that AB 7's direct applicability to deferred energy accounting cases reflects the existence of a broader presumption of prudence that must be applied in other types of cases. Neither the legislative history nor the Legislative Counsel's digest, or the language of the bill itself, contain any acknowledgement of a presumption remaining intact for other types of utility rate cases.[28]

SWG's arguments distinguishing deferred energy accounting proceedings from general rate cases to justify different treatment for the presumption are misleading and largely inaccurate. SWG suggests that deferred energy accounting proceedings are solely about "expedited review of a limited issue" and that general

[28] *See, e.g.*, Assembly Bill 7, 2007 Leg., 74th Sess., as enrolled, at https://www.leg.state.nv.us/Session/74th2007/Bills/AB/AB7_EN.pdf.

rate cases are far more complex. (Br. at 53.) SWG's attempts to distinguish deferred energy cases at pages 45 to 53 of its Brief appear focused on the quarterly updates that SWG and other public utilities are authorized to utilize for deferred energy accounting, which provides a means for SWG's rates to adjust on a quarterly basis to more closely reflect the actual cost of natural gas.

SWG states that the whole point of deferred energy accounting is to avoid a costly and time-consuming general rate case. (Br. at 51.) The crucial piece that SWG is missing is that once a year, SWG is required to file an annual rate adjustment application ("ARA") with the PUCN pursuant to NRS 704.110(9). The ARA reviews each quarterly adjustment to the fuel charges reflected in rates, as well as the transactions and recorded costs of the gas utility reflected in the utility's quarterly filings. NRS 704.110(9)(d). The statute specifically provides that there is no presumption of prudence for the quarterly rate adjustments or for any transactions or recorded costs included in those adjustments. SWG has the burden of proving the reasonableness and prudence of its quarterly rate adjustments in the annual ARA proceedings. *Id.*

So, while SWG tries to distinguish deferred energy accounting from general rate cases by discussing their "expedited" nature that avoids a rate case, SWG's arguments miss the fact that SWG must file once a year what amounts to a full-blown rate case to prove the reasonableness and prudence of its quarterly rate

adjustments. While the rate case is called an ARA instead of a GRC (general rate case), it is still a full-blown rate proceeding. These ARA proceedings are rate cases, with all of the attenuating requirements such as consumer sessions. *See* NRS 704.110(9).

SWG attempts to argue why a presumption of prudence makes more sense in a general rate case than in a deferred energy proceeding, but the opposite is actually true. Monopoly utilities do not earn a return on investment for the fuel costs that are captured in deferred energy proceedings, but they do earn a return on their investments that flow through a general rate case. (4 JA 947.) Natural gas costs are a pass-through cost charged to customers without a mark-up. The PUCN explained that "[b]ecause the utility is not entitled to earn a profit on the purchase of natural gas, there is no incentive for the utility to imprudently inflate the costs associated with such purchases." (*Id.*) In passing AB 7, the Legislature wanted to ensure that a utility is not entitled to a presumption of prudence even with respect to proceedings involving pass-through natural gas costs.

If there were an inclination to adopt a presumption favoring utilities, it would make more sense from a public policy standpoint for the presumption to exist in proceedings that exclusively involve pass-through costs because one might reasonably presume that a utility with no financial motive to increase the pass-through costs will attempt to keep those costs low to avoid the public outcry that

could occur from increasing customers' rates. The utility's cost-benefit analysis changes, however, in a general rate case, where it seeks to recover costs on which it will earn a return. A utility's return on equity (in this case, the PUCN approved a return on equity of 9.25 percent) is applied to all approved capital costs, allowing the utility to earn more as it spends more.

5. Rate cases are manageable and costs will not increase without a rebuttable presumption of prudence.

SWG wants this Court to believe that a rebuttable presumption of prudence has to exist, else rate-setting proceedings will become far too complex, "unmanageable," and unnecessarily "lard[ed]" up. (Br. at 20, 58.) SWG also argues that "denying the presumption would have the perverse consequence of increasing the costs that we, the rate payers, bear." (Br. at 58-59.) SWG offers no evidence to support its assertions.

As noted above, SWG identifies only three times when a rebuttable presumption of prudence has been applied by the PUCN, in 1986, 1988, and 2009. In the meantime, the PUCN has litigated a multitude of other rate cases.[29] Even without SWG's rebuttable presumption of prudence, those rate cases have all been completed pursuant to the statutorily-mandated, 210-day timeframe, with orders

[29] *See, e.g.*, NRS 704.110(3) (requiring electric and water utilities to file a rate case every three years, with certain limited exceptions).

issued and rates implemented. The cases were not unnecessarily larded up or unmanageable without the presumption.

This Court should disregard SWG's inaccurate narrative of the PUCN imposing onerous burdens and instead keep in mind the specific facts of this case and the straightforward, reasonable types of questions that SWG wants to evade. There is no practical problem with the utility being expected to provide supporting evidence for the projects and other costs it is seeking to recover in rates. Moreover, it is not impractical for the utility to provide evidentiary support for a particular project or cost once an intervening party challenges its prudence.

With regard to SWG's attempt at framing the presumption of prudence as a consumer protection measure, the reality is that any increased expenses associated with the utility having to actually prove a case are relatively insignificant compared to the dollars at stake in large capital investment projects for utilities. Removing regulatory oversight of costs is *not* good for customers.

6. The lighter-touch regulation that applies to natural gas utilities would make a rebuttable presumption of prudence more problematic for ratepayers.

Given its unique regulatory paradigm, SWG would benefit from a rebuttable presumption of prudence more than any other public utility in Nevada. Natural gas utilities like SWG are not required to file a general rate case at specific intervals. *See* NRS 704.110(3) (noting that because none of the provisions of subsections

(3)(a) through (d) apply to natural gas utilities, such utilities may file a general rate application at their own discretion). Electric utilities and certain water utilities, on the other hand, must file rate cases every three years, with some limited exceptions. NRS 704.110(3)(a)-(d). Natural gas utilities also do not make resource planning filings every three years, unlike electric and water utilities. NRS 704.661(1) (noting resource plan filing requirements for water utilities); NRS 704.741(1) (noting resource plan filing requirements for electric utilities); NRS 704.991 (requiring that natural gas utilities only file an informational report for resource planning); NAC 704.961 (requiring natural gas utilities to file an informational report only).

So, under SWG's theory, it can file a general rate case when it chooses, having spent as much money as it wanted to in the intervening years between rate cases, and having not received any determination that its investments were prudent from the PUCN in a resource plan, and still be awarded with a presumption of prudence for its investments. Depending on the number of years between SWG's general rate cases, the total costs presumed to be prudent under its interpretation of the law could be significant. More importantly, the longer that SWG waits between rate cases – at its own discretion – the more stale the information becomes. SWG expects that for the rebuttable presumption to be overcome, the other interveners in the case must prove imprudence. The staler the information

becomes, the more progressively difficult it will be for interveners to prove imprudence to overcome the presumption.

7. Applying a rebuttable presumption of prudence contradicts existing law.

By claiming that the rebuttable presumption of prudence is rooted in the Constitution, SWG is, in effect, arguing that a rebuttable presumption of prudence should apply for all public utilities. Finding that all public utilities enjoy a presumption of prudence would render several existing statutes and regulations meaningless. Specifically, the Legislature has created a resource planning construct for electric and water utilities, wherein a PUCN finding accepting a utility's plan in an integrated resource planning ("IRP") case deems any facility investment contained in that plan as "prudent." NRS 704.110(13), NRS 704.661(6). Resource plans are filed for specific projects before those projects' costs are recovered in rates that are set in a general rate case.

If a presumption of prudence applied to all utilities, there would be no need to determine prudence in a resource plan in accordance with existing law. Also, if all utilities are entitled to a rebuttable presumption of prudence, then all utility investments would be deemed prudent automatically for purposes of a general rate case, even without an IRP finding. In other words, a finding by this Court that a rebuttable presumption of prudence exists for all utilities would render the existing IRP statutes and regulations meaningless.

This Court has found that "[w]here the intention of the Legislature is clear, it is the duty of the court to give effect to such intention and construe the language of the statute to effectuate, rather than nullify, its manifest purpose." *Woofter v. O'Donnell*, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975) (citations omitted). The Legislature's intention in the above-referenced IRP statutes, which is carried out via the specified Commission regulations, is clear that only those utility facilities, programs and projects accepted by the Commission in an IRP are deemed to be a prudent investment. *See, e.g.*, NRS 704.110(13), NRS 704.661(6), NAC 704.9494(3)-(6), NAC 704.5682(3). If a rebuttable presumption of prudence exists for all utilities, , the Court would not be effectuating the intent of the IRP statutes and regulations that assume prudence is not an automatic giveaway in a general rate proceeding but must be granted via resource planning. Existing Nevada law requires public utilities to demonstrate and ***prove*** the prudence of their facilities, programs and projects; electric and water utilities do so as part of resource planning, while gas utilities are required to do so in a general rate case.

This Court should also consider whether a presumption of prudence, if applied in Nevada, is inconsistent with the burden of proof set forth in NAC 703.2231. This regulation requires SWG to file an application that includes material "of such composition, scope and format that it would serve as its complete case if the matter is set for hearing." NAC 703.2231. This regulation, which has

the force of law,[30] requires that SWG meet its burden of proof in its application to avoid delays at hearing. In interpreting its own regulation, the PUCN found that SWG "cannot establish the prudence of expenditures through the discovery process." (5 JA 1132.). The PUCN found that "as a matter of course, [it] simply does not have access to all of the data that is produced in response to discovery" unless the discovery responses are admitted into evidence via written or oral testimony. (*Id.* at 1132-33.) If NAC 703.2231 cannot be read to permit SWG to meet its burden of proof later after an intervener proves imprudence or raises serious doubt, then a presumption of prudence would be entirely inconsistent with the existing burden of proof under NAC 703.2231.

III. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE PUCN'S DECISION ON EACH ISSUE ON APPEAL.

A. The 9.25-percent ROE is supported by substantial evidence.

NRS 704.001(4) provides that the PUCN must "balance the interests of customers and shareholders of public utilities by providing public utilities with the opportunity to earn a fair return on their investments while providing customers with just and reasonable rates[.]" Two seminal U.S. Supreme Court cases, *Bluefield Waterworks & Improvement Co. v. West Va. Pub. Serv. Comm'n*, 262 U.S. 679 (1923) and *Hope*, 320 U.S. 591, inform the PUCN's decisions regarding

[30] NRS 233B.040(1)(a).

ROE. (20 JA 4833-34.) The Nevada Supreme Court has found that "[t]he crux to every rate case involving the cost of common equity is just how one goes about conforming to the *Bluefield* and *Hope* cases." *Nevada Power Co.*, 91 Nev. at 825, 544 P.2d at 434. Consistent with this direction from the Courts, the PUCN relied heavily on both the *Hope* and *Bluefield* decisions to determine the appropriate return on equity for SWG. (4 JA 944-45; 5 JA 1003-04, 1009.)

In this appeal, SWG argues that the PUCN arbitrarily selected an ROE that was lower than anyone requested, and that the PUCN provided no specific evidence that SWG's ROE of 9.25 percent would be commensurate with returns of other enterprises with corresponding risks. (Br. at 13-14, 59.) These statements ignore the evidence.

The 9.25-percent ROE set by the PUCN was within the range of reasonableness set by the PUCN and within the zone of reasonableness recommended by two parties in the case. (6 JA 1251-52.)[31] The PUCN heard evidence that indicated that any number within that range was reasonable and that SWG's risk profile supported a return on equity in the lower end of the zone. (*Id.*

[31] *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) ("[T]his Court has often acknowledged that the Commission is not required by the Constitution or the Natural Gas Act to adopt as just and reasonable any particular rate level; rather, courts are without authority to set aside any rate selected by the Commission which is within a 'zone of reasonableness'" (quoting *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)).

at 1251; 5 JA 1009.)

As to whether the ROE is commensurate with returns of other enterprises of corresponding risk, the PUCN evaluated model analyses, among other things. In this case, all of the parties used SWG's proxy group to apply the models. (18 JA 4271; 5 JA 1004.) The modeling performed by the parties and weighed by the PUCN in its decision-making evaluates whether the ROE estimates are commensurate with returns of other enterprises of corresponding risk. (*See* 18 JA 4271-85.) The PUCN made findings as to why SWG was not riskier than its peers, including that SWG had more credit-supportive or risk-mitigating mechanisms, like decoupling, approved by the PUCN. (5 JA 1008-09.)

SWG stated that it had more debt than its proxy group (Br. at 14.), but the evidence it cited did not support its arguments. The "undisputed evidence" that SWG pointed to in making this claim was a comparison of its own equity-to-debt ratio in its rebuttal testimony;[32] the evidence has nothing to do with the proxy group. (18 JA 4454-55.) In fact, the evidence demonstrates less risk in that SWG's debt for its Southern Nevada jurisdiction has declined significantly (by 70

[32] A utility's rebuttal testimony should never amount to "undisputed" evidence. If the utility is following the standards for rebuttal as set forth in the PUCN regulations, its rebuttal testimony should only be explaining, repelling, counteracting or disproving facts offered in evidence by the other parties. NAC 703.097. Thus, by its very nature, rebuttal evidence cannot be "undisputed" evidence.

basis points, or 0.7 percent) when comparing the 2012 and 2018 rate cases. (*Id.*) SWG also cites BCP's testimony to argue it has "slightly higher" risks in terms of debt levels, but as explained in the Statement of Facts, the PUCN rejected BCP's risk assessments based on countervailing evidence of SWG's credit rating and credit-supportive environment. (17 JA 4198; 5 JA 1008.)

Similarly, for reasons supported *supra* in the Statement of Facts, SWG's reliance on a 9.68-percent broader industry-average ROE and 10.23-percent average for the proxy group is flawed. An industry-average ROE does not consider the financial modeling that compares SWG to its proxy group. (7 JA 1591.) "The attempt by SWG to utilize one single data point to overcome the [PUCN's] careful deliberation in arriving at a just and reasonable return on equity by considering various financial models, macroeconomic conditions and SWG's risks as compared to its proxy groups" cannot demonstrate that the PUCN's Modified Order is invalid. (*Id*.)

Additionally, the 10.23-percent figure, at best, represents an average ROE for all natural gas utilities across the country since 1980. An average ROE over the last 40 years is meaningless and cannot be relied upon for rate-setting because it "does not reflect the current economic conditions, including historically low risk-free rates." (*Id.*)

Citing its rebuttal again, SWG also argues that credit rating agencies rank SWG at a higher risk than all but one of the proxy group utilities. (Br. at 14.) To reach this conclusion, SWG's witness had to convert each letter rating from credit rating agencies into a numerical scale and take the average. (19 JA 4522-23.) While such a mathematical exercise results in some comparison, the results of such a comparison could be manipulated depending upon what numerical values are used to convert letter ratings to numbers.

The PUCN was presented with differences of opinions from various experts on this issue, but it concluded that the evidence did not support that SWG was riskier than its peer utilities in the proxy group. (5 JA 1009.) The PUCN's determinations regarding SWG's attractiveness to the investment community, including SWG's relative riskiness compared to its peers, are findings of fact based on an evaluation of the weight of the evidence; they are exactly the type of findings for which this Court must not substitute its judgment for that of the PUCN pursuant to NRS 703.373(11).

SWG suggests in its Brief that the PUCN should have chosen a rate of return closer to the middle of the percentages suggested by the parties, given that the PUCN did not find that SWG faced less risk than its proxy group. (Br. at 78.) The problem with this argument is that the PUCN did find instances where SWG's

risks were lower than its peers. For example, only one other of the 18 comparable gas utilities had full decoupling like SWG. (5 JA 1008-09.)

In total, SWG's arguments in its appeal do not put forth legitimate evidence to support a finding that the PUCN has run afoul of *Bluefield* or *Hope*. Based on the evidence, the 9.25-percent return on equity approved by the PUCN is "reasonably sufficient to assure confidence in the financial soundness of the utility" and is "commensurate with the returns on investments in other enterprises having corresponding risks." *Bluefield*, 262 U.S. at 692-93; *Hope*, 320 U.S. at 603.

While SWG may disagree with the PUCN's decision to approve 9.25 percent for its ROE, the PUCN's decision was based on substantial evidence in the record. "There may be cases where two conflicting views may each be sustained by substantial evidence." *Robertson Transp. Co. v. Pub. Serv. Comm'n,* 39 Wis.2d 653, 159 N.W.2d 636, 638 (Wis. 1968.) The Modified Order does not need to disprove that SWG's requested ROE may also be satisfactory in terms of the evidence taken and the standards set forth in the *Hope* and *Bluefield* cases. Indeed, "[s]ubstantial evidence is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *Olsen v. Nat'l Transp. Safety Bd.*, 14 F.3d 471, 475 (9th Cir. 1994) (*quoting Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1965)). The

PUCN weighed the evidence before it and concluded that a 9.25-percent return on equity would result in just and reasonable rates. This Court should uphold the PUCN's decision.

SWG argues that this Court, upon reversing the judgment of the District Court, should remand with instructions that the PUCN approve the 10.30-percent ROE "proven" by SWG. (Br. at 79.) This Court does not have the authority to mandate that the PUCN simply grant SWG its originally-requested ROE. Ratemaking "is primarily a legislative function." *Nevada Power Co.*, 91 Nev. at 827, 544 P.2d at 436. A Court order that prescribes the ROE would amount to a legislative function not constitutionally entrusted to the Courts. *Id.* Thus, this Court cannot instruct the PUCN to award SWG its requested ROE.

B. Substantial evidence supports the pension expense amounts included in rates.

SWG challenges the normalization of volatile pension expenses and the PUCN's rejection of its proposed discount rate.

The PUCN determined that the normalization of pension expenses is the best means to arrive at just and reasonable rates. (5 JA 1073-74.) As detailed *supra* in the Statement of Facts, SWG had proposed a pension tracker to address volatility in its pension expenses, but Staff and BCP expressed concerns with the tracker. Staff proposed as an alternative to the tracker that pension expense be normalized (averaged) over a five-year period.

SWG claims that the three-year period was arbitrary, and that, in the absence of a showing of imprudence, the presumption of prudence applies and SWG's pension expenses should have been approved as requested. (Br. at 73-74.) While Staff had proposed a five-year normalization period and SWG had proposed a tracker, the PUCN is not bound in its decision to the positions presented by the parties, so long as there is substantial evidence to support its decision. *See Heidtman v. Nevada Indus. Comm'n*, 78 Nev. 25, 368 P.2d 763 (1962). The PUCN may use its own expertise and judgment to make findings that are supported by the record. *See State, Emp. Security Dept. v. Hilton Hotels Corp.*, 102 Nev. 606, 608 n.1, 729 P.2d 497, 498 n.1 (1986). The PUCN found that the three-year period of 2016 through 2018, with 2018 corrected to reflect the PUCN-approved discount rate, was more reflective of historical figures for purposes of determining pension expense. (5 JA 1074.)

The choice between a pension tracker and normalization (averaging) to address volatile pension expenses is not relevant to the existence or non-existence of a presumption of prudence or whether the PUCN should have deferred to the management decisions of the utility. The PUCN, in weighing the evidence before it, is free to use the ratemaking method that will result in just and reasonable rates. The U.S. Supreme Court has found that there is no single ratemaking theory

mandated by the Constitution,[33] and normalization is used frequently in ratemaking as a means to develop just and reasonable rates. (*Id.* at 1073-74; 16 JA 3885, 3993.)

As to the rejection of SWG's proposed lower discount rate, the PUCN found that SWG failed to provide evidence in support of its proposed change, even after an opportunity was provided at hearing to present such evidence. (5 JA 1071.) Rather than adopting SWG's unsupported reduction to the existing discount rate, the PUCN relied on evidence of historical discount rates in finding that the substantial evidence on the record supported a rejection of SWG's proposal. (*Id*.)

SWG would like for this Court to find that the presumption of prudence saves its proposed discount rate. In so doing, SWG incorrectly asserts that a presumption of prudence requires the PUCN to presume that evidence exists to support SWG's proposals, even when SWG refuses, or is unable, to provide supporting evidence when asked to do so. But SWG still has a burden of proof that it must meet independent of any presumption. NAC 703.2231. "A change in the presumption of prudence does not change the burden of proof set out in [the Commission's] governing statutes. The presumption of prudence does not address the burden of proof at all." *Office of Pub. Counsel v*, 409 S.W.3d at 379. SWG never presented any evidence to demonstrate why its lower discount rate was

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

prudent or reasonable. It would be unreasonable to apply a burden-shifting, rebuttable presumption of prudence to SWG's inability to present any evidence as to why it proposed that specific discount rate (other than to say, "The actuary gave us the number").

C. The record provides ample support for a 100-percent disallowance of the Challenged Work Orders.

SWG, in its appeal, raises a host of irrelevant or unpersuasive arguments to try to convince this Court that the PUCN decision to disallow all of the CWO costs was in error and should be reversed. (Br. at 5-11, 67-71.) None of the issues raised by SWG, however, overcomes the utility's failure to present substantial evidence, to make available a witness capable of meaningfully speaking to the execution of the CWOs, or the systemic lack of accountability, oversight, and prudent management exhibited by the utility.

The PUCN's regulations memorialize the burden of proof in rate cases. NAC 703.2231 provides:

> An applicant must be prepared to go forward at a hearing on the data which have been submitted and to ***sustain the burden of proof*** of establishing that its proposed changes are just and reasonable and not unduly discriminatory or preferential. To avoid delay by the Commission in its consideration of the proposed changes, ***the applicant must ensure that the material it relied upon is of such composition, scope and format that it would serve as its complete case if the matter is set for hearing***.

(emphasis added). NRS 233B.040(1)(a) provides that reasonable regulations that are appropriately adopted by an agency "have the force of law". The PUCN found

in its Modified Order that SWG was never able to sustain its burden of proof in accordance with NAC 703.2231. (5 JA 1130-31.)

The PUCN's Modified Order walks through each phase of the case and explains why SWG never met its burden of proof. Paragraph 623 discusses SWG's initial application and testimony, paragraphs 624 and 625 discuss the discovery portion of the case along with intervener (Staff) testimony, and paragraph 626 concerns the rebuttal testimony filed by SWG. (*Id.* at 1131-34.) These paragraphs indicate that SWG could not provide witnesses that were involved in the execution of the CWOs to answer questions from parties or the Commission; SWG included items of expense in the CWOs that demonstrated a complete lack of oversight; SWG attempted to shift its burden to other parties and tried to establish the prudence of expenditures in discovery, which does not comport with the requirements of NAC 703.2231; and SWG failed to provide adequate documentary and decision-maker support for the costs associated with the CWOs. (*Id.*) While SWG argues that the PUCN ignored evidence proffered by the utility that substantiated its expenses (Br. at 69), the Modified Order details the evidence considered by the PUCN and why the information presented by SWG was insufficient to meet its burden of proof. The PUCN decision to disallow all of the costs associated with the CWOs aligns with this Court's precedent that looks to

the substantial evidence in the record, regardless of whether any presumption is appropriately applied or not. *Nev. Power*, 122 Nev. at 824, 138 P.3d at 488.

Even if a presumption existed, SWG would still have to produce evidence. In states where utility commissions utilize a presumption, they have stated that "a public utility should do more than present a list of transactions and costs and summarily assert all costs were prudently incurred."[34] The utility still bears responsibility for adequately supporting the costs included in its application with evidentiary support that is "commonly relied upon by reasonable and prudent persons in the conduct of their affairs" that would demonstrate the reasonableness of such expenditures. *See* NRS 233B.123, NAC 703.2231.

Moreover, the claims by SWG that the PUCN's decision was made without any evidence that there was an abuse of discretion, lack of good faith, inefficiency, or improvidence are false. (*See* Br. at 2, 59, 67.) As explained *supra* in the Statement of Facts, the record indicates numerous items of expense – massages, gratuitous employee perks, and expensive consultant dinners – that SWG inappropriately included in its application and attempted to recover through rates

[34] *In re: Petition of Mississippi Power Co. for Finding of Prudence in Connection with the Kemper County Integrated Gasification Combined Cycle Generating Facility*, Order, 2013 WL 6044209, at *2-*3 (2013); *see also Coalition of Cities for Affordable Util. Rates v. Pub. Util. Comm'n of Texas*, 798 S.W.2d 560 (Tex. 1990).

charged to its customers. (*See also* 13 JA 3230-31, 3236-37, 3239-40, 3242, 3245-46, 3248.)

SWG states that the PUCN, before disallowing the CWOs, was required to engage in a transaction-by-transaction analysis. (Br. at 68 (citing *Nev. Power*, 122 Nev. at 837).) SWG's reliance on the *Nev. Power* case for this statement is misplaced. In that case, this Court found that the PUCN had to analyze each practice or transaction when deciding whether an allowance or disallowance is warranted; that finding was based on an interpretation of NRS 704.110(10), which applies only to deferred energy accounting proceedings and not to general rate proceedings. *Nev. Power*, 122 Nev. at 837, 138 P.3d at 497. Moreover, the Modified Order did analyze each of the CWOs separately. (5 JA 1104-34.)

Another theme of SWG's argument is that no party said that the projects included in the CWOs were not needed. (Br. at 7). The PUCN does not dispute this and was not trying to substitute its judgment for utility management about whether the projects were needed or not. But the inquiry cannot end there. Even if a project is needed, the PUCN still must evaluate the evidence that a utility provides to support a capital project, including whether the choice made by the utility was the least-cost option or the best available alternative project, or that the project expenditures were reasonable under the circumstances. (8 JA 1912; 10 JA 2484-85.) The PUCN found that SWG failed to provide such evidence.

Additionally, SWG claims that nobody explained before the hearing why the information SWG had provided was insufficient. (Br. at 5.) This is another exaggerated or outright false claim. Staff's testimony explained in detail why it is important that the witness sponsoring capital project testimony be involved in that project, such that the witness can provide adequate documentary and decision-maker support. (13 JA 3227-28.) The Staff witness also described some of the extreme difficulties he encountered in trying to conduct an on-site audit of SWG's capital projects, including getting access to certain types of information. (*Id.* at 3228-33.) At the hearing, while being cross-examined by SWG's attorney, the Staff witness also described his efforts in communicating with the utility during the discovery process to answer his questions about justifying from a business perspective why SWG undertook a project, which includes answering questions like why SWG developed the timeline it did for that project, why the specific vendor was chosen, what the alternatives were to the project, etc. (*See, e.g.,* 10 JA 2476 (noting a conversation with the business director); *id.*at 2481-82 (detailing why the information SWG did provide was insufficient).)

SWG's claims of unfair surprise as to the evidence it had to produce or the volume of information in this proceeding must be entirely discounted. (Br. at 5.) SWG was specifically ordered in its 2012 rate case "to produce a witnesses capable of advocating that the capital projects listed in [Master Data Request]-106 are just

and reasonable." *Application of Southwest Gas Corp.,* Docket Nos. 12-02019, 12-04005, Modified Order, 2012 WL 6901332, at ¶ 382 (Dec. 14, 2012). The PUCN stated that failure to produce such witnesses "subjects SWG to a potential violation of NAC 703.2231." *Id.* All of the CWOs were projects that were listed in Master Data Request 106. (21 JA 5013-18.) This directive in the 2012 order was the result of Staff having many of the same problems in 2012 that occurred in 2018. *Application of Southwest Gas Corp.,* 2012 WL 6901332, at ¶ 376 (noting that "[a]lthough SWG did provide contracts, sample work orders, change orders, requests for proposals, and bids for specific projects … it was only able to provide vague justification concerning the need for such projects" and "was unable to provide any business cases for the specific projects").

SWG seemingly faults Staff for not taking certain actions on its own as part of its discovery audit process. For example, SWG states that Staff did not review similar projects completed by other utilities; did not speak to SWG about its chosen vendors; and did not offer alternative timelines for the projects even though SWG never justified why it incurred increased costs (overtime) to expedite projects. (Br. 9-10.) At hearing, SWG went even further, including asking Staff why it did not conduct its own RFP. (10 JA 2487-88.) Surely, if Staff had undertaken such actions, Staff could have been faulted for trying to substitute its judgment for that of management.

As to SWG's questioning of whether a Staff witness had the sufficient expertise to evaluate the projects (Br. at 10), the key is not whether Staff has expertise regarding software projects. Staff's witness had sufficient expertise to audit the information that SWG presented to the PUCN to support the costs that the utility was seeking to recover through rates. As the Staff witness testified at hearing, he had over nine years of experience reviewing multi-million-dollar utility projects. (9 JA 2009-10.).

In conclusion, the PUCN found that SWG did not offer sufficient evidence to sustain its burden of proof for any of the costs associated with CWOs, thus disallowing 100 percent of the costs. (5 JA 1130.) The PUCN decision to disallow 100 percent of CWO costs was substantiated by the underlying record, "which preponderantly reveals a systemic lack of accountability, oversight and prudent management." (*Id.* at 1130-31.)

CONCLUSION

Based on the foregoing discussion, the PUCN respectfully requests that this Court affirm the District Court's Order Denying Petition for Judicial Review.

Dated this 1st day of March, 2021.

THE PUBLIC UTILITIES COMMISSION OF NEVADA

By: */s/ DEBREA M. TERWILLIGER, ESQ.*_

GARRETT WEIR, ESQ.
Nevada Bar No. 12300
DEBREA M. TERWILLIGER
Nevada Bar No. 10452
1150 East William Street
Carson City, NV 89701
Tel: 775-684-6132
Fax: 775-684-6186
dterwilliger@puc.nv.gov
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

1. I certify that the PUCN's Answering Brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared in Microsoft Word 2013 with a proportionally spaced typeface in 14-point, double-spaced, Times New Roman font.

2. I certify that the Answering Brief exceeds the type-volume limitations of NRAP 32(a)(7), because it contains 19,224 words, not including the portions of the Answering Brief that are not counted pursuant to NRAP 32(a)(7)(C).

3. I certify that I have drafted and reviewed the Answering Brief. The Answering Brief 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 comply with the applicable rules, I may be subject to sanctions.

Dated this 1st day of March, 2021.

THE PUBLIC UTILITIES COMMISSION OF NEVADA
By: */s/ DEBREA M. TERWILLIGER, ESQ.*_

GARRETT WEIR, ESQ.
Nevada Bar No. 12300
DEBREA M. TERWILLIGER
Nevada Bar No. 10452
1150 East William Street
Carson City, NV 89701
Tel: 775-684-6132
dterwilliger@puc.nv.gov
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that I am an employee of the Public Utilities Commission of Nevada and that on this date I electronically filed and served copies of the **Respondent's Answering Brief** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF filing system to the following:

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
dpolsenberg@lrrc.com
jhenriod@lrrc.com
asmith@lrrc.com
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, NV 89169
Attorneys for Southwest Gas Corporation

Aaron D. Ford, Esq.
Ernest D. Figueroa, Esq.
Whitney F. Digesti, Esq.
bcpserv@ag.nv.gov
efigueroa@ag.nv.gov
wdigesti@ag.nv.gov
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701
Attorneys for the State of Nevada, Bureau of Consumer Protection

Dated this March 1, 2021.

__/S/ *SHAYLA HOOKER*___
SHAYLA HOOKER