**IN THE SUPREME COURT OF THE STATE OF NEVADA**



**Case Number 85693**

MASS LAND ACQUISITION, LLC,
a Nevada limited liability company,

*Petitioner*,

*v.*

FIRST JUDICIAL DISTRICT COURT of the State of Nevada, in and for Storey County; THE HONORABLE JAMES E. WILSON, JR., District Judge,

*Respondents*,

SIERRA PACIFIC POWER COMPANY,
a Nevada corporation d/b/a NV Energy,

*Real Party in Interest.*

---

On Petition for Writ of Mandamus or Prohibition
to the First Judicial District Court of Nevada
(District Court Case No. 22 RP00001 1E)

---

# BRIEF OF EDISON ELECTRIC INSTITUTE AND AMERICAN GAS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF REAL PARTY IN INTEREST AND DENIAL OF THE PETITION

---

Jeremy C. Marwell
(*pro hac vice* pending)
Vinson & Elkins LLP
2200 Pennsylvania Ave., NW
Suite 500W
Washington, DC 20037
(202) 639-6507
jmarwell@velaw.com

Adam Hosmer-Henner (NSBN 12779)
McDonald Carano LLP
100 W. Liberty St., Tenth Floor
Reno, Nevada 89501
(775) 788-2000
ahosmerhenner@mcdonaldcarano.com

Attorneys for *Amici Curiae*

## NRAP 26.1 DISCLOSURE

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

American Gas Association ("AGA") is an incorporated, not-for-profit trade association that represents local energy companies that deliver natural gas in the United States. AGA has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Some AGA member companies are corporations with publicly traded stock.

Edison Electric Institute is an incorporated, not-for-profit trade association representing all U.S. investor-owned electric companies. The Edison Electric Institute has no parent corporation and no publicly held company has 10% or greater ownership in the Edison Electric Institute.

The law firms who have appeared for AGA and Edison Electric Institute in the above-captioned proceedings, or are expected to appear in this Court, are McDonald Carano LLP and Vinson & Elkins LLP.

Submitted this 9th day of February, 2024.

MCDONALD CARANO LLP

By: */s/ Adam Hosmer-Henner*

Adam Hosmer-Henner (NSBN 12779)
100 W. Liberty St., Tenth Floor
Reno, Nevada 89501

Jeremy C. Marwell
(*pro hac vice* pending)
Vinson & Elkins LLP
2200 Pennsylvania Ave., NW
Suite 500W
Washington, DC 20037
(202) 639-6507
jmarwell@velaw.com

*Attorney for* Amici Curiae

## TABLE OF CONTENTS

**Page(s)**

## TABLE OF AUTHORITIES

### Cases



### State Statutes



### Federal Cases

**Out of State Cases**



**State Cases**

Lateef, Shahzad & Marc Reyes, *Generation Transmission, and Delivery*, NV Energy (2017), https://perma.cc/C2UF-WNXS ..... 5

Lazar, Jim, *Electricity Regulation in the US: A Guide* (2d ed. 2016), https://perma.cc/A6PP-W8X5 ..... 14, 15

Merrill, Thomas W., *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986) ..... 20

NV Energy, *Greenlink Nevada*, https://perma.cc/UUU6-AEZG (last visited Jan. 8, 2024) ..... 13

Plautz, Jason, *Nevada Passes Clean Energy Bill Requiring State to Joint RTO, Accelerating $2B Transmission Project*, Utility Drive (June 2, 2021), https://perma.cc/26B7-LP2P ..... 11

*Public Utilities Commission of Nevada* [Overview Presentation] (Feb. 2017), https://perma.cc/9TTB-DYHA ..... 8

Salkin, Patricia E., et al., *Land Use Planning and Development Regulation Law* § 16:8 (3d ed. Westlaw Feb. 2023) ..... 18

Saunders, Michael, *An Overview of Nevada Public Utility Consumer Protection*, Nevada Lawyer (Apr. 2020) ..... 16

U.S. Dep't of Energy Office of Policy, *Queued Up . . . But in Need of Transmission*, https://perma.cc/6K6W-AC9F (Apr. 2022) ..... 10

U.S. Dep't of Energy, *National Transmission Needs Study: Draft for Public Comment* (Feb. 2023), https://perma.cc/3S7K-XE3K ..... 10, 11

## IDENTITY AND INTEREST OF *AMICI CURIAE*

*Amicus curiae* the American Gas Association ("AGA"), founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 77 million residential, commercial, and industrial natural gas customers in the U.S., of which 96 percent—more than 74 million customers—receive their gas from AGA members. AGA advocates for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today, natural gas meets more than one-third of the U.S.' energy needs.[1] NV Energy is a subsidiary of Berkshire Hathaway Energy, which is a member of AGA.

*Amicus curiae* Edison Electric Institute ("EEI") is the trade association that represents all U.S. investor-owned electric companies. Its members provide electricity for nearly 250 million Americans and operate in all 50 States and the District of Columbia. Real Party in Interest Sierra Pacific Power Company d/b/a NV Energy is a member of EEI that provides electricity service to more than 1.5 million Nevadans.

EEI's members are leading a clean energy transformation and are united in their commitment to deliver reliable and affordable electricity service to their

[1] For more information, please visit www.aga.org.

customers across America. EEI and its members are particularly focused on the urgent challenge of expanding the nation's electricity-transmission infrastructure, which studies indicate will need to **triple** in size by 2050 to accommodate growing demand for clean energy. For a variety of reasons (including growing demand, extreme heat, and a historical lack of connectivity between Las Vegas and northern Nevada), the need for new electricity transmission lines is particularly acute in the Silver State. NV Energy plans to spend billions of dollars on new electricity transmission lines in the coming decade, and EEI's other members will spend tens of billions more.

The particular dispute in this proceeding involves a natural gas pipeline, of direct interest to AGA and its members. EEI and its members are also interested in this case because the Court's disposition of the Petition will affect many types of linear infrastructure in Nevada for which eminent domain may be necessary, including electricity distribution and transmission lines and a broad range of other public utility infrastructure. If accepted, the unprecedented legal arguments presented by Petitioner Mass Land Acquisition, LLC ("Mass Land") would significantly increase the cost and complexity of constructing much-needed electricity infrastructure and likely prevent some infrastructure from being constructed at all, thus dramatically raising electricity rates for ordinary Nevadans and obstructing the State's ongoing clean energy transition. *Amici* and their

members therefore have a significant interest in ensuring that the Petition is denied. *Cf.* NRAP 29(d)(3). *Amici* have concurrently filed a Motion for Leave to File a Brief as *Amici Curiae*, which if granted, will provide *amici* with the authority to file this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Mass Land freely admits that, if this Court were to accept its arguments, neither NV Energy nor any other non-government-owned public utility in Nevada could **ever** use eminent domain to acquire private property. Reply 18; *accord* Petition 2, 14–15 ("Pet."). That theory is remarkable. Crediting Mass Land's argument would work a sea change in the law and establish Nevada as an extreme outlier; so far as *amici* are aware, there is no other State where public utilities are categorically prohibited from condemning easements required to build utility lines across private property.

And for good reason: Eminent domain has existed for centuries as the public's bulwark against what social scientists call the "holdout problem." Absent eminent domain, incumbent property owners would have every incentive to leverage their position to extract exorbitant rents, thereby obstructing projects that promote the public interest. The end result of Mass Land's position would be to vest every private property owner in Nevada with an individual veto power over projects necessary to protect and advance the public good, including natural gas distribution

pipelines and the ongoing buildout of the electricity-distribution lines that are critical to the success of America's transition towards clean energy.

That is not—and cannot be—the law. The Nevada Constitution makes clear that, for purposes of eminent domain, the term "government" is "defined" to include any "private entity that has the power of eminent domain." Nev. Const. art. I, § 22(8). Nevada's statutes in turn permit "the power of eminent domain [to] be exercised" by "public utilities" for "public uses," including both "[l]ines for . . . electric power" and "[p]ipelines for petroleum products" or "natural gas." NRS 37.0095(2); NRS 37.010(1)(g), (k). Because NV Energy enjoys a statutory power of eminent domain, it **is** functioning as the "government" when exercising that power for one of the valid "public uses" listed in the statute, as is the case here. This case therefore does not implicate the PISTOL amendments, which were crafted to prevent private parties—but **not** the "government"—from taking private property and conveying it to another private party. *Accord* Answer 9–10, 13–14 & n.1 ("Ans.").

This brief will focus on the dire real-world effects that would occur if this Court endorses Mass Land's interpretation of the Nevada Constitution. Although this case nominally relates to just one natural gas pipeline, Mass Land's legal theories apply with equal force to any form of linear infrastructure developed by any entity defined as a "public utility" under Nevada law—including electric transmission and distribution lines; natural gas gathering, transmission, and

distribution pipelines; water and sewer lines; telecommunications infrastructure; and more. *Amici* respectfully submit that, as this Court considers the Petition, it should bear in mind that the practical implications of its decision will extend far beyond the context of natural gas pipelines. *See infra* Section I. For example, this Court's disposition of the Petition will affect the siting of all electricity transmission lines in the State, which currently span well over 4,000 total miles and may span several multiples of that figure by the decade's end.[2]

If this Court were to credit Mass Land's sweeping theories, NV Energy and other electric utilities would be barred from using eminent domain to condemn easements necessary to build, maintain, and operate electricity transmission and distribution lines across private property. That would be a disaster for Nevada. The nation's transmission infrastructure will need to expand significantly in the coming decades in order to meet the challenges of the ongoing energy transition, and the need for new transmission infrastructure is particularly pressing in Nevada. If public utilities do not have the power to use eminent domain, the transmission buildout will be stalled. Rates will increase markedly, and much-needed projects—such as the

[2] *See* Shahzad Lateef & Marc Reyes, *Generation, Transmission, and Delivery*, NV Energy 11 (2017), https://perma.cc/C2UF-WNXS (noting that NV Energy's transmission system spanned 4,443 miles as of 2017); *see also infra* Section II (discussing upcoming buildout of transmission lines).

Greenlink Nevada transmission lines—will be delayed or even cancelled. *See infra* Section II.

Mass Land grapples with none of this. The Petition fails to appreciate that NV Energy and other public utilities are different from other for-profit companies because they operate via a regulated-utility business model, under which companies provide service to the public subject to extensive regulation by the State far beyond that applicable to other private companies. Eminent domain is critical to that business model because it is an essential tool to control costs. Without eminent domain, the costs of building and maintaining electrical and other linear public utility infrastructure would skyrocket, because landowners will have every rational incentive to "hold out" for above-market compensation. Those costs will in turn be "passed through" to ordinary Nevadans who can ill afford higher electric bills. *See infra* Section III.

## ARGUMENT

### I. This Case Will Affect Nearly All Linear Infrastructure in Nevada.

The specific dispute in this case relates to NV Energy's exercise of eminent domain to acquire a right of way for a natural gas pipeline to cross property owned by Mass Land. *See* 1 Petitioner's Appendix ("PA") 00002. But the underlying legal issues at issue here extend far beyond the context of natural gas pipelines. Mass Land's arguments would have significant implications for **all** linear infrastructure

developed by nominally private entities in Nevada, including power lines developed by NV Energy, natural gas pipelines developed by Southwest Gas, telecommunications lines developed by Nevada Bell, and water and sewer lines developed by some 17 for-profit entities across the State.

NV Energy is defined as a "public utility" under Nevada's statutes and has been recognized as a "public utility" by this Court. *See* NRS 704.020; NRS 704.3296; *Nevada Power Co. v. Eighth Jud. Dist. Ct.*, 120 Nev. 948, 952, 102 P.3d 578, 581 (2004). Nevada's statutes in turn permit "the power of eminent domain [to] be exercised" by "public utilities" for "public uses," including both "[l]ines for . . . electric power" and "[p]ipelines for petroleum products" or "natural gas." NRS 37.010(1)(g), (k). And the Nevada Constitution provides that, for purposes of eminent domain, the term "government" is defined to include the State, its political subdivisions and agencies, and "any" "private entity that has the power of eminent domain." Nev. Const. art. I, § 22(8).

Mass Land nevertheless argues that, because NV Energy is a for-profit corporation, its use of eminent domain against a private party can **never** constitute a "public use" under the Nevada Constitution. *See* Pet. 9–10. Mass Land contends that this case is controlled by a 2008 amendment to the Nevada Constitution which provides that "[p]ublic use shall not include the direct or indirect transfer of any interest in property taken in an eminent domain proceeding **from one private party**

**to another private party**." Nev. Const. art. I, § 22(1) (emphasis added). In Mass Land's view, any eminent domain action initiated by NV Energy against a private landowner violates that provision because such proceedings necessarily involve a transfer from "one private party" (the condemnee) to "another private party" (NV Energy).

If that argument were correct, its implications would reach far beyond natural gas pipelines. A large number of private companies are (1) recognized as "public utilities" under Nevada law, *see* NRS 704.020–.021, NRS 704.3296; and (2) empowered by Nevada statute to exercise the power of eminent domain for defined "public uses," NRS 37.0095(2), NRS 37.010(1). These include:

- electric utilities (*e.g.*, NV Energy), who are authorized to use eminent domain for "[l]ines for . . . electric light and electric power and sites for plants for electric light and power," NRS 37.010(1)(g);

- natural-gas utilities and petroleum-products companies (*e.g.*, Southwest Gas), who are authorized to use eminent domain for "[p]ipelines for the transportation of crude petroleum, petroleum products, or natural gas," NRS 37.010(1)(k);

- 17 investor-owned water or wastewater utilities,[3] who are authorized to use eminent domain for "pipes for supplying persons . . . with water for domestic and other uses," NRS 37.010(1)(e); and

- telephone and telecommunication companies (*e.g.*, Nevada Bell), who are authorized to use eminent domain for "[l]ines for telephone[s]" and other video or telecommunications services, NRS 37.010(1)(g), (n).

[3] *See Public Utilities Commission of Nevada* [Overview Presentation] at 7–12 (Feb. 2017), https://perma.cc/9TTB-DYHA; Ans. 11–12.

Mass Land's legal argument turns on the notion that the entities above are indistinguishable from other private parties for purposes of Nevada's eminent-domain laws, despite the fact that the legislature has defined these entities as "public utilities" and has explicitly conferred on them the power of eminent domain. By Mass Land's own admission, that argument would apply equally to each of the utilities above (and to a wide variety of other "public uses" for which private utilities may need to employ eminent domain). *See* NRS 704.020, NRS 704.3296, NRS 37.010(1) (listing additional examples of "public uses" for which regulated private entities may employ eminent domain, including railroad lines, sewage lines, development of docks or wharves, and radio or agricultural infrastructure). Indeed, Mass Land concedes that, if this Court were to credit its arguments, none of the utilities listed above could **ever** use eminent domain to acquire private property. Reply 18; *see* Pet. 2, 14–15.

## II. Crediting Mass Land's Arguments Would Significantly Complicate Nevada's Ongoing Energy Transition by Inhibiting the Development of Much-Needed Electric Transmission Lines.

America has a pressing need for new electricity-transmission infrastructure. The U.S. Department of Energy recently estimated that, in order to satisfy growing demand for renewable electricity, the country will need to **triple** its existing

transmission infrastructure by 2050.[4] To meet even moderate estimates of anticipated future demand, America will need to add 47,000 miles of new transmission lines by 2035—enough to circle the Earth twice.[5] EEI's member companies—including NV Energy—stand ready to do their part to meet that challenge. Indeed, EEI projects that its member companies will spend about $27 billion on transmission construction next year, plus tens of billions more on distribution investments.[6]

The need for new electricity transmission lines is particularly acute in Nevada. The U.S. Department of Energy recently reported that, to meet "moderate" estimates of anticipated load, up to 4,500 gigawatt miles of new transmission lines will be needed in the Mountain West region by 2035—a 90% increase relative to the 2020 system.[7] If future energy demands are closer to the high end of current estimates, transmission infrastructure in this region will need to grow even faster and more dramatically—*i.e.*, a 173% expansion by 2035 and a 221% expansion by 2040,

---

[4] U.S. Dep't of Energy Office of Policy, *Queued Up . . . But in Need of Transmission*, https://perma.cc/6K6W-AC9F (Apr. 2022).

[5] U.S. Dep't of Energy, *National Transmission Needs Study: Draft for Public Comment* 106 (Feb. 2023), https://perma.cc/3S7K-XE3K.

[6] Edison Elec. Inst., *Industry Data (Transmission and Distribution)*, https://perma.cc/4U8Y-YZKF (last visited Jan. 25, 2024).

[7] *National Transmission Needs*, *supra* note 5, at v.

relative to the 2020 baseline.[8] Risks from extreme heat and wildfires, which are expected to increase as climate change becomes more prevalent, make the need for expanded and resilient transmission lines in Nevada even more acute.[9] It therefore comes as no surprise that the Department of Energy categorizes Nevada as among the "[r]egions in greatest need of cost-effective transmission growth."[10]

In recognition of that problem, the Nevada legislature recently authorized NV Energy to build $2.5 billion worth of new transmission lines.[11] Among other things, NV Energy plans to begin construction in the coming years on the "Greenlink Nevada" project, which will involve the construction of new high-voltage transmission lines that will link the entire State, in an effort to solve problems stemming from a historical lack of connectivity between the Las Vegas region and northern Nevada.[12]

If this Court were to grant the Petition, Nevada's ability to build the transmission lines needed for the next generation would be significantly stymied—if not foreclosed outright. Given the absence of **federal** eminent domain authority

---

[8] *Id.* at 89.

[9] *See id.* at v.

[10] *Id.* at 106; *see id.* at iii.

[11] *See* Jason Plautz, *Nevada Passes Clean Energy Bill Requiring State to Joint RTO, Accelerating $2B Transmission Project*, Utility Drive (June 2, 2021), https://perma.cc/26B7-LP2P (discussing passage of Senate Bill 448).

[12] *See id.*

under relevant provisions of the Federal Power Act, 16 U.S.C. § 791 *et. seq.*, NV Energy and other public utilities in Nevada rely on **state** eminent domain authority to condemn the rights of way that are necessary to construct transmission lines. State "eminent domain authority for transmission lines has always been" a "key legal tool to facilitate the development of such lines," and it will only become more important given that "the country's transmission grid is in need of expansion to improve reliability," to "integrate domestic renewable energy into the grid," and "to allow greater energy independence and achieve federal and state climate change goals." Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. Rev. 1079, 1083, 1086 (2013). For that reason, "post-*Kelo* reforms in the states were careful not to restrict . . . eminent domain actions brought by private companies to build . . . electric transmission lines" and other electricity infrastructure, "which had been enshrined in state statutes and constitutions for decades." James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 Minn. L. Rev. 659, 661 (2019).

Nevada is one such example. As NV Energy has explained, the 2008 PISTOL amendments preserved the ability of public utilities to employ eminent domain, even while restricting the ability of other parties to take private property and transfer it to another private party. *See* Ans. 9, 13–14 & n.1. This Court has historically countenanced NV Energy's use of eminent domain. *See* Ans. 11–12 (collecting cases); *see also Clark Cnty. v. HQ Metro, LLC*, 134 Nev. 467, 468, 422 P.3d 1243,

1244 (2018) (post-PISTOL decision discussing NV Energy's use of eminent domain to condemn an easement for electrical transmission lines to cross private property).

NV Energy will continue to require eminent-domain authority to construct transmission lines in the coming years. The Greenlink Nevada project, for example, will involve two new transmission lines that together span almost 600 miles, from Las Vegas northwest towards Reno and then from Reno east to Ely.[13] Were Mass Land's theories to prevail in this case, numerous landowners along the Greenlink path would promptly file copycat suits seeking to obstruct that project. The incumbent landowners would have an immediate and strong financial incentive to file such suits, and then leverage them to secure exorbitant rents. But this type of litigation would visit enormous burdens on NV Energy and the courts; obstruct a Project desperately needed by the Nevada public; impose significant costs on utility customers, who will ultimately pay for the increased costs of infrastructure necessary to provide them service; and frustrate the will of the Nevada legislature, which approved the Project with overwhelming majorities.

[13] *See* NV Energy, *Greenlink Nevada*, https://perma.cc/UUU6-AEZG (last visited Jan. 25, 2024).

## III. Allowing Nevada Public Utilities to Use Eminent Domain Is Necessary to Ensure Reliable Service and Control Costs for the Public.

### A. Eminent Domain Is Critical to the Regulated Utility Business Model.

Much of Mass Land's Petition rests on the notion that NV Energy is a "for-profit company" that is purportedly indistinguishable from other "private" actors for purposes of Nevada eminent-domain law. *See* Pet. 1, 9–10; Reply 1, 14. That is not accurate. Mass Land's arguments evince a misunderstanding of the regulated utility model and fail to appreciate the ways in which a regulated utility's exercise of eminent domain in service of the public interest is different in kind from so-called "private-to-private" transfers.

EEI is the trade association for all of the nation's investor-owned electric companies. Those businesses operate as regulated utilities, in the context of what is known as the "regulatory compact"—a hornbook utility law concept that describes the relationship between government regulators, electric (and other) utilities, and the customers they serve. Under that compact, state regulators (typically acting through a public service commission such as the Public Utilities Commission of Nevada) accommodate the interests of utilities and their customers by regulating rates and requiring electric utilities to serve all customers in a particular, exclusive service area. *See* Jim Lazar, *Electricity Regulation in the US: A Guide* 6 (2d ed. 2016), https://perma.cc/A6PP-W8X5. Electric utilities are granted a monopoly franchise in

a service area and assured the ability to recover prudently incurred costs plus a reasonable rate of return on invested capital, in exchange for the requirement that rates charged to customers be subject to government review and approval. *Id.* at 47; *see Smyth v. Ames*, 169 U.S. 466, 546–47 (1898); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (Starr, J., concurring) ("The utility business represents a compact of sorts; a monopoly on service in a particular geographical area (coupled with state-conferred rights of eminent domain or condemnation) is granted to the utility in exchange for a regime of intensive regulation, including price regulation[.]").

In short, a regulated utility provides a service to the general public at rates and terms of service determined by a regulatory agency. *See* George L. Blum & Lucas Martin, 64 Am. Jur. 2d Public Utilities § 120 (Westlaw May 2023); Steven Ferrey, *Power Future*, 15 Duke Envtl. L. & Pol'y F. 261, 288–89 (2005) ("Electricity requires infrastructure to be created and moved to market . . . . In a conventionally structured regulated model, utilities are required to build the vertically integrated infrastructure necessary to accomplish adequate service, with a reasonable reserve margin. The costs of this reserve are rolled into basic service rates."). The utility here, NV Energy, generates, transmits, and distributes electricity in Nevada, as well as providing natural gas service. NV Energy's rates are set by the Public Utility Commission of Nevada pursuant to statutory criteria. *Cf.* NRS 704.110; *see also*

Michael Saunders, *An Overview of Nevada Public Utility Consumer Protection*, Nev. Lawyer (Apr. 2020).

Central to the regulatory compact is cost-of-service ratemaking, whereby a utility is entitled to a rate which will permit the utility to recover its cost and expenses plus a reasonable return on the value of property devoted to public use. *See* NRS 704.040–.140; NRS 704.210. Cost-of-service ratemaking is typically based on a range of factors, including a utility's investments and other expenditures intended to ensure that it can provide efficient and reliable service to its customers. Indeed, utilities often have a legal obligation to make such investments and improvements to their facilities as are necessary to provide adequate service to customers at just and reasonable rates. *Cf.* NRS 704.040.

Eminent domain is a particularly critical part of the regulated-utility model and regulatory compact. Because moving power "often involves eminent domain to use . . . the property of another to extend power from the generating facility to the monopoly grid," the States have "extended their eminent domain power to regulated utilities as a necessary government function within the ambit of public use." Steven Ferrey, *Law of Independent Power* § 8:15.30 (2023). Without eminent-domain power, every individual property owner could obstruct the development of natural gas pipelines, as well as electricity distribution and power lines that are clearly necessary to protect and advance the public interest, and that have been sited by the

utility at a location that is most efficient and economical for the public at large (even if it may be inconvenient for one landowner). *See* Ferrey, *Power Future*, at 288–89 (noting that electric utilities "have eminent domain powers to get th[e] job" of "creat[ing] and mov[ing electricity] to market . . . done against resistance from communities or individuals").

In Nevada, the terms "public utility" and "public use" are defined by statute. *See* NRS 704.020–.021; NRS 704.3296; *see also* NRS 37.0095(2); NRS 37.010(1). As explained above, those statutes authorize public electric utilities to employ eminent domain "in behalf of . . . public uses" that include "[l]ines for . . . electric light and electric power and sites for plants for electric light and power." NRS 37.010(1)(g). Pursuant to that authority, it is sometimes necessary for NV Energy to employ eminent domain to condemn easements that allow natural gas pipelines, or electricity infrastructure such as overhead power lines and underground electricity distribution lines, to cross privately held property. The property owner receives just compensation in return for the easement, and, if the property is not used for the intended purposes within five years, it reverts to the original property owner. *See* Nev. Const. art. I, § 22(3)–(6); *Nevada Power Co. v. 3 Kids, LLC*, 129 Nev. 436, 442, 302 P.3d 1155, 1158 (2013).

The Nevada legislature has conferred eminent domain authority on public utilities in recognition of the fact that eminent domain is necessary in order to ensure

that Nevada citizens pay reasonable rates for necessary public services such as electricity, natural gas, water, and telephone service. *See* Patricia E. Salkin et al., *Land Use Planning and Development Regulation Law* § 16:8 (3d ed. Westlaw Feb. 2023) (noting that "[p]ublic service corporations such as power companies . . . have long held the power to condemn to meet their land needs" because they supply "a necessity or a convenience that can be provided only if the power of eminent domain is available"). The central tenet of the "cost of service" business model used by regulated utilities is that the utility provides service at reasonable rates in large part by socializing the costs of its system to all of its beneficiaries through government-approved rates. Phrased differently, the prudently incurred costs of providing service are "passed through" to the utility's customers. A necessary corollary of that principle is that, if the utility's costs of doing business are increased, then the rates paid by the utility's customers will generally increase proportionally. *See generally* Herbert Hovenkamp, *Regulation and the Marginalist Revolution*, 71 Fla. L. Rev. 455, 479 (2019).

### B. Allowing Nevada Public Utilities to Use Eminent Domain Is Necessary to Prevent the "Holdout Problem" and Control Costs.

If utilities such as NV Energy did not have the power of eminent domain, the process of developing linear infrastructure such as power and natural gas lines would be significantly more complex and expensive, to the ultimate detriment of the rate-paying public.

Public utilities develop siting plans for linear infrastructure based on a range of considerations, including public need, system engineering and operations, population growth, location of energy sources, and efficiency. For example, if development and population growth patterns dictate the need for new electricity transmission lines to be routed to a new area, NV Energy will generally plan that route in a manner that minimizes costs consistent with operational, engineering, and other applicable constraints. If necessary, NV Energy will condemn easements from incumbent property owners along that route or negotiate with landowners for voluntary agreements reached "in the shadow" of eminent domain. If NV Energy did not have the power of eminent domain, the process would become much more expensive and complicated.

Individual property owners will often (and reasonably) prefer that electricity infrastructure not cross their land (the "not in my backyard," or NIMBY, phenomenon). That will remain true even when a route across their property is indisputably the most efficient course that maximizes the public good, and even when the condemnation of an easement (*e.g.*, for installing an underground electric conduit) poses only a relatively minor inconvenience to the landowner, who would still be able to productively use their land for most purposes even after the easement is granted. Property owners have every rational incentive to become so-called "holdouts"—*i.e.*, to demand compensation that vastly exceeds the fair market price

for the easement. Without eminent domain, developers of linear infrastructure would need to "obtain an easement from each of hundreds of contiguous property owners" by voluntary agreement, each of whom "would have the power to hold out"; in that world, "assembly of the needed parcels could become prohibitively expensive," such that "the costs might well exceed the project's potential gains." Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 75 (1986).

Incumbent property owners know that, if they refuse to grant an easement, the utility may have to modify the project route in a way that markedly deviates from the most efficient path. Property owners also know that the costs of relocating or redesigning a line may be very large compared to the costs of the most efficient route, meaning that the utility might rationally pay an above-market price for its preferred route, in order to avoid the costs of the alternative. Paying that above-market price creates a windfall for the private property owner, the cost of which is ultimately passed on to the utility's customers, meaning that average citizens end up subsidizing the individual landowner's windfall. The Nevada legislature, like those of every other State, has elected to solve this problem (and to protect the interests of the public) by conferring eminent-domain authority on public utilities.

The "holdout problem" may also manifest in other ways. Linear infrastructure will often span significant distances, and a utility may be able to negotiate reasonably priced easements with all but a few of the affected landowners. In that case, the

entire project will be held hostage by the final few holdout landowners. Those landowners will be aware that "time is money," meaning that delays of the project themselves increase costs. Private landowners who stand as the last obstacle to completion of a project will often demand even higher compensation than original holdouts, in recognition of the fact that it may be cheaper and more efficient for the utility to pay an above-market rate, rather than incurring the costs of delay or rerouting. Again, the result is a windfall payment from the utility to a private landowner, subsidized by the public.[14]

## CONCLUSION

The Petition should be denied.

[14] Mass Land ignores all of this. To the extent the Petition grapples with the "holdout problem" at all, it suggests that stripping public utilities of eminent-domain authority would be insignificant because NV Energy and other Nevada utilities could still "use eminent domain to acquire **public** property." Reply 18 (emphasis added). That assertion (which presumably refers only to land owned by state and local governments, not the United States) is not credible. Linear infrastructure projects such as Greenlink Nevada need to cross hundreds of miles of land, and crafting an efficient route across those hundreds of miles will necessarily involve passage over at least some private property.

## AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the Social Security number of any person.

Submitted this 9th day of February, 2024.


McDONALD CARANO LLP

By: */s/ Adam Hosmer-Henner*

Adam Hosmer-Henner (NSBN 12779)
100 W. Liberty Street, Tenth Floor
Reno, Nevada 89501

Jeremy C. Marwell
(*pro hac vice* pending)
Vinson & Elkins LLP
2200 Pennsylvania Ave., NW
Suite 500W
Washington, DC 20037
(202) 639-6507
jmarwell@velaw.com

Attorneys for *Amici Curiae*

## NRAP 32(a)(9) CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface. I further certify that this Brief complies with the type-volume limitations under NRAP 21(d) as it contains 4,895 words.

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

//
//
//
//
//
//
//
//
//
//
//
//

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Submitted this 9th day of February, 2024.

McDONALD CARANO LLP

By: */s/ Adam Hosmer-Henner*

Adam Hosmer-Henner (NSBN 12779)
100 W. Liberty Street, Tenth Floor
Reno, Nevada 89501

*Attorney for* Amici Curiae

## CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I certify that I am an employee of McDonald Carano LLP and on February 9, 2024, the foregoing was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Court's E-Filing system (Eflex), which served all participants in the case registered with Eflex.

*/s/ Jacqueline Carstenbrook*
An Employee of McDonald Carano LLP