IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioner,

vs.

FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR STOREY COUNTY, AND THE HONORABLE JAMES E. WILSON, JR., DISTRICT JUDGE,

Respondents, and

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

Real Party in Interest.

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Supreme Court Case No.: 85693

District Court Case No.: 22 RP 00001 1E

AMICUS CURIAE PUBLIC UTILITIES COMMISSION OF NEVADA'S BRIEF IN SUPPORT OF REAL PARTY IN INTEREST NV ENERGY'S ANSWER TO PETITIONER'S PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION

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I. Description, Interest, and Filing Authority of *Amicus Curiae*.

Pursuant to Nevada Revised Statutes ("NRS") Chapters 703 and 704, the Public Utilities Commission of Nevada ("Commission") supervises and regulates the operation and maintenance of public utilities in Nevada. Under NRS 703.152, the Commission may intervene "in any court on behalf of the public utilities and their customers in this State and represent their views in any matter which affects the development, transmission, use or cost of energy in Nevada." Pursuant to Nevada Rule of Appellate Procedure ("NRAP") 29(a), filing an *amicus curiae* brief by a state agency does not require consent of the parties or leave of court.[1]

II. LEGAL ARGUMENT

A. The Nevada Constitution explicitly contemplates private entities such as NV Energy having the power of eminent domain.

Article 1, section 22, subsection 8, as amended in 2008, of the Nevada Constitution reads as follows:

> For all provisions contained in this section, government shall be defined as the State of Nevada, its political subdivisions, agencies, any public or private agent acting on their behalf, and any public or private entity that has the power of eminent domain.

[1] The Commission includes a simultaneously filed and separate motion for leave to file this brief after the deadline established by the briefing schedule in this case.

NRS 37.0095(2) further states that "the power of eminent domain may be exercised by a person who is not a public agency pursuant to" paragraphs (g) and (k) of NRS 37.010(1), which specifically imbue public utilities with the power to exercise eminent domain for public uses such as "[l]ines for telephone, electric light and electric power and sites for plants for electric light and power," as well as "[p]ipelines for the transportation of crude petroleum, petroleum products or natural gas." A "public utility" is defined at NRS 704.020(2)(a) as any "plant or equipment, or any part of a plant or equipment, within this State for the… delivery or furnishing for or to other persons… heat, gas, coal slurry, light, power in any form or by any agency, water for business, manufacturing, agricultural or household use, or sewerage service." The private or public nature of the ownership of such plant or equipment is irrelevant in determining whether it constitutes a "public utility."

By the clear text of the Nevada Constitution referenced above, private entities may exercise the power of eminent domain and are considered "governmental" when doing so. Sierra Pacific Power Company d/b/a NV Energy ("NV Energy")[2] is a privately held corporation, but it is by definition a public

[2] Sierra Pacific Power Company and Nevada Power Company both do business as NV Energy, as they are affiliated through common ownership under the holding company NV Energy, Inc. While they are regulated as two separate entities with distinct service territories and rates, certain facets of their operation, such as resource planning and system dispatch, occur on a joint basis.

utility with the power of eminent domain.[3] In addition, NV Energy has been regulated by the Commission, in various forms, as a public utility since the Commission's inception in 1919. Nev. Stats. Chap. 109 (1919), 198.

Petitioner conspicuously avoids using the word "utility" when describing what is, by far, the largest utility, both in terms of the volume of utility services provided and geographical area serviced in Nevada, when considering the entirety of NV Energy. Petitioner's failure to state the obvious does not make NV Energy's role as a utility any less of a fact. NV Energy is a public utility from a textual, historical, and practical perspective and, therefore, is an entity with the power of eminent domain under the very provision that Petitioner relies on to make its arguments. NV Energy is exactly the type of private entity that the Constitution recognizes as necessarily exercising eminent domain powers in the public interest.

B. Petitioner Misreads the Plain Language of Article 1, Section 22.

In providing 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," Article 1, Section 22(1) of the Nevada Constitution restricts any entity with eminent domain powers, public or private, from taking

[3] This Court recently stated as much: "Private entities operate Nevada's public utilities, but a public commission sets the maximum rates they can charge for their retail services, subject to judicial review." *Southwest Gas Corporation v. Public Utilities Commission of Nevada*, 138 Nev. 37, 37 (2022).

property from one private party and transferring it to another. The language refers to a scenario where private property has already been lawfully taken pursuant to eminent domain, explaining that such "property taken in an eminent domain proceeding" cannot, after having been taken, subsequently be transferred to another private party. Had Section 22(1) been intended to prohibit private entities from using eminent domain to acquire interest in private property, it would not have described the property as having been "taken in an eminent domain proceeding" and would have instead simply read as follows: "Public 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."

Similarly, if the initiative had been intended to exclude private companies from acting in a governmental capacity, it would have simply left out the word "private" in Section 22(8). However, the People's Initiative to Stop Taking Our Land ("PISTOL"), and Nevada voters retained the word "private" in the empowering section. By doing so, PISTOL explicitly permitted private companies' eminent domain powers, recognizing that private entities bestowed with eminent domain powers are performing government action.

As NV Energy explains in its Answer at pages 20-22, the PISTOL amendment was initiated in response to the United States Supreme Court's

decision in Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655 (2005) and this Court's decision in City of Las Vegas Downtown Redevelopment Agency v. Pappas, 119 Nev. 429, 76 P.3d 1 (2003), each of which dealt with the aforementioned situation where property was taken through eminent domain and subsequently transferred to a private entity for economic development. The type of taking that PISTOL was designed to prevent is distinct from takings by private entities like NV Energy who are endowed with the power of eminent domain for a statutorily-defined public purpose. NV Energy is not acquiring the land at issue to transfer it to another private party; thus, the legal restrictions on such transfers are not at issue in this matter.

Additionally, the Nevada Legislature in 2007 amended NRS Chapter 37 in response to the Constitutional amendment and retained the statutory framework authorizing certain private entities, such as utilities like NV Energy, to exercise eminent domain powers. The Legislature's review and amendment of its eminent domain statutes occurred during the interregnum after the ballot initiative amending the Constitution had been voted on in the 2006 election and before it appeared on the 2008 ballot. *See* Assembly Bill 102 (2007). Had the Legislature failed to take necessary action to make NRS Chapter 37 comport with the intent of the ballot initiative, the proponents of PISTOL could have raised concerns or run

another initiative to clarify the intention. However, they did neither. In fact, the sponsors of PISTOL supported and were involved in drafting the legislation. *See* 4-PA00700 – 00787; 4-PA00741 – 00744. Since 2008, neither the Legislature nor this Court have taken action to change which entities have the power of eminent domain, even though there have been ample opportunities to do so.[4]

C. The Constitutional amendment must not be interpreted in such a way as to subject Commission determinations to a jury trial.

The Commission is tasked with providing "for the safe, economic, efficient, prudent and reliable operation and service of public utilities" and "balanc[ing] the interests of customers and shareholders of public utilities" by providing an opportunity of a fair return for the utility and just and reasonable rates for customers. NRS 704.001(3) and (4). Public utilities are also tasked with the statutory requirement to deliver "reasonably adequate service and facilities" at "just and reasonable" rates. NRS 704.040(1). The Commission approves infrastructure and other projects that allow utilities to continue to provide safe, reliable, and economic service to their customers. *See*, e.g., NRS 704.661, NRS 704.741. The Commission's quasi-judicial role involves a variety of decisions that serve as the basis for planning, construction, and cost-recovery of utility capital projects.

[4] NV Energy's Answer lists several cases that were decided in the aftermath of the PISTOL initiative.

The Commission has serious concerns regarding the effect of allowing its decisions to be re-litigated in an alternative forum without the benefit of the Commission's specialized knowledge. Contested cases before the Commission address complex issues involving numerous economic, engineering, accounting, and policy considerations, and the Commission evaluates testimony submitted by expert witnesses on behalf of various intervening parties who represent a wide range of interests.[5] Leading up to the hearings on utility planning proposals, parties conduct discovery, engage in motion practice, and regularly submit pre-filed testimony and exhibits totaling thousands of pages per case. Many of the proposals scrutinized by the Commission involve infrastructure projects that require the use of large amounts of land to reliably provide critical utility services to customers. When the Commission approves a particular project or plan, it acts consistently with its overarching duty to "[p]rotect, further, and serve the public interest," and before the Commission can issue a permit to construct a utility facility, it must find "[t]hat the facility will serve the public interest." NRS 703.151(1); NRS 704.890(1)(g).

[5] For example, the most recent integrated resource plan (IRP) amendment filed by NV Energy initiated administrative litigation before the Commission in which 16 intervening parties engaged in discovery, motion practice, pre-filed testimony, briefing, and witness examination at hearing. Commission orders regularly exceed 300 pages in length to address all parties' positions, resolve applicants' requests for relief, and establish appropriate regulatory obligations. The record in such cases can span well over ten thousand pages of documents.

Following the Commission's decision in a utility planning proceeding, there is an opportunity for parties to file a petition for reconsideration or rehearing, and if a party is unsatisfied with the outcome of such a request, it may appeal the Commission's final decision by filing a petition for judicial review in district court pursuant to NRS 703.373. In such a review, the district court does not hold a jury trial and must rely on the record developed at the Commission, barring any procedural irregularities. NRS 703.373(8). If, after judicial review at the district court, the party is still dissatisfied with the outcome, the party may then appeal the determination to this Court. NRS 703.376; NRAP 3A(b)(1). In either case, neither the district court nor this Court will "reweigh the evidence or substitute [its] judgment for that of the [Commission] on factual questions." NRS 703.373(11), also see Southwest Gas Corporation v. Pub. Utils. Comm'n, 138 Nev. 37, 40, 504 P.3d 503, 508 (2022), citing Nev. Power Co. v. Pub. Utils. Comm'n, 122. Nev. 821, 834, 138 P.3d. 486, 495 (2006), 834. This Court has declined to review the Commission's fact-finding decisions *de novo* in an "agency action where a party alleges a confiscation of its property" and found that "[i]nvolvement of the power of eminent domain does not, as respondents contend, serve to enlarge the scope of judicial review of action by a governmental body." Southwest Gas at 42, citing Urban Renewal Agency v. Iacometti, 79 Nev. 113, 120, 379 P.2d 466, 469 (1963).

In sum, interested parties are allowed to participate in Commission proceedings, and, if they are dissatisfied with an outcome, may petition to have the results reviewed by the judiciary based solely on the record developed by the Commission.

Once the Commission has performed an exhaustive analysis of a proposed project and deemed it prudent[6] in a resource-planning decision (subject to the processes described above), the utility sets out to build the project, often relying on eminent domain. After completion of a project, the utility will seek cost recovery in a future "rate case" in which the Commission, through a thorough process involving numerous intervening parties, discovery, extensive pre-filed testimony, and a hearing, reviews the reasonableness of the costs and whether they should be allowed for inclusion in rates charged to customers. To reduce the likelihood of non-recovery of costs when constructing a project that requires placement on, over, or under private land, utilities typically propose the most direct, least-cost option, based on a multitude of factors such as delivery or interconnection points, accessibility (roads, rail, etc.), geography, terrain, environmental factors, and other impacts or challenges. To avoid messy or poor infrastructure planning and build-

[6] In the regulatory context, "prudency" is the determination that a course of action (such as investing in an infrastructure project) is appropriate and reasonable based on the facts that are known or knowable at the time when the decision to take the action is made. When the Commission deems a utility's plan prudent in a resource-planning case, the utility will eventually be allowed to recover from its ratepayers the costs that it incurred in reasonably executing an approved plan.

out, eminent domain serves as a tool to ensure timely, cost-effective, and efficient construction. Planning processes and permitting can take years to complete and involve Commission approval before moving forward with land-purchasing, easements, and condemnation.

The Commission notes all of the above processes and procedures because the proposal by Petitioner would serve to undermine the comprehensive and thoughtful vetting that occurs at the Commission by subjecting every utility project that requires the use of eminent domain to a jury trial as to whether the project is for "public use." While there are many situations in which a jury may be the best arbiter of requested relief, a jury cannot develop the amount of expertise and background required to fully assess the information that goes into evaluating a utility's infrastructure needs.

For example, if the Commission approves a new transmission line to ensure reliability of service during peak demand months (typically summer for electricity and winter for gas), the entire project could be stifled because of a poor outcome at a jury trial if the project requires an eminent domain action over private property. A denial of a utility's power to exercise eminent domain could lead to catastrophic outages and/or require the use of much more expensive alternatives, with the higher costs recovered through rates charged to utility customers; in some cases,

the alternatives may require more condemnation than would otherwise be necessary. Petitioner's proposed abrogation of utilities' limited power of eminent domain would have long-lasting and severe impacts on the role of the Commission by affecting the ability of public utilities to build utility infrastructure in Nevada, frustrating the Commission's efforts to ensure the safe, economic, efficient, prudent, and reliable operation and service of public utilities. If utilities cannot rely on the timely exercise of eminent domain when needed, they may be forced to delay or cancel Commission-approved projects, or use sites/routes that are more complicated, hazardous, and/or expensive.

D. Contrary to Petitioner's claims, NV Energy followed proper regulatory procedures relating to the land in question.

In June 2020, NV Energy filed with the Commission a request to build a new gas distribution line pursuant to the Utility Environmental Protection Act ("UEPA"). *See* Docket No. 20-06019. Commission approval is necessary to build new "gas transmission lines, storage plants, compressor stations and their associated facilities when constructed outside any incorporated city" under the UEPA. *See* generally NRS 704.820, et seq., NRS 704.860(3).

Gas pipelines are considered to be either "transmission" or "distribution" depending on the maximum internal pressure at which they are operated (maximum allowable operating pressure or "MAOP"). 49 CFR 192.3.

Transmission lines operate at higher pressure than distribution lines. All pipelines have a pressure at which the chance of them deforming or rupturing is greatly increased (the specified minimum yield strength or "SMYS"); once the operating pressure exceeds 20 percent of the SMYS, pipelines are considered transmission pipelines.[7] Distribution lines are generally any lines that operate below transmission pressures and are not meant for "gathering" purposes, like those lines used in extraction.

NV Energy withdrew its UEPA application for the South Reno Second Source pipeline in October 2022 because the pipeline would only be operated as a distribution pipeline at no more than 320 pounds per square inch, which is less than 20 percent of the SMYS. Docket No. 20-06019, Withdrawal Letter at pp. 1 and 6. However, once NV Energy placed the pipeline into service, the Regulatory Operations Staff of the Commission inspected the finished project and determined that NV Energy had installed 40 feet of pipeline interconnecting the South Reno Second Source pipeline to the then-existing bulk transmission line (TC Energy's Tuscarora Interstate Pipeline). The 40-foot interconnection pipeline operates at the same pressure as the Tuscarora Interstate Pipeline at 1,000 psi, meaning that the short, 40-foot section was an unpermitted transmission line, for which the

[7] Transmission lines also require different construction standards. *See*, e.g. 29 CFR 192.327; 29 CFR 192.315.

Commission assessed NV Energy a fine. Docket No. 22-11025, Joint Petition at 1; Order at 6. Based on the Commission's understanding and the maps provided in the instant Petition, this short section is at least 9 miles from the section crossing MLA's property. Docket No. 20-06019, Application, p. 1.

III. CONCLUSION

Based upon the foregoing, the Court should deny Petitioner's request as it relates to whether NV Energy retains the power of eminent domain. NV Energy is clearly acting as a public utility within the plain meaning of the Nevada Constitution and related statutory scheme. Further, the Court should not take utility regulatory decisions out of the Commission's hands in favor of a jury determination in a setting where there is more than likely to be a dearth of information, specialized knowledge, and experience to make appropriate utility planning decisions.

DATED this 9th day of February, 2024.

By: 

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CERTIFICATE OF COMPLIANCE

(a) I hereby certify that this Amicus Curiae 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 Amicus Curiae Brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point font, Times New Roman style. *See* NRAP 29(d) ("An amicus brief must comply with Rule 32.")

(b) I further certify that this amicus brief in support of an answer to a writ petition complies with the applicable 3,500 word length limitation of NRAP 29(e) and 21(d) because, excluding the parts of the Amicus Curiae Brief exempted by NRAP 32(a)(7)(C), it contains 2896 words.

DATED this 9th day of February, 2024.

By: _____

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), the undersigned, an employee of the Public Utilities Commission of Nevada, hereby certified that on the 9th day of February, 2024, s/he served a true and correct copy of the foregoing, **AMICUS CURIAE PUBLIC UTILITIES COMMISSION OF NEVADA'S BRIEF IN SUPPORT OF REAL PARTY IN INTEREST NV ENERGY'S ANSWER TO PETITIONER'S PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION**, by:

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addressed as follows:

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