

IN THE SUPREME COURT OF THE STATE OF NEVADA

OFFICE OF THE NEVADA ATTORNEY
GENERAL'S BUREAU OF CONSUMER
PROTECTION,

Appellant,

vs.

THE PUBLIC UTILITIES
COMMISSION OF NEVADA AND NV
ENERGY D/B/A NEVADA POWER

COMPANY

Respondents.

No. 54072

FILED

SEP 28 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a Nevada Public Utilities Commission action. First Judicial District Court, Carson City; James E. Wilson, Judge.

NV Energy d/b/a Nevada Power Company (NPC) sought approval from the Nevada Public Utilities Commission to amend its resource action plan. NPC requested approximately \$682 million to construct a natural gas-fired generation plant, called Harry Allen, and approval to purchase an existing plant, called Bighorn. The Office of the Nevada Attorney General's Bureau of Consumer Protection (BCP) intervened. NPC, BCP, and the Commission's regulatory operations staff engaged in discovery regarding Harry Allen, Bighorn, and another existing plant, known as Apex.

Shortly before the Commission's public hearing on the matter, NPC revealed a letter from Apex's owner, which offered to sell Apex to NPC. Based on this letter, Commission staff members supplemented and revised their pre-filed direct testimony, conditioning support for Harry Allen on NPC's good faith efforts to acquire Apex as a less costly

alternative. After considering pre-filed testimony and live testimony from witnesses, the Commission approved NPC's request to construct Harry Allen. The Commission subsequently denied BCP's petition for rehearing and NPC commenced construction of the Harry Allen Plant. The district court denied BCP's petition for judicial review.¹

BCP now appeals, arguing that: (1) substantial evidence does not support the Commission's decision and the Commission improperly denied its petition for rehearing, (2) the Commission and NPC denied BCP due process by failing to provide sufficient notice regarding the potential purchase of Apex, and (3) the district court erred by denying judicial review. We conclude that BCP's arguments lack merit and affirm the order of the district court. Because the parties are familiar with the facts and the procedural history of the case, we do not recount them further except as necessary to our disposition.

DISCUSSION

I. Standard of review

In reviewing a final decision of the Nevada Public Utilities Commission, our role is identical to that of the district court. Nevada Power Co. v. Public Util. Comm'n, 122 Nev. 821, 834, 138 P.3d 486, 495 (2006). This court will only set aside the Commission's decision if it is "[a]rbitrary or capricious or characterized by abuse of discretion." NRS 233B.135(3)(f); NRS 703.373(6)(f). The reviewing court cannot substitute its judgment for the agency's judgment as to the weight of the evidence on a question of fact. NRS 233B.135(3); NRS 703.373(6). This court will

¹BCP did not request injunctive relief in the district court to stop the construction of the Harry Allen Plant.

uphold a decision that is based upon substantial evidence and within the framework of the law. Nevada Power, 122 Nev. at 834, 138 P.3d at 495. Substantial evidence is that which a reasonable mind might find adequate to support a conclusion. Id.

II. Substantial evidence supports the Commission's decision to approve Harry Allen, and the Commission properly denied BCP's petition for rehearing

BCP argues that the Commission did not discuss or provide a reasoned basis for approving Harry Allen in light of evidence that Apex was a superior and less costly alternative. BCP also argues that the Commission's denial of rehearing was arbitrary, capricious, and marked by legal error. We disagree.

A. Substantial evidence supports the Commission's approval of Harry Allen

Pursuant to NRS 704.751(1), the Commission may accept the power company's amendment to an action plan as adequate, or specify the inadequate portions of the plan. The amendment at issue requested authority to acquire Bighorn and to construct Harry Allen. NPC did not seek the Commission's approval to purchase Apex, nor did NPC include Apex as an alternative plan. NPC witnesses stated that NPC considered the feasibility of purchasing Apex, but decided to pursue Bighorn instead. Thus, the purchase of Apex was not at issue in the hearing.

In its order, the Commission noted the potential purchase of Apex as a substitute for the construction of Harry Allen, and considered the staff's position on this matter. The Commission also stated NPC's rebuttal position: that the letter from Apex's owner did not constitute a firm offer of sale, and that NPC needed to construct Harry Allen, acquire Bighorn, and gain power from another supplier to fill projected energy shortfalls in the near future. The Commission stated that no party

recommended that it deny NPC's request to construct Harry Allen, and mentioned that while the construction of Harry Allen was not the preferred plan, NPC had limited options.

Substantial evidence supports the Commission's decision to approve construction of Harry Allen, even in light of the letter of sale. Commission staff members responded positively when asked for their recommendations regarding approval of Harry Allen. NPC witnesses testified that Apex did not provide a substitute for Harry Allen, that NPC did not have the capital to acquire both Bighorn and Apex simultaneously, that acquisition of both power plants would hurt NPC and Nevada energy customers by retaining too much power, and that the cost of purchasing Apex versus constructing Harry Allen did not represent a lower cost alternative because the two were not equivalent.

We do not reweigh evidence or substitute our judgment for that of the Commission. Nevada Power, 122 Nev. at 834, 138 P.3d at 495. The Commission's summary of evidence and its consideration of the witnesses' positions on both sides of the issue demonstrate that the Commission heard and weighed the evidence before it. The fact that the Commission weighed the evidence in favor of NPC's request does not make its decision arbitrary or capricious. In re Jolley, 308 F.3d 1317, 1320 (Fed. Cir. 2002). Even if the record supports more than one reasonable but contradictory conclusion, "we will not find the Board's decision unsupported by substantial evidence simply because [it] chose one conclusion over another plausible alternative." Id. We conclude that a reasonable person could find that the testimony and evidence that the Commission considered are adequate to support its decision.

B. The Commission properly denied rehearing

Pursuant to NAC 703.801, BCP argued that the Commission committed a mistake of fact by stating that no party recommended denial of NPC's request to construct Harry Allen. BCP also contended that the Commission failed to consider how the potential purchase of Apex affected its decision, and argued that it received inadequate notice regarding the Apex issue.

The Commission addressed these three arguments in its order denying rehearing. First, the Commission referenced the staff and BCP witnesses who testified that they did not oppose the construction of Harry Allen, or condition their support for Harry Allen on a good faith attempt by NPC to purchase Apex. The Commission reasoned that it could not construe non-opposition and conditioned approval as recommending denial, and accordingly, it did not make a mistake of fact. Second, the Commission summarized its decision to allow supplemental and modified pre-filed testimony regarding the potential sale of Apex due to the late discovery of the letter of sale. However, the Commission explained that it afforded the letter little weight because the purchase of Apex was not an issue on the docket, and the details of the letter could not be verified during the hearing. The Commission based its decision to approve Harry Allen on the evaluation of the evidence provided by witnesses regarding Harry Allen itself. Finally, the Commission addressed BCP's argument that it received flawed notice by stating that NPC only requested authority to construct Harry Allen and to purchase Bighorn, and the Commission noticed the application accordingly.

Reviewing courts limit their determinations to whether substantial evidence supports a commission's decision. PSC v. Continental Tel. Co., 94 Nev. 345, 348, 580 P.2d 467, 468-69 (1978). The

reviewing court may set aside the decision if it is arbitrary, capricious, or an abuse of discretion. NRS 233B.135(3)(f); NRS 703.373(6)(f). Abuse of discretion is “an apparent absence of any grounds or reasons for the decision.” Tighe v. Von Goerken, 108 Nev. 440, 443, 833 P.2d 1135, 1136 (1992) (quoting City Council v. Irvine, 102 Nev. 277, 280, 721 P.2d 371, 373 (1986)). Here, the Commission set forth in its original order the testimony and evidence used as a basis to approve Harry Allen. Then, in its denial of BCP’s petition for rehearing, the Commission outlined its responses to BCP’s assertions based upon the evidence submitted. The Commission stated grounds and reasons for its decision, and we conclude it did not abuse its discretion in denying BCP rehearing.

III. The Commission and NPC provided adequate notice of the potential purchase of Apex

BCP argues that the Commission denied it due process by failing to provide adequate notice regarding the potential discussion of Apex at the hearing. BCP also argues that NPC failed to identify the purchase of Apex as an alternative to Harry Allen, resulting in inadequate notice in violation of due process. We disagree.

A. The Commission properly noticed the hearing

NRS 233B.121(1) provides that “all parties must be afforded an opportunity for hearing after reasonable notice.” The notice must include statements describing: (1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing will be held; (3) the statutes and regulations involved; and (4) the matters asserted. NRS 233B.121(2)(a)-(d).

Here, the Commission filed a public notice regarding Docket No. 08-05014. The statement provided (1) the date, time, and place of the prehearing conference, (2) notice pursuant to NAC 703.655, (3) the

relevant NRS and NAC chapters under which NPC filed its application, and (4) NPC's request for approval to purchase Bighorn and construct Harry Allen.

We determine that the Commission properly complied with the requirements of NRS 233B.121, noticing the hearing on NPC's amendment. NPC's application did not request approval of the Commission to purchase Apex, thus the Commission properly did not include the potential discussion of Apex in the public notice statement.

B. BCP had an opportunity to be heard regarding the letter of sale

In order to satisfy procedural due process, a party must have notice and an opportunity to be heard. Callie v. Bowling, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007). Here, due to the introduction of the letter of sale so close to the hearing date, the Commission's staff members requested permission to modify their pre-filed direct testimony, believing that the hearing alone would not adequately address the issue of Apex's alleged economic superiority to Harry Allen. The Commission found that the late receipt of the letter justified the staff's request to amend its pre-filed testimony, and also allowed NPC to respond to these modifications by filing rebuttal testimony.

This court has stated that "due process requirements of notice are satisfied where the parties are sufficiently apprised of the nature of the proceedings so that there is no unfair surprise." Nevada St. Apprenticeship v. Joint Appren., 94 Nev. 763, 765, 587 P.2d 1315, 1317 (1978). The crucial element of notice is for parties to have an adequate opportunity to prepare. Id. Here, although NPC withheld the letter from discovery for a short time while it conducted internal fact-finding regarding the alleged offer to sell, the Commission allowed its staff to modify its pre-filed testimony once NPC revealed the letter, and allowed

NPC to submit modified rebuttal testimony. Staff witnesses and NPC also testified at the hearing regarding the potential purchase of Apex. The Commission and NPC did not unfairly surprise BCP with information regarding the potential purchase of Apex, when the Commission itself ensured BCP an opportunity for the issue to be heard by allowing modification to pre-filed testimony and hearing such testimony live. BCP had an adequate opportunity to prepare for the potential Apex issue before the hearing. Therefore, we conclude that both the Commission and NPC satisfied due process regarding notice of the Apex issue.

IV. The district court properly denied judicial review

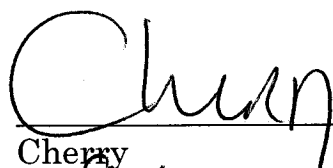
BCP argues that the district court failed to correct the Commission's errors when it denied BCP's petition for judicial review. We disagree.


In reviewing the Commission's decision, the district court, like this court, has a limited role in deciding if the Commission's decision is within the framework of the law and supported by substantial evidence. Nevada Power Co. v. Public Util. Comm'n, 122 Nev. 821, 834, 138 P.3d 486, 495 (2006). In its order, the district court summarized the testimony and evidence supporting the Commission's decision to approve Harry Allen. The district court acknowledged BCP's argument that the Commission received evidence that the purchase of Apex represented a lower cost alternative to Harry Allen, but stated that it must uphold the Commission's decision as long as substantial evidence supports it.

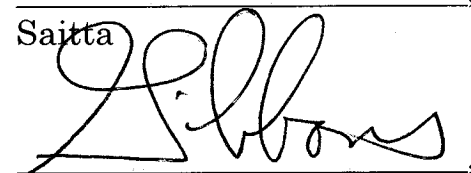
We conclude that the district court properly applied the standard of review for utilities commission decisions. Id. The district court summarized the Commission's evidence and determined it was substantial. The district court also responded to BCP's argument regarding Apex as a lower cost alternative to Harry Allen, saying even if

such evidence existed, the Commission relied upon substantial evidence to make the decision to approve Harry Allen. The district court reiterated that NPC did not seek the Commission's approval to purchase Apex, thus the purchase of Apex was not at issue in the proceedings, and the Commission's notice adequately described the application for approval of Harry Allen. As a result, the district court properly denied BCP judicial review. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Cherry

 _____, J.
Saitta

 _____, J.
Gibbons

cc: Hon. James E. Wilson, District Judge
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