IN THE SUPREME COURT OF THE STATE OF NEVADA

SAGUARO POWER COMPANY, A CALIFORNIA LIMITED PARTNERSHIP,
Appellant,
vs.
THE PUBLIC UTILITIES COMMISSION OF NEVADA; OFFICE OF THE NEVADA ATTORNEY GENERAL'S BUREAU OF CONSUMER PROTECTION; AND SOUTHWEST GAS CORPORATION,
Respondents.

No. 56682

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a public utilities action. First Judicial District Court, Carson City; James Todd Russell, Judge.

I.

In 2005, respondent Southwest Gas Corporation (Southwest) applied to respondent Public Utilities Commission of Nevada (Commission) to make Deferred Energy Accounting Adjustments (DEAA) and Base Tariff Energy Rating (BTER) changes. The application was given docket number 05-5015 (2005 docket). The Commission posted public notice of the application and notice of its scheduled hearing on the matter. At the hearing, the Commission's Regulatory Operations Staff (Staff) proposed amending the shrinkage rate calculation in Southwest's

application.[1] Specifically, Staff pointed out that direct-connect transportation customers, who pay to use Southwest's pipelines but do not purchase gas from Southwest, do not contribute to Southwest's loss of gas as it travels through the system. Staff proposed a change to an input number in the shrinkage rate formula so that volumes of gas sent to these customers would not be used to calculate shrinkage charges.[2] See Glossary of Gas Industry Terms, 34B Rocky Mtn. Min. L. Special Inst. ch. 1, Definition 304 (1993) (defining shrinkage rate). Southwest agreed with Staff's suggestion and the Commission's 2005 order amended the shrinkage rate calculation in Southwest's application by adjusting the input number as Staff suggested. A mathematical error diminished the increase in shrinkage rates the Commission had intended to effectuate.

The next year, Southwest again applied to recoup expenses through the DEAA process. The Commission posted public notice and, after discovering the mathematical error in the 2005 order, posted an amended notice detailing its intent to fix that mistake in the 2006 application. After a hearing, Staff and Southwest stipulated to revised DEAA charges and the Commission issued an order in docket 06-05018 (2006 docket). The order and stipulation implemented the same

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[1]Shrinkage rate is the method Southwest uses to estimate the cost of lost and unaccounted for gas.

[2]A handful of other major customers were contractually exempt from paying shrinkage; their volumes were also excluded in the amended calculation. Appellant Saguaro Power Company was contractually obligated to pay shrinkage.

adjustment to the shrinkage rate as did the 2005 order; it also fixed the calculation error from 2005.

Appellant Saguaro Power Company did not participate in either the 2005 or 2006 proceedings, but after the changes made by the 2006 order had been implemented, Saguaro noticed an increase in the price it was paying for shrinkage.[3] It reviewed the 2005 and 2006 orders and believed that the increase in shrinkage rate could be traced to the Commission's adjustments of variables in those orders. Saguaro also believed the Commission should have included the adjustment to shrinkage rate in the notice on those dockets. Because it allegedly was unaware of the changing shrinkage rate and did not have opportunity to contest those changes, Saguaro wanted a refund. Saguaro petitioned the Commission to reopen the 2005 and 2006 dockets or, in the alternative, to open an investigatory docket into the manner in which shrinkage rate was developed, modified, and allocated.

The Commission addressed Saguaro's grievances in docket 08-02008 (2008 docket); it denied Saguaro's request to reopen its 2005 and 2006 proceedings but granted Saguaro's alternative request to open an investigatory proceeding. The Commission ordered Saguaro, Southwest, and Staff to brief it on (1) how other states allocate and determine shrinkage charges and (2) the filed rate doctrine and the process by which the Commission might make transportation customers whole if the

[3]Following the 2005 order, the new shrinkage rate calculation took effect on November 1, 2005. However, the mathematical error masked the effect of the change in shrinkage rate methodology; the shrinkage rate billed to Saguaro for this period was lower than it would have been without the error.

Commission determined that the allocation of shrinkage costs should be modified.

The Commission assigned a new docket number, 08-03033, to this investigation. After briefing and a hearing, the Commission entered an order refining the shrinkage rate calculation but maintaining, as it had in the 2005 and 2006 orders, that direct connect transportation customers were exempt from shrinkage charges. The Commission denied Saguaro's request for a refund because granting a refund would "violate the filed rate doctrine and result in retroactive ratemaking."

Saguaro petitioned the district court for judicial review of the Commission's order in docket 08-03033. It asserted that the Commission's 2005 and 2006 orders were void at the outset because of inadequate notice and, therefore, it should be refunded more than $1,000,000 in shrinkage costs. The district court denied Saguaro's petition for judicial review, concluding that the Commission's order on docket 08-02008 denying Saguaro's request to reopen the 2005 and 2006 proceedings and initiating the investigation was a final order under NAC 703.540. Saguaro's right to petition for judicial review, the court determined, arose with resolution of that proceeding, not after final resolution of the investigatory proceeding. In an alternative holding, the district court agreed with the Commission that granting a refund would violate the prohibition against retroactive ratemaking. Thus, the district court denied the petition for judicial review.

Saguaro appeals. It argues that the Commission's order in docket 08-02008 was not a final order from which it could petition, and, therefore, its petition for judicial review of the order in docket 08-03033 is properly before the courts. Furthermore, it argues that the doctrine

against retroactive ratemaking does not apply because the Commission's 2005 and 2006 orders were void due to inadequate notice, and a refund should issue. See Public Serv. Comm'n v. Southwest Gas, 99 Nev. 268, 662 P.2d 624 (1983) (hereinafter Southwest Gas) (holding that the rule against retroactive ratemaking yields when charges have been assessed pursuant to a void order).

II.

A.

As a preliminary matter, we disagree with the district court's conclusion that Saguaro should have petitioned for judicial review of the 2008 order and that its failure to do so results in claim or issue preclusion.

The district court's decision was based on NAC 703.540, which governs Commission procedure. NAC 703.540 establishes the Commission's dispositional options after a contested case; it may grant, deny, or set petitions for further proceedings. The district court seized on the verbiage of the order in docket 08-02008, in which the Commission "granted" in part and "denied" in part Saguaro's petition, in reaching its conclusion. The district court concluded that because the Commission did not explicitly set the matter for further proceedings, nothing was left for the Commission to determine, making the order final and ripe for judicial review, which Saguaro did not pursue. Because Saguaro missed its chance for review, the district court concluded, Saguaro's subsequent request for review of issues related to the order in docket 08-02008 were precluded.

But reading the order's language in a vacuum is not how we determine finality for preclusion purposes. It is NRS 233B.130 and NRS

703.373,[4] not NAC 703.540, that govern a party's right to petition for judicial review of a decision of an administrative agency. Pursuant to those statutes, a party has a right to petition for judicial review once the Commission has issued a "final decision," NRS 233B.130(1)(b); NRS 703.373(1), and courts must employ a "functional view of finality," which "look[s] past labels" to "what the order or judgment actually does, not what it is called." Valley Bank of Nevada v. Ginsburg, 110 Nev. 440, 444-45, 874 P.2d 729, 733 (1994).

Here, the Commission's order in docket 08-02008 was not final because it left rights of the parties to be determined by the Commission. Public Serv. Comm'n v. Community Cable, 91 Nev. 32, 42-43, 530 P.2d 1392, 1399 (1975) (an administrative order that leaves open issues for future resolution or retains the matter for further action is not final); 73A C.J.S. Public Administrative Law and Procedure § 369 (2004). The Commission retained authority over the matter by initiating a proceeding under a new docket number to investigate how the new shrinkage rate methodology came to be modified, calculated, and allocated. As part of this investigation, the Commission requested briefing on the filed rate doctrine and the process by which the Commission might make transportation customers whole if it determined that the allocation of shrinkage costs should be modified.

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[4]NRS 703.373 was amended in 2011, see 2011 Nev. Stat., ch. 215 § 1.7, at 938-39, but the amendments do not change the substance of our analysis. We will refer to the pre-2011 version of NRS 703.373 in this order.

While the Commission ultimately determined, in its 2008 order, that granting a refund would "violate the filed rate doctrine and result in retroactive ratemaking," this last directive—that the parties brief it on the refund process—left open the question of whether the Commission might decide that a refund for Saguaro was appropriate. Clear finality is necessary to promote "judicial economy by avoiding the specter of piecemeal appellate review," Valley Bank of Nevada, 110 Nev. at 444, 874 P.2d at 733, and to allow the agency to complete its task without judicial interference, see Westside Chtr. Serv. v. Gray Line Tours, 99 Nev. 456, 459, 664 P.2d 351, 353 (1983) ("It is generally accepted that where an order of an administrative agency is appealed to a court, that agency may not act further on that matter until all questions raised by the appeal are finally resolved."). And without a clear delineation of the issues the Commission retained, meaningful judicial review of the Commission's decision in docket 08-02008 would have been hampered and may have interfered with the Commission's ongoing investigation.

Here, the Commission's order directing briefing on whether and how to refund excessive rates left open this portion of Saguaro's inquiry in docket 08-02008. Likewise, the spartan nature of the Commission's findings of fact and conclusions of law, which noted only that reopening the 2005 and 2006 proceedings was against the "public interest," provided little from which a court could have conducted meaningful judicial review. See State, Bd. Psychological Exmr's. v. Norman, 100 Nev. 241, 244, 679 P.2d 1263, 1265 (1984) (stressing the importance of factual findings and conclusions of law to meaningful judicial review). Thus, while issue and claim preclusion can apply to prevent judicial review of final administrative orders, see Britton v. City of

North Las Vegas, 106 Nev. 690, 692, 799 P.2d 568, 569 (1990), the Commission's 2008 order was not final. Cf. Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1054-55, 194 P.3d 709, 713 (2008) (stating that one factor necessary for the application of claim or issue preclusion is that the initial ruling must have been final); NRS 703.373(1).

B.

While Saguaro's petition for judicial review survives the preclusion challenge, it fails on the merits. The Public Utilities Commission is "a creature of the legislature; rate making is a legislative process." Southwest Gas, 99 Nev. at 274, 662 P.2d at 628. The Commission has authority to fix rates that are "'just and reasonable,'" id. (quoting Garson v. Steamboat Canal Co., 43 Nev. 298, 312, 185 P. 801, 805 (1919)), and its decisions are "prima facie lawful," NRS 704.130. Given the Commission's ratemaking authority, the rule against retroactive ratemaking prohibits changes to past, lawfully established rates. 73B C.J.S. Public Utilities § 137 (2004); Pub. Service Comm'n v. Sierra Pacific, 103 Nev. 187, 195, 734 P.2d 1245, 1251 (1987). This prohibition reinforces the principle that customers who use the utility's service should pay for it, rather than making future or current ratepayers pay for past gas consumption. 73B C.J.S. Public Utilities § 137 (2004).

As Saguaro points out, however, the "statutory presumption of validity of [an] agency's order assumes that the order was promulgated in accordance with law and in abidance with 'the requirements of due notice and hearing.'" Southwest Gas, 99 Nev. at 274, 662 P.2d at 628 (quoting Southwest Gas Corp. v. Public Serv. Comm'n, 92 Nev. 48, 61, 546 P.2d 219, 227 (1976)). Thus, a Commission order that is void from the outset will not be protected by the rule against retroactive ratemaking. Id. at 278, 662 P.2d at 630 ("charges cannot be validly grounded on a void order"

and the rule against retroactive ratemaking does not apply to such charges). Valid notice includes notice of the contents of the rate application, id. at 271, 662 P.2d at 626 (citing Nevada Power Co. v. Public Serv. Comm'n, 91 Nev. 816, 820, 544 P.2d 428, 431 (1975)), and must "accurately reflect the subject matter to be addressed and that the hearing will allow full consideration of it." Id.

Saguaro invokes Southwest Gas and asserts that the Commission's 2005 and 2006 orders are void for inadequate notice. It contends that information about a potential change in the shrinkage rate calculation was "entirely absent from the contents of the 2005 Application . . . and the notice," and the 2006 notice should have included "reference to the ten-fold increase in the shrinkage rate," information about the change in shrinkage rate methodology, and reference to the calculation error made in the 2005 application. Thus, Saguaro seeks to avoid application of the doctrine against retroactive ratemaking.[5]

This argument lacks merit. Saguaro does not establish that the change in shrinkage rate went beyond the Commission's traditional ratemaking authority and effectuated a policy shift amounting to a regulation as did the Commission's order in Southwest Gas. In Southwest Gas, Southwest initiated a proceeding by filing with the Commission a rate increase application. Id. at 270, 662 P.2d at 625-26. The Commission provided a general public notice of the rate application. Id. at 271, 662

[5]While the Commission has not affirmatively concluded that the notice in the 2005 and 2006 proceedings was inadequate, so long as the facts regarding notice are not in dispute, the adequacy of notice is a question of law subject to de novo review. Daniels v. State, 114 Nev. 261, 270, 956 P.2d 111, 116 (1998).

P.2d at 626. At the hearing, however, the Commission initiated rate design proceedings by moving to alter Southwest's rate structure to eliminate block rates and "require a single unit rate for all customers, large or small." Id. at 270-71, 662 P.2d at 626.

Southwest petitioned for judicial review, arguing that the Commission should have provided notice that it would consider a rate redesign. Id. The trial court determined that the rate design changes effectuated a general policy of the Commission and, therefore, involved promulgating a regulation pursuant to NRS 233B.038. Id. at 273, 662 P.2d at 627. In promulgating a regulation, the Commission had to comply with the notice provisions of NRS 233B.060; the district court concluded that the Commission's general notice was not sufficient because it did not alert all interested persons of the contemplated rate design changes. Id. This court affirmed, holding that the rate redesign amounted to a regulation that affected all gas utilities and their customers, entitling them to notice of the contemplated redesign before it was imposed. Id. at 273, 662 P.2d at 627; NRS 233B.038. As an inadequately noticed regulation, the Commission's order was deemed void, of no effect at any time, and a refund was required. Southwest Gas, 99 Nev. at 273, 662 P.2d at 627.

Under NRS 233B.038(1)(a), a regulation is "[a]n agency rule, standard, directive, or statement of general applicability which effectuates or interprets law or policy . . . ." The Commission's change in the 2005 and 2006 dockets, unlike the one at issue in Southwest Gas, did not undertake wholesale rate design changes. Instead, the change to the shrinkage rate formula originated with a Staff suggestion to change a number in Southwest's application, the type of suggestion that Commission Staff is

statutorily directed to make. NRS 704.100(h) (Commission "shall . . . consider . . . any presentation that the Regulatory Operations Staff of the Commission may desire to present").

Heeding Staff's suggestion and implementing the change was an exercise of the Commission's legislative ratemaking authority, see Southwest Gas, 99 Nev. at 274, 662 P.2d at 628, and such judgment is not for the courts to question. See 64 Am. Jur. 2d Public Utilities § 96 (2011) (a ratemaking governmental body "has considerable discretion in setting public utility rates"); 73B C.J.S. Public Utilities § 29 (2004) (a public utility regulatory commission is "vested with discretion" in making rates). Shrinkage rate is a variable charge routinely amended in deferred energy accounting proceedings and Saguaro's contract with Southwest enunciated the variable character of these charges.

Thus, the general notices of Southwest's rate increase and DEAA applications issued by the Commission for the 2005 and 2006 proceedings adequately informed interested parties of the substance of the hearing. As such, we agree with the Commission and the district court that the rule against retroactive ratemaking bars amendment of rates—if they were in error at all—set by the 2005 and 2006 orders.[6] Accordingly, we

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[6]Aside from the content of the notices, Saguaro argues that it should have received a special mailing when the Commission amended the 2006 notice to include information pertaining to the shrinkage rate. There is no support for Saguaro's assertion that an amended notice requires a more targeted distribution than an original and, therefore, this argument fails. It is the "substance of the notice, not its title, [that] determines its adequacy" and its adequacy is judged as if it was the original notice. Water Transp. Ass'n v. I.C.C., 684 F.2d 81, 84 (D.C. Cir. 1982); Martyna v.

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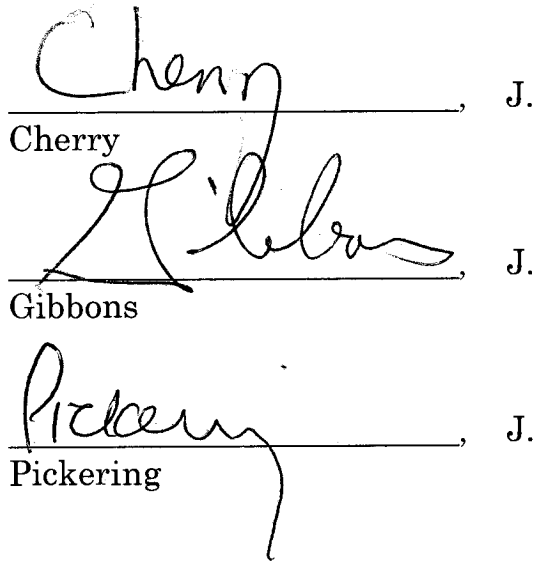
ORDER the judgment of the district court AFFIRMED.



Cherry, J.

Gibbons, J.

Pickering, J.

cc: Hon. James Todd Russell, District Judge
Robert G. Berry, Settlement Judge
Kaempfer Crowell Renshaw Gronauer & Fiorentino
McDonald Carano Wilson LLP/Reno
Attorney General/Consumer Protection Bureau/Las Vegas
Public Utilities Commission of Nevada
Meridith J. Strand
Carson City Clerk

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Unemployment Comp. Bd. of Rev., 692 A.2d 594, 596 (Pa. Commw. Ct. 1997). Because the original notice was sufficient, we conclude that the amended notice was adequate, too.