IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF RENO,
Appellant,
vs.
PUBLIC UTILITIES COMMISSION OF NEVADA; AND NEWMONT USA,
Respondent.

No. 57584

FILED

JUN 21 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment denying a petition to review a public utility commission order. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

I.

Sierra Pacific Power Company (Sierra) placed an electricity transmission line from Tracy power plant to Silver Lake substation to transmit electricity to the northern parts of Reno and Sparks. Because the transmission line was to traverse part of Reno, Sparks, and unincorporated Washoe County, Sierra obtained special use permits from the two cities and the county. The Washoe County Commissioners conditioned the permit on Sierra placing underground a 3.36-mile section of the line going through unincorporated Washoe County. Sierra complied, and the undergrounding cost approximately $5,900,000 more than placing the line above ground. After completing the project, Sierra filed a general rate application with respondent the Public Utilities Commission of Nevada (PUC), pursuant to NRS 704.110, seeking authority to recover expenses for the project, including the costs associated with undergrounding.

The PUC held a duly noticed hearing and appellant City of Reno, Washoe County, and respondent Newmont USA[1] intervened. A substantial portion of the hearing was dedicated to the cost allocation of undergrounding. Commission staff recommended that the Commission approve a surcharge on all Washoe County ratepayers—including ratepayers residing in unincorporated parts of the county, along with Reno and Sparks residents—for Sierra to recover the added undergrounding costs. It pointed out that Washoe County mandated the undergrounding as a permit condition and, therefore, its residents should bear the cost under the "cost-causer pays" principle. The Bureau of Consumer Protection (BCP) and Newmont agreed with this recommendation.

Washoe County asserted that its residents should not be solely responsible; it provided testimony of two county commissioners (who required the undergrounding) that the requirement was imposed for safety reasons. And, because the undergrounding requirement was primarily a safety concern, all of Sierra's ratepayers—including those in remote counties—should be required to help cover the added cost of $5.9 million. Reno attended the hearing but did not provide direct testimony; instead it cross-examined several of the witnesses. As part of its cross-examination, Reno laid the groundwork for its theory that its residents should be treated differently from those in unincorporated Washoe County.

After receiving the testimony and evidence, the PUC determined that assigning the incremental cost of undergrounding to

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[1]Respondent Newmont USA is a mining company operating in Elko and Eureka counties and intervened as a ratepayer.

Washoe County ratepayers was a "fair[ ] and . . . equitable method in which to set just and reasonable rates for all of Sierra's ratepayers" (emphasis added) because the benefit redounded to Washoe County and Washoe County was the jurisdiction that ordered undergrounding. It noted that assigning costs solely "to those ratepayers residing near Calle De La Plata in the Spanish Springs Valley because they receive the benefits (both safety and aesthetic) from the transmission line being placed underground" would be an unreasonable burden because that would create the unjust and unreasonable result of assigning more than $5.9 million in costs to only 5,000 ratepayers. Similarly, the Commission rejected Washoe County's proposal that all Sierra ratepayers, including those in far-off Elko County, should bear the costs because doing so would ignore the principle that the political subdivision that caused additional costs should pay for them. Thus, the PUC ordered Sierra to institute a three-year surcharge on Washoe County ratepayers.

Washoe County moved for reconsideration arguing, inter alia, that the PUC's order interfered with its police powers and was arbitrary and capricious because it was beyond the scope of the normal "cost-causer pays" rule. Reno joined in this motion for reconsideration in part, asserting that "the PUC's decision on the application of the Washoe County Surcharge, as it relates to the rate payers in the Cit[y] of Reno . . . on its face is arbitrary capricious and an abuse of discretion." The PUC denied the petition for reconsideration.

Reno[2] petitioned the district court for judicial review, arguing that the PUC's order should have levied the surcharge only on residents of unincorporated Washoe County, not all county residents. It argued that the residents of Reno did not benefit from the aesthetic value of undergrounding, that it would be unfair to require them to pay for it, and that Reno residents are not the cost causers because Reno is governed by the city council, not county commissioners. Thus, it asserted that the Commission's order was unjust, unreasonable, and an arbitrary and capricious abuse of discretion.

The district court denied the petition for review, concluding that the PUC's order was not arbitrary or capricious, or an abuse of discretion. It concluded: "regardless of the decision the Commission makes, there will inevitably and unfortunately be winners and losers" and held that the PUC's decision was just and reasonable and "correctly applied the longstanding rate design principle that cost causers pay for the incremental costs they impose upon the utility's system." Reno appeals, making the same arguments it made in the district court.

II.

Before turning to the merits, however, respondents press two arguments which they assert preclude our merits review. First, the PUC and Newmont argue that Reno does not have standing to petition for judicial review. This assertion lacks merit because, as an intervenor in the rate proceeding, Reno has standing to petition the courts for review under NRS 703.373 as a "party of record." Valley Bank of Nevada v.

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[2]Washoe County also petitioned the district court but is not a party to this appeal.

Ginsburg, 110 Nev. 440, 448, 874 P.2d 729, 735 (1994) (an intervenor is a "party of record"). Second, respondents argue that Reno waived arguments it did not make to the Commission. State, Bd. of Equalization v. Barta, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) ("Because judicial review of administrative decisions is limited to the record before the administrative body, . . . a party waives an argument made for the first time to the district court on judicial review."). Specifically, respondents point out that Reno did not call a witness to testify that residents of unincorporated Washoe County should pay and the Commission did not consider Reno's position.

We reject this argument, as well. Reno suggested during cross-examination of a Commission staff witness its theory that only those in unincorporated Washoe County should pay for undergrounding, pressed that witness about the division of costs between unincorporated Washoe County residents and Reno and Sparks residents, and established that Reno and Sparks residents would combine to cover 75-80 percent of the costs resulting from undergrounding. Reno was not required to supply a witness to support its argument. See NRS 233B.123(4) (a party may address issues not addressed on direct examination); NAC 703.685(3); NAC 703.500 (no requirement that a party put on evidence, and each party is entitled to cross examine). Furthermore, "[t]he Commission considered many options for the assignment of undergrounding costs ranging from directly assigning costs to the ratepayers residing near Calle De La Plata to broadly assigning undergrounding costs to all of the ratepayers in Sierra's service territory." (Emphases added); see WGES, Inc. v. District of Columbia PUC, 924 A.2d 296, 303 (D.C. 2007) ("an agency is not required to respond to every comment, or to analyse (sic)

every issue" raised in a proceeding (internal quotation omitted)). While Reno did not present direct testimony, the party raising the "failure to exhaust" administrative remedies argument has the burden of proving it, and a "tie must go to the plaintiff," here Reno. Salas v. Wisconsin Dept. of Corrections, 493 F.3d 913, 922 (7th Cir. 2007).

III.

Turning to the merits, Reno asserts that the PUC's decision to charge all Washoe County ratepayers for undergrounding located only in an unincorporated part of the county was unjust, unreasonable, and an abuse of discretion. As Reno's brief notes, the "only limit on the Commission's authority to regulate utility rates" is that they be "just and reasonable." NRS 704.040(1). The Legislature gave the PUC "plenary" authority to regulate utility rates under NRS 704.100 to 704.130. Nevada Power Co. v. Dist. Ct., 120 Nev. 948, 957, 102 P.3d 578, 584 (2004); Consumers League v. Southwest Gas, 94 Nev. 153, 157, 576 P.2d 737, 739 (1978) ("Our legislature has created a complete and comprehensive statutory scheme for the regulation of utility rates . . . and has vested performance of that function in the Public Service Commission."). Pursuant to this authority, the PUC's regulations refine the meaning of "just and reasonable": under NAC 704.655-65, the PUC's ratemaking policies for Sierra require it to "consider a utility's marginal (incremental) cost of service to each class of customer in determining the revenue required from that class." NAC 704.660.

Our review is, therefore, quite limited. Like the district court, this court "reviews a PUC[ ] decision for legal error or abuse of discretion." Nevada Power Co. v. Public Util. Comm'n, 122 Nev. 821, 834, 138 P.3d 486, 495 (2006). This court will uphold a PUC decision so long as it is just and reasonable, "'within the framework of the law'" and "based on

substantial evidence in the record." Id. (quoting Silver Lake Water v. Public Serv. Comm'n, 107 Nev. 951, 954, 823 P.2d 266, 268 (1991)); NRS 703.373. "[S]ubstantial evidence [is] that which a reasonable mind might accept as adequate to support a conclusion." Id. (quotations omitted). In this case, we agree with the district court that the PUC's decision is "just and reasonable," NRS 740.040, and is "within the framework of the law." NRS 703.373(11) (as renumbered in 2011; see 2011 Nev. Stat., ch. 215, § 1.7, at 938-39); Nevada Power Co., 122 Nev. at 834, 138 P.3d at 495.

The PUC's allocation of undergrounding costs was based on substantial evidence and was not arbitrary or capricious. At the PUC hearing, Washoe County's witness testified that allocating undergrounding costs to the jurisdiction that required undergrounding is "not . . . unusual." The same witness recognized that the PUC routinely requires cost causers to pay for additional costs and "recommend[ed]" following that principle in this case. See City of Albuquerque v. Public Regulation, 79 P.3d 297, 303-04 (N.M. 2003) (noting approval of a plan to recover undergrounding costs from local ratepayers when the undergrounding is required for reasons other than safety). Commission staff and the BCP provided testimony that assigning costs to Washoe County ratepayers was appropriate. Further, Reno had the opportunity to submit evidence (it chose not to) and to cross-examine all witnesses during the day-long hearing. The PUC "considered many options" and decided that charging "the jurisdiction that ordered [the undergrounding] as a condition of a permit [ ] is the Commission's fairest and most equitable method in which to set just and reasonable rates for all of Sierra's ratepayers."

But despite the substantial evidence and care the Commission used to reach its decision, Reno proposes three reasons the Commission's order is contrary to settled law, unjust and unreasonable. First, Reno argues that the City of Reno is not the cost causer of the increased expense and because the Washoe County Commissioners required the undergrounding, the people who live in the unincorporated portion of the county should cover the costs. This argument lacks merit because the Washoe County Board of Commissioners, which required the undergrounding, is politically beholden to all Washoe County residents, and represents the people of Reno as well as the people living in unincorporated Washoe County. NRS 243.340 (residents of Reno are residents of Washoe County).[3]

Second, Reno argues that the "ratepayer benefit tenet" militates against requiring Reno residents to pay for the undergrounding. It asserts that the aesthetic benefit accrues only to those people located near the undergrounding—and those people all live in unincorporated Washoe County. Relatedly, it asserts that the "unfair burden axiom" should operate as a check on the PUC's power to assign rates to people who don't benefit from the increased rates. While testimony elicited at the PUC hearing indicated that Reno and Sparks, combined, would foot the bill for 75-80 percent of the undergrounding, it is not clear that any other practical option would have assigned costs more fairly. Reno's proposal to

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[3]Reno argues that allowing the PUC order to stand would create a carte blanche precedent that a jurisdiction could require undergrounding and everyone would have to pay. This argument fails. Washoe County required the undergrounding and the PUC required Washoe County residents to pay for it.

assign all costs to individuals in unincorporated Washoe County, for example, would have unfairly burdened many residents in unincorporated Washoe who live farther from the benefits than some Renoans.

Third, Reno argues that the PUC misunderstood land use authority and believed that the Washoe County Commission had jurisdiction over Reno's land. Citing NRS 278.020, Reno asserts that the PUC cannot shift part of the costs of undergrounding to people who are not within the Washoe County Board of Commissioner's authority for land use matters. This argument fails for two reasons. First, as Newmont points out, Reno did not make this argument to the district court and "'[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.'"[4] Bower v. Harrah's Laughlin, 125 Nev. 470, 479, 215 P.3d 709, 717 (2009) (quoting Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)). Second, nothing in the record indicates that the PUC misunderstood the scope of Washoe County's land use jurisdiction and, while NRS 278.020 provides for land use authority in cities and counties, it does not purport to regulate how the PUC achieves cost allocation under these circumstances.

It is not the court's duty to "reweigh the evidence," but to ensure that the PUC complied with the law and based its decision on substantial evidence. NRS 703.373 (11); PSC v. Continental Tel. Co., 94

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[4]Reno argues in its reply that it made the argument to the district court. However, the portion of the transcript to which it cites only reveals its argument to the district court that the Washoe County Board of Commissioners was both the legal and actual cause of the undergrounding. This is not disputed.

Nev. 345, 348, 580 P.2d 467, 468-69 (1978). Where a decision comes down to a matter of degree and, as the district court pointed out, "regardless of the decision the Commission makes, there will inevitably and unfortunately be winners and losers," this "court shall not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact." NRS 703.373(11). Here, the PUC had substantial evidence to support its determination; its order was just and reasonable and within its authority under the law.

Reno's petition fails for a second reason. In addition to making a showing that the Commission's decision was unjust and unreasonable or arbitrary and capricious, Reno bears the burden of showing that the PUC's order prejudiced its "substantial rights." NRS 703.373(11). This, it has not done. Reno's brief explains that it is petitioning to protect its police powers, not in a representative capacity for its residents:

> Unlike Washoe County, the City does not purport to represent the interests of the City of Reno ratepayers. The City's interest is similar to that of Respondent Newmont. Specifically, if the Order stands as written, the BCC has an incentive to require undergrounding in unincorporated areas at the expense of City ratepayers that receive no benefit. Moreover, the Order further exacerbates the current fiscal inequity between the City and the County, and creates an inequitable situation where those receiving no benefit (City residents) subsidize the lifestyle of those receiving benefits (unincorporated County residents). Ultimately, this could lead to extremely high power rates for the City and the region, and put the City economy at an economic disadvantage in comparison to other parts of the country. As a result, the City has a vital interest in the present case.

But the focus of all of Reno's arguments is on the effect of the PUC's decision as it relates to Reno's resident ratepayers[5] and not Reno's police powers. If, as Reno claims, it petitioned for judicial review to protect its police powers, it was obligated to show how the Commission's order substantially impaired its rights in this regard. But Reno has not done so and we discern no imposition on Reno's police power stemming from the Commission's order.

Accordingly, we affirm.

Cherry, C.J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Steven R. Kosach, District Judge
Jonathan L. Andrews, Settlement Judge
Reno City Attorney
Kaempfer Crowell Renshaw Gronauer & Fiorentino
Goodwin Procter, LLP
Public Utilities Commission of Nevada/LV
Washoe District Court Clerk

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[5]It is questionable whether Reno could have participated in a representative capacity if it had wanted to, but this issue has not been fully briefed. New Jersey v. New York, 345 U.S. 369, 372 (1953) (the parens patriae doctrine does not require that a party involved in a case as sovereign represent its citizens).