Agenda 21-16 Item 2A

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ANGIE M. ELQUIST
[redacted]
Telephone: [redacted] E-mail: [redacted]

October 11, 2016

VIA E-MAIL: bpotter@puc.nv.gov
Joe Reynolds, Chairman
Public Utilities Commission of Nevada
c/o Bre Potter, Commission Secretary

Re: General Counsel Position

Dear Mr. Reynolds:

I am writing to convey my interest in the position of General Counsel for the Public Utilities Commission of Nevada (PUCN) that was found on the Nevada Human Resource Management Website. I worked with the PUCN when I interned with the Bureau of Consumer Protection (BCP), through the Attorney General's office, my third year of law school. I then worked for the BCP for two years from 2004-2006. In addition, my variety of experience in representing state and county government departments and boards makes me a suitable candidate for this position.

My four years as the District Attorney for Lander County included handling all civil and criminal matters for my office. There was one deputy district attorney in the office, and between the deputy and I, we divided all criminal matters equally and handled each case from start to finish. I dealt with personnel issues, budgetary issues, and collaborated with and provided legal advice and presentations to county departments and boards. I also thoroughly enjoyed working as a deputy district attorney and a deputy attorney general, in particular, representing the various boards and governmental departments. The responsibilities of these positions provided considerable professional fulfillment; therefore, working as general counsel for the PUCN will provide a working environment where I feel best suited.

My positions with the Division of Child and Family Services and the Nevada Bureau of Consumer Protection offered opportunities to work on both administrative and legislative processes. I've drafted regulations, statutes, Attorney General Opinions, and attended board meetings, workshops and administrative hearings. My experience has included providing daily legal advice on a variety of issues, through representation of state agencies, county departments, the school district, and the county hospital, with each day providing new legal issues. I've drafted and reviewed hundreds of contracts along with policies and procedures.

I am extremely organized and adapt quickly to any new learning environment. I am loyal and trustworthy with a strong work ethic. The combination of my employment history, my passion for continual learning, and my high ethical values will enable me to make a valuable contribution to the PUCN.

I believe I have extensive experience in most, if not all, of the responsibilities listed in the job description. I would greatly appreciate the opportunity to expand upon how my experience can benefit the PUCN. Thank you for your time, and I look forward to hearing from you.

Respectfully,

Angie Elquist

Angie M. Elquist

ANGIE M. ELQUIST
[redacted]
Telephone: [redacted] E-mail: [redacted]

EXPERIENCE

Coldwell Banker Select Real Estate, Reno, Nevada; June 2016 – Present. *Nevada Licensed Realtor.*

Law Offices of Mark Wray, Reno, Nevada; March 2015 – May 2016. *Associate Attorney*: General practice, civil litigation, business law, legal research and writing, appellate work.

Lander County District Attorney, Battle Mountain, Nevada; October 2010 – January 2015. *District Attorney*: Handled all criminal and civil matters for Lander County. Managed entire office with one deputy district attorney and three office staff. Managed a yearly budget. Handled all criminal matters, from reviewing reports to appeals. Handled all civil matters, child protective proceedings, juvenile delinquency, public administration of estates, public guardianships, personnel matters, human resources and union issues, open meeting law, ethics issues, legal counsel for all county departments and boards, county hospital, and school district, drafted and reviewed contracts, offered day-to-day legal advice and legal opinions.

Humboldt County District Attorney's Office, Winnemucca, Nevada; July 2008 – October 2010. *Deputy District Attorney*: Handled all civil matters for Humboldt County, Nevada. Worked closely with all county departments and boards, dealt with personnel matters, human resources and union issues, open meeting law, ethics issues, drafted and reviewed contracts, offered day-to-day legal advice and legal opinions.

Office of the Nevada Attorney General, Carson City, Nevada; October 2004 – July 2008. *Deputy Attorney General*: Represented the State of Nevada Division of Child and Family Services; Worked in areas of child welfare, juvenile justice, and children's mental health. Assisted with day-to-day legal advice, drafted statutory language, opinions, and regulations, worked with open meeting law, personnel issues, legislative issues, and litigation. Previously worked for the Bureau of Consumer Protection on regulatory and legislative issues pertaining to utilities; Participated in cases before the Nevada Public Utilities Commission.

Law Offices of Mark Wray, Reno, Nevada; August 2002 - October 2004. *Law Clerk/Associate Attorney*: General practice, civil litigation, business law, legal research and writing.

Legal Work While in Law School: *Utility Consumers' Action Network (UCAN)*, San Diego, California; April 2000 - December 2000. *Legal Intern*: Consumer issues pertaining to utilities; *The Law Firm of McDonald Carano Wilson, LLP*, Reno, Nevada; May 2001 - July 2001. *Summer Law Clerk:* Legal research and writing.

Self-supporting while obtaining college degrees: 1989 - 1999. Executive assistant, office manager for insurance company (two years), gained proficiency in Microsoft, database programming and other computer programs, accounting assistant, surveyor, receptionist, restaurant hostess, cashier, cook, and waitress.

EDUCATION

California Western School of Law, ABA/AALS, San Diego, California: Juris Doctor, May 2002 *Top 26% based on class standing of 47/183.

University of Nevada, Las Vegas, Las Vegas, Nevada: Bachelor of Arts, Women's Studies, 1999 *3.9 grade point average.

University of Nevada, Reno, Reno, Nevada: Bachelor of Arts, General Studies, Emphasis in Elementary/Special Education, 1994; Studied abroad at Université de Pau, France in 1994.

OTHER CERTIFICATES/SERVICE/TRAINING

Obtained a Human Resources Representative Certificate and an Advanced Certificate, 2014.
University of Nevada, Reno (Instructor on Letter of Appointment) - Women's Studies 490, Fall 2005. Volunteered as child attorney advocate for four years at Washoe Legal Services; Volunteered at Salvation Army Family Emergency Shelter (SAFES), Volunteer Attorneys for Rural Nevadans (VARN), and TADC/Safe Nest domestic violence shelter, worked over 300 hours at the shelter assisting with emergency protective orders, and crisis calls. Completed graduate courses in History at Boise State from 1995-1997.

Case No. CR 10296

Dept. 2

FILED

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SADIE SULLIVAN
DIST. COURT CLERK

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IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

-oOo-

THE STATE OF NEVADA,

Plaintiff,

vs.

BEN FRANCIS CLARK,

Defendant.

______________________________/

OPPOSITION TO MOTION TO SUPPRESS/DISMISS

COMES NOW, Plaintiff, the State of Nevada, by and through its attorney, ANGIE M. ELQUIST, the Lander County District Attorney, and hereby submits its Opposition to Defendant's Motion to Suppress/Dismiss ("Opposition"). This Opposition is based on the following points and authorities, the pleadings and papers on file and other such matters as the Court may deem proper.

Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

DATED this 1st day of July 2014.

ANGIE M. ELQUIST
Lander County District Attorney
Nevada State Bar No. 8441

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POINTS AND AUTHORITIES

I. FACTUAL HISTORY

The State adopts the facts set forth in the Preliminary Hearing Transcript, *State of Nevada v. Benny F. Clark*, January 8, 2013, filed January 30, 2013. ("Tr.").

On the morning of June 23, 2012, at approximately 8:30 a.m., Lander County Sheriff Deputy Alex Rangel and Deputy Gary Campbell ("Deputies") responded to a call involving a disturbance between neighbors. Tr., p. 7, ll. 16-25, p. 8, ll. 1-8.

The Deputies arrived and spoke with the reporting party for about five minutes before they went next door to make contact with Ben Clark, the Defendant ("Defendant"). *Id.* at p. 50, ll. 20-22. Before leaving to speak with Defendant, Deputy Campbell explained to the reporting party that the Deputies were unable to make the arrest themselves and only the reporting party could make a misdemeanor citizen's arrest. *Id.* at p. 69, ll. 23-15, p. 70, ll. 1-2. The Deputies then walked next door to get the Defendant's side of the story and investigate the complaint against him. *Id.* at p. 11, ll. 15-17, p. 22, ll. 3-4, p. 47, ll. 3-4, p. 52, ll. 12-13, p. 56, l. 20, p. 57, ll. 4-16, p. 69, ll. 2-3.

The Deputies heard loud music and a car alarm coming from the garage that was adjacent to Defendant's residence, but did not locate the Defendant in the garage. *Id.* at p. 10, ll. 2-6, p. 46, ll. 12-15, p. 47, ll. 6-25, p. 48, ll. 1-7. Deputy Campbell noticed the backyard gate and the sliding glass door to the Defendant's home were open, so the Deputies approached that entrance. *Id.* at p. 10, ll. 7-9, p. 47, ll. 6-12, p. 48, ll. 3-14. Deputy Campbell knocked on Defendant's house next to the open door and Deputy Rangel knocked again on the frame of the door. *Id.* at p. 48, ll. 15-20. The Defendant came out of the hallway for what Deputy Rangel believed to be a peaceful conversation. *Id.* at p. 12, ll. 25, p. 13, ll. 1-2. Deputy Campbell heard Deputy Rangel say hello to the Defendant inside his house and then heard Deputy Rangel exclaim, "[p]ut it down. Put the gun down, or, drop it. Drop the gun." *Id.* at p. 48, ll. 22-25, p. 49, ll. 1-4. The Defendant began to raise his loaded gun towards the Deputies, but Deputy Rangel was able to draw his weapon first, which stopped Defendant from raising it all the way. *Id.* at p. 13, ll. 8-13, p. 85, ll. 1-11.

At this point, both Deputy Rangel and Deputy Campbell had their duty weapons drawn and pleaded with Defendant over and over for Defendant to drop his gun. *Id.* at p. 13, ll. 10-17, p. 14, ll. 1-9. The Deputies informed the Defendant they were just there to talk to him and find out what happened next door. *Id.* at p. 11, ll. 15-17, p. 22, ll. 3-4, p. 47, ll. 3-4, p. 52, ll. 12-13, p. 56, l. 20, p. 57, ll. 4-16, p. 69, ll. 2-3. Defendant started a belligerent tirade of offensive slurs directed at the Deputies while waving his loaded .357 revolver around. *Id.* at p. 14, ll. 1-18, p. 17, ll. 7-18, p. 49, ll. 9-10, p. 52, ll. 8-19, p. 54, ll. 11-14, p. 63, ll. 8-9, p. 85, ll. 1-11. Defendant called the Deputies "cocksuckers" "keystone cops" and "the N word" *Id.* at p. 14, ll. 1-5, p. 17, ll. 16-18, p. 52, ll. 15-19, p. 85, ll. 1-11.

The Deputies begged the Defendant to drop his gun, asking him approximately 20 to 30 times. *Id.* at p. 13, ll. 19-21, p. 14, ll. 3-5, p. 53, ll. 15-16. The Deputies were scared and knew they were in danger. *Id.* at p. 13, ll. 12-13, p. 14, ll. 21-22, p. 16, ll. 1-2, p. 54, ll. 2-6. They had nowhere to hide for cover. *Id.* at p. 14, ll. 21-22. Deputy Campbell said he "100 percent" believed the Defendant was going to shoot his partner. *Id.* at p. 54, ll. 2-4.

The Deputies were not there to arrest the Defendant. *Id.* at p. 11, ll. 15-17, p. 22, ll. 3-4, p. 47, ll. 3-4, p. 52, ll. 12-13, p. 56, l. 20, p. 57, ll. 4-16, p. 69, ll. 2-3. They only wanted to talk to the Defendant and investigate the complaint. *Id.* Once the Defendant began to raise his loaded gun toward the Deputies and started waving it around in a threatening manner, the situation became a felony crime. *Id.* at p. 13, ll. 8-13, p. 14, ll. 1-18, p. 17, ll. 7-18, p. 32, ll. 24-25, p. 33, ll. 1-3, p. 35, ll. 14-15, p. 49, ll. 9-10, p. 52, ll. 8-19, p. 54, ll. 11-14, p. 63, ll. 8-9, p. 72, ll. 24-25, p. 73, ll. 1-3, p. 85, ll. 1-11.

II. LEGAL OVERVIEW

As the Defendant cited in, *Arterburn v. State*, 111 Nev. 1121, 901 P.2d 668 (1995):

> Courts have acknowledged that three categories of police interactions exist: (1) the "consensual encounter," which is completely voluntary and for which a police officer needs no justification; (2) the "detention," which is a seizure strictly

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limited in length, scope and purpose, and for which a police officer must have an articulable suspicion that the civilian has committed or will commit a crime; and (3) the "arrest," for which a police officer must have probable cause (citations omitted).

Defendant's argument addresses numbers two (2) and three (3) above, an alleged illegal detention and an alleged illegal arrest. The detention and arrest, however, are not at issue in this case. The issue in this case is number one (1) above, the consensual encounter. The issue surrounds the consensual encounter between the Defendant and the Deputies. This case began as a consensual encounter. Defendant's actions escalated the situation to an exigent circumstance by threatening the lives of the Deputies, and a felony assault. Therefore any detention or arrest thereafter were legal.

III. ARGUMENT

A. Defendant's Motion Should Be Denied Because the Interaction Between the Deputies and Defendant Started as a Consensual Encounter

If the totality of the circumstances suggests a consensual encounter between the police and citizens, all evidence obtained will be admitted and not suppressed. *Somee v. State*, 124 Nev. 434, 444-445, 187 P.3d 152, 159-160 (2008). A "consensual encounter is not a seizure, and thus, the Fourth Amendment is not implicated." *State v. Beckman*, 305 P.3d 912, 918 (Nev. 2013) (citations omitted). "[M]ere police questioning does not constitute a seizure." *State v. Lisenbee*, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000) (citing *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382 (1991)).

In this case, the Deputies stated they went to the Defendant's house to get his side of the story and investigate the complaint against him. Tr. at p. 11, ll. 15-17, p. 22, ll. 3-4, p. 47, ll. 3-4, p. 52, ll. 12-13, p. 56, l. 20, p. 57, ll. 4-16, p. 69, ll. 2-3. The Deputies were not there to arrest the Defendant, only to talk to the Defendant and investigate the complaint. *Id.* Therefore, it was a consensual encounter and the Fourth Amendment was not implicated.

Police officers may approach a home to contact the inhabitants. *United States v. Perea-Rey*, 680 F.3d 1179, 1187 (9th Cir. 2012). "Officers conducting a knock and talk need not

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approach only a specific door if there are multiple doors accessible to the public." *Id. at* 1188 (citing *United States v. Titemore*, 335 F. Supp. 2d 502, 505-506 (D. Vt. 2004)). Deputy Campbell saw both the backyard gate and the sliding glass door open and went to the Defendant's open back door to have a consensual encounter with the Defendant. Tr. at p. 10, ll. 7-9, p. 47, ll. 6-12, p. 48, ll. 3-14. See also *U.S. v. Hendrix*, 664 F.3d 1334 (10th Cir. 2011) (police officer's "knock and talk" investigation and speaking to occupants of a residence while standing outside a closed door to the residence, did not contravene Fourth Amendment, even absent reasonable suspicion or probable cause); *U.S. v. Thomas*, 430 F.3d 274 (6th Cir. 2005) (the court found that the officers' use of the rear door to contact the defendant was not unreasonable under the circumstances because the back door, which opened onto a deck, was adjacent to the driveway and clearly served as the customary entrance to the defendant's home); *U.S. v. Titemore*, 335 F. Supp. 2d 502 (D. Vt. 2004) (a state trooper lawfully approached the defendant's residence at an unenclosed sliding porch door on the side of the house that was not accessible from a walkway to make a knock and talk visit in order to investigate a neighbor's complaint of vandalism and theft).

The initial encounter started off pleasant with Deputy Rangel and the Defendant saying hello to one another. Tr. at p. 12, ll. 25, p. 13, ll. 1-2, p. 48, ll. 22-25, p. 49, ll. 1-4. Once the Defendant grabbed his loaded gun, began to raise it toward the Deputies and walked toward them waving the gun around in a threatening manner, the consensual encounter changed. *Id.* at p. 13, ll. 8-13, p. 14, ll. 1-18, p. 17, ll. 7-18, p. 32, ll. 24-25, p. 33, ll. 1-3, p. 35, ll. 14-15, p. 49, ll. 9-10, p. 52, ll. 8-19, p. 54, ll. 11-14, p. 63, ll. 8-9, p. 72, ll. 24-25, p. 73, ll. 1-3, p. 85, ll. 1-11.

The Deputies informed the Defendant that they were only there to talk to him and find out what happened next door. *Id.* at p. 11, ll. 15-17, p. 22, ll. 3-4, p. 47, ll. 3-4, p. 52, ll. 12-13, p. 56, l. 20, p. 57, ll. 4-16, p. 69, ll. 2-3. Defendant could have simply refused to talk to them and closed his sliding glass door, but instead he grabbed his loaded gun, began to raise it up toward the Deputies, and started a belligerent tirade of offensive slurs while waving his loaded .357 revolver around. *Id.* at p. 13, ll. 8-13, p. 14, ll. 1-18, p. 17, ll. 7-18, p. 49, ll. 9-10, p. 52, ll. 8-19, p. 54, ll. 11-14, p. 63, ll. 8-9, p. 85, ll. 1-11.

Whether a knock and talk violates an individual's Fourth Amendment rights is not based upon the good faith belief of police officers. *United States v. Garcia*, 997 F.2d 1273, 1279-1280 (9th 1993). "In reviewing police action . . . the touchstone of the Fourth Amendment analysis must always be that of reasonableness." *State v. Lisenbee*, 116 Nev. 1124, 1128, 13 P.3d 947, 950 (2000) (citations omitted). It was reasonable for the Deputies to go through an open backyard gate to an open sliding glass door to have a consensual encounter with the Defendant.

Because the Deputies made contact with Defendant as a consensual encounter, and Defendant's actions led to a felony assault, any warrantless detention or arrest was justified. Therefore, the Fourth Amendment is not implicated, and the evidence should not be suppressed.

B. Defendant's Motion Should Be Denied Because the Interaction Between the Deputies and Defendant Escalated to an Exigent Circumstance When the Defendant Threatened the Safety of the Deputies

"Warrantless home entries . . . are presumptively unreasonable unless justified . . . such as when exigent circumstances exist." *See Camacho v. State*, 119 Nev. 395, 400, 75 P.3d 370, 374 (2003); *Hannon v. State*, 125 Nev. 142, 145, 207 P.3d 344, 346 (2009). When reviewing if an exigent circumstance exists, a law enforcement officer's subjective motivation is irrelevant. *Hannon*, at 146, 347 (citations omitted). "In reviewing police action . . . the touchstone of the Fourth Amendment analysis must always be that of reasonableness." *Lisenbee*, at 1128, 950 (citations omitted).

Once the Defendant brought out his loaded gun, started to raise it toward the Deputies, and waved it around in a threatening manner, the consensual encounter changed. Tr. at p. 13, ll. 8-13, p. 32, ll. 24-25, p. 33, ll. 1-3, p. 35, ll. 14-15, p. 54, ll. 11-14, p. 72, ll. 24-25, p. 73, ll. 1-3, p. 85, ll. 1-11. Now the lives of the Deputies were threatened and they were in danger. *Id.* Deputy Campbell 100 percent believed the Defendant was going to shoot his partner. *Id.* at p. 54, ll. 2-4. Any reasonable police officer would have reacted to the threat in front of them in the same way. The Defendant created an exigent circumstance when he threatened the lives of the Deputies.

"The *Fourth Amendment* does not require police officers to delay in the course of an

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investigation if to do so would gravely endanger their lives or lives of others." *United States v. Flippin*, 924 F.2d 163, 166 (9th Cir. 1991) (citing *Warden v. Hayden,* 387 U.S. 294, 298-99, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967)). "Police must be allowed to protect themselves before a potential threat of danger develops into a tragedy." *Id;* See also *State v. Hillman,* 417 S.W.3d 239 (Mo. 2013) (exigent circumstances existed if the time needed to obtain a warrant would endanger life . . . .); *United States v. Butler*, 405 Fed. Appx. 652 (3rd Cir. 2010) (not precedential) (exigent circumstances existed because an officer's life and the lives of his fellow officers were in danger when they conducted a "knock and talk" at an apartment's front door, and the defendant opened the door slightly and pointed a gun at an officer); *Waddy v. State*, 880 S.W.2d 458 (Tex. App. 1994) (the warrantless arrest was proper when a police officer saw the suspect running with a gun in his hand and he arrested him inside the suspect's apartment because the exigent circumstance of a threat to the public existed); *United States v. Thomas*, 372 F.3d 1173(10th Cir. 2004) (the warrantless entry was justified when defendant was holding a gun and ran down a hallway because the officer had reasonable fear to ensure the officer's safety and the safety of others).

Because the Defendant created the exigent circumstance of putting the Deputies' lives in danger, any warrantless detention or arrest was justified. Therefore, the Fourth Amendment is not implicated, and the evidence should not be suppressed.

C. Defendant's Motion Should Be Denied Because Defendant's Felony Assault Upon the Deputies Allowed for Any Warrantless Detention and Arrest

Nevada Revised Statutes 171.124(1) allows an arrest by a peace officer without a warrant when a person has committed or attempted to commit a public offense in the officer's presence or when a person commits a felony or gross misdemeanor. In this case, once the Defendant grabbed his loaded gun, began to raise it toward the Deputies, and started waving it around in a threatening manner in front of the Deputies, it became a felony assault upon the Deputies. Tr. at p. 13, ll. 8-13, p. 14, ll. 1-18, p. 17, ll. 7-18, p. 32, ll. 24-25, p. 33, ll. 1-3, p. 35, ll. 14-15, p. 49, ll. 9-10, p. 52, ll. 8-19, p. 54, ll. 11-14, p. 63, ll. 8-9, p. 72, ll. 24-25, p. 73, ll. 1-3, p. 85, ll. 1-11.

Because the Defendant committed felony assault upon the Deputies, any warrantless

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detention or arrest was justified. Therefore, the Fourth Amendment is not implicated, and the evidence should not be suppressed.

D. The Defendant's Argument About the Defendant's Right to Bear Arms in His Home is Not At Issue in This Case

The issue of the right of the Defendant to bear arms in his home is not at issue in this case. Yes, the Deputies agreed the Defendant had a right to have a gun in his home. Tr. at p. 34, ll. 18-20, p. 64, ll. 6-9. The argument here is that the Defendant does not have the right to commit felony assault upon police officers when they come to his door for a consensual encounter. The United State Supreme Court has stated that even the Second Amendment right to bear arms has some limitations. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 595, 128 S. Ct. 2783, 2799 (2008). "There seems to us no doubt . . . that the *Second Amendment* conferred an individual right to keep and bear arms. Of course the right was not unlimited . . . we do not read the *Second Amendment* to protect the right of citizens to carry arms for *any sort* of confrontation . . . ." *Heller*, at 595, 2799. "The *Second Amendment* plainly does not protect the right to use a gun to rob a bank . . . ." *Id.* at 636, 2822 (Stevens, J., dissenting).

The Defendant has every right to have a gun in his home. He does not, however, have the right to use that gun to threaten the lives of the Deputies and commit felony assault.

E. With Regard to Defendant's Arguments About the Information Upon Affidavit, The State Reserves Its Arguments Contained in This Opposition; Contained in Its Motion for Leave of Court to File an Amended Information Upon Affidavit; and Contained in Its Reply to Defendant's Opposition to Motion for Leave of Court to File an Amended Information Upon Affidavit

As far as any arguments by the Defendant regarding the Information Upon Affidavit, and the Court ruling in favor of the State, the State reserves its arguments contained in this Opposition; contained in its Motion for Leave of Court to File an Amended Information Upon Affidavit, filed on February 11, 2013; and contained in its Reply to Defendant's Opposition to Motion For Leave of Court to file an Amended Information Upon Affidavit, filed on February 22, 2013.

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IV. CONCLUSION

Based upon the arguments set forth above, the State respectfully requests that Defendant's Motion be denied.

DATED this 1st day of July 2014.

ANGIE M. ELQUIST
Lander County District Attorney
Nevada State Bar No. 8441

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Lander County District Attorney's Office, and that on this 1st day of July 2014, I provided a copy (by means as indicated) of the OPPOSITION TO MOTION TO SUPPRESS/DISMISS to the following:

Larry Dunn and Karena Dunn
1188 California Avenue
P.O. Box 2911
Reno, Nevada 89505
Fax: (775) 322-6088

( ) U.S. Mail

( ) Hand-delivered

(X) Via fax

( ) Certified Mail

Laurie Black

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POST OFFICE BOX 187 · BATTLE MOUNTAIN, NEVADA 89820
TELEPHONE (775) 635-5195 · FACSIMILE (775) 635-8209

PETER K. KEEGAN, ESQ.
DIRECT: [redacted]

October 21, 2016

<u>**VIA EMAIL [BPotter@puc.nv.gov]**</u>
Joe Reynolds, Chairman
Public Utilities Commission of Nevada
C/O Bre Potter, Commission Secretary
BPotter@puc.nv.gov

Re: General Counsel Position – Public Utilities Commission

Greetings, Chairman Joe Reynolds:

I am a strong candidate for this position because I have successfully managed high volume litigation practice, in both state and federal courts, since April of 2011. My legal experience includes relevant practice representing Nevada administrative bodies to ensure compliance with Nevada Revised Statutes ("NRS") 233B, NRS 241, and NRS 333. Over the course of my practice I have developed a respected leadership style, which allows me to build professional rapport amongst colleagues, maximize individual talents, and achieve optimum productivity.

I have served Nevada as a Deputy Attorney General ("DAG") since January of 2014. Upon joining the Attorney General's Office, I worked in the Litigation Division and provided defense counsel to the Nevada Department of Corrections. As a DAG in the Litigation Division I was responsible for cases ranging from small claims trials and state district court appeals, to federal jury trials and appeals to the Ninth Circuit.

In August of 2015, I began representing the Department of Taxation and the Department of Business and Industry. In my current position, I serve as counsel for the Real Estate Division, Manufactured Housing Division, Appraisal Commission, Board for the Regulation of Liquefied Petroleum Gas, Board for Professional Engineers and Land Surveyors, Division of Industrial Relations, and the Domestic Violence Batterer's Treatment Certification Committee. My duties also include providing open meeting law counsel to the Board of Medical Examiners and the Board of Veterinary Examiners. In my current position, I have assisted with regulatory amendments, authored Attorney General Opinions and Open Meeting Law Opinions, and I am often called upon to provide litigation support to my colleagues in different divisions within the Office.

My leadership and litigation abilities stem from my time in private practice with RCO Hawaii L.L.L.C. ("RCO"), a national real estate law firm. At RCO, I was the lead judicial foreclosure attorney and supervised a team of over twenty staff members, including attorneys, paralegals, and legal assistants. At RCO, I prepared staff for and participated in on-site federal regulatory audits. A professional highlight of my employment at RCO, was my successful writ of certiorari in the case *Deutsche Bank National Trust Company v. Peelua*, 126 Haw. 32, 265 P.3d 1128 (2011), which resulted in a published opinion in favor of our client.

I look forward to an opportunity to meet with the members of the Public Utilities Commission to discuss how I will fulfill the role of General Counsel.

Respectfully,

Peter K. Keegan, Esq.
NV Bar # 12237

Peter K. Keegan, Esq.

[redacted]

Education

Vermont Law School, South Royalton, Vermont
Juris Doctor, May 2009
- Research: *Interstate Water Markets...Bank On It.*

California Polytechnic State University, San Luis Obispo, California
Bachelor of Arts, Political Science, June 2006
- Minor, Environmental Science, June 2006

Columbia University's Biosphere 2, Oracle, Arizona
Environmental Science Certificate, August - December 2003
- Drafted grant proposal for California interstate beverage container recycling

Legal Experience

Nevada Attorney General's Office, Carson City, Nevada
Deputy Attorney General, January 2014 – Present
- Served as counsel for a variety of Nevada administrative bodies, prosecuted administrative cases, defended petitions for judicial review, provided open meeting law counsel, and supported high profile litigation Office wide. Served as civil defense counsel for the Nevada Department of Corrections in all actions brought against the State of Nevada in federal and state courts; appeared for appeals, trials, depositions, motions, settlement conferences, and mediations.

RCO Legal, P.S., Honolulu, Hawaii & Reno, Nevada
Lead Attorney, April 2011 - January 2014
- Served as plaintiff's counsel for institutional lenders and servicers in high volume of judicial foreclosure practice involving component bankruptcy and probate matters; managed over 20 support staff and supervised four attorneys; oversaw client communications; resolved complex issues of title; mitigated loss while mediating cases in compliance with both state and federal homeowner protection laws; and developed firm-wide case processing strategies.

Third Circuit Court of Hawaii, Fourth Division, Kealakekua, Hawaii
Judicial Law Clerk and Bailiff for the Honorable Judge Elizabeth A. Strance, October 2010 - April 2011
- Managed the court's calendar; supervised jury trials from jury pool generation to panel payment; instructed the jury clerk, court clerk and judicial assistant regarding trial preparations; provided the judge with thorough analyses and proposed dispositions to secure the just, speedy and inexpensive determination of both civil and criminal actions taken under advisement; and coordinated courtroom security including the taking into custody of criminal defendants.

Third Judicial District of Nevada, Lyon and Churchill County, Nevada
Judicial Law Clerk and Bailiff for the Honorable Judge Leon A. Aberasturi, August 2009 - August 2010
- Drafted orders for judge's signature; composed memoranda dissecting legal theories and proposing judicial action; scrutinized civil and criminal filings for procedural compliance to assist in efficient disposition; developed standardized forms adopted by the court for family law proceedings; and managed hearings and jury trials as bailiff.

United Space Alliance, LLC, Kennedy Space Center, Cape Canaveral, Florida
Regulatory Compliance Intern, May - August 2008
- Performed regulatory audits of hazardous waste management for certification, conducted due diligence of potential treatment and disposal contractors, compiled risk assessment for asbestos abatement on shuttle launch pad during flame trench repair, and advised on procurement plan for U.S.D.A.'s Biopreferred Federal Acquisition Regulation.

Nevada State Attorney General's Office, Government and Natural Resources Division, Carson City, Nevada
Law Clerk, May - August 2007
- Prepared legal memoranda including: a preliminary injunction against the U.S. Dept. of Energy for violating its Yucca Mountain water permit, a legislative update of Nevada's mortgage income verification laws under the Home Mortgage Disclosure Act, and an inter-basin water transfer by the Walker River Paiute Indian Tribe.

Friends of the Earth International Environmental Organization, Brussels, Belgium
Research Associate, June - December 2004
- Managed five research interns; compiled reports on ratification of international law agreements for the "*Earth Charter*" Commission Update; and organized roundtable negotiations between E.U. member states for the U.N.

Leisure Pursuits
- Backpacking, chess, cycling, parenting, reading, skiing, swimming, surfing, triathlons, volunteering, water polo

[redacted]
October 16, 2016

by e-mail only bpotter@puc.nv.gov
Joe Reynolds
Chairman
Public Utilities Commission of Nevada
1150 East William Street
Carson City, Nevada 89701

Dear Chairman Reynolds:

I write to apply for the position of General Counsel within the Public Utilities Commission of Nevada. My resume is attached. I also attach a writing sample from text I prepared alone for a continuing legal education seminar on the law of evidence at which I spoke. I am admitted to practice law in Nevada and federal courts within Nevada. I heard about this position via the Washoe County Bar Association's periodic newsletter, *The Writ*.

As you can see from my resume, I have extensive experience already as an attorney within the Public Utilities Commission of Nevada. I was Administrative Attorney for Commissioner Galen D. Denio, who was formerly manager of the regulatory staff's engineering division. As Administrative Attorney, I advised and counseled Commissioner Denio on administrative law and procedure and on matters pertaining to the commission. Among my duties, I drafted hearing notices, drafted tentative rulings on motions and procedural issues, counseled and advised the commissioner on legal issues at hearings, counseled and advised the commissioner on findings of fact and conclusions of law to present for a vote of the commission, and drafted proposed orders and opinions for a vote of the commission. This position required on my part extensive legal and practical knowledge of administrative law, as Commissioner Denio was not an attorney and, as you know, the record on any appeal consisted of the proceedings before the commission. To my knowledge, none of the dozens of orders or opinions I drafted was challenged on or the subject of judicial review.

I also possess extensive experience in civil litigation practice in Nevada. Over the years, I have maintained a civil case load and have litigated hundreds of cases from inception to final judgment. On those cases, I often represented an insurer either as an indemnitor or a party. These cases typically concerned personal injury, wrongful death, consumer or commercial disputes, property damage, subrogation, or insurance coverage. I worked independently and was responsible for formulating and conducting all legal evaluations and strategy and discovery and for representing the clients at depositions, hearings, mediations, arbitrations, trials, and appeals. I have won dozens of cases, many on motion but also some after arbitration, trial, or appeal. I have had particular success in my motion and appellate practice. One of the cases I won before the Supreme Court of Nevada, after my briefing and oral argument before the court, is reflected in a published opinion. 128 Nev. Adv. Op. No. 39, 282 P.3d 733 (2012).

I have been recognized for my abilities. Upon invitation, I have been a speaker at continuing legal education seminars on legal writing, uninsured and underinsured motorist coverage law, insurance coverage litigation, post-verdict civil practice, and evidence law. For all these seminars, I prepared extensive written material. I am scheduled to speak later this year at a seminar on Nevada civil litigation practice. I have been a mediator in the Nevada Foreclosure Mediation Program and have mediated numerous mortgage defaults to final resolution. I have also been an arbitrator in the Nevada court-annexed arbitration program and the Better Business Bureau Auto Line arbitration program for warranty disputes between new vehicle purchasers and manufacturers.

I have in every respect the record of a capable and honest attorney, with no negative background whatsoever, and seek to apply for this position with the most transparency possible. To that end, I enclose with this correspondence the application I completed, *sworn under oath to the State Bar of Nevada*, to become an arbitrator in the court-annexed arbitration system in Nevada. That application process requires a background check conducted by the State Bar of Nevada before swearing in by the Supreme Court of Nevada. I was sworn without incident or delay. The application shows my professional history on the last page.

As you can see, I have had unfortunate experiences with certain past employers. In one position, at Perry & Spann, P.C., my employment was terminated because I did not bill over 200 hours per month every month and spend enough time promoting the firm and no other reason (although my billing average was 195 hours per month my last calendar year and my bills were paid nearly one-hundred percent during that period as I actually worked the time I billed). In another position, at Hamilton & McMahon, Ltd., my employment was terminated for no reason given despite my repeated requests for a reason (and despite the facts that I won most of the cases won by that firm during my years there and successfully eliminated a large file backlog left by a prior attorney).

It is difficult for me to account for this behavior toward me other than to point out that at both offices I was smart and professional and not corrupt or obsequious. I worked quietly and independently, won dozens of cases, and my work product was sophisticated. I can assure you that I am aware of no fact given to me, or that could account for, these terminations of my employment other than those stated here—*I have sworn as much under oath to the State Bar and the Supreme Court*. I have been a capable and ethical attorney at all times. All statements in this cover letter, my resume, and my arbitrator application are true without reservation. My sworn statement attests to my background in the broadest way possible. I have omitted nothing. I have no negative background whatsoever, personally or professionally. In attaching the application, it is not my intention to be critical or judgmental about past employers but only to be certain that there are no misunderstandings about my abilities or background or character. Finally, my experience with Commissioner Denio was positive in every respect, and I enjoyed thoroughly working with him and for him.

I have a long record of success in civil and administrative law practice and a skill for abstract legal analysis that I know would be ideal for this position. I would be pleased to meet with you and the other commissioners to discuss practice within the commission. I have in every respect the record of an honest, capable attorney and would welcome the opportunity to discuss my background, experience, and accomplishments. Thank you for considering my application.

Sincerely,

Mark T. Liapis

MARK T. LIAPIS

[redacted]

PROFESSIONAL

Licensed to practice law: 1989, Ohio; 1991, Nevada; 1992, California; 1997, U.S. District Court, District of Nevada; 1998, U.S. Court of Appeals, Ninth Circuit.
Lecturer, Continuing Legal Education, National Business Institute, Inc.
Mediator, Nevada Foreclosure Mediation Program.
Arbitrator, Nevada Court Annexed Arbitration Program.
Arbitrator, BBB Auto Line Arbitration Program

EXPERIENCE

2008-present — PRIVATE PRACTICE — Reno, NV
Contract Attorney
Civil litigation.
Review and evaluate files for litigation strategy and advise accordingly.
Draft documents upon review and evaluation of files.
Advise and counsel clients and insurers as necessary.
Appear and litigate upon scheduling conflict.

HAMILTON & MCMAHON, LTD. — Reno, NV

2005-2007 — *Attorney*
Civil litigation.
Maintain defense practice caseload.

- Advise and counsel clients and insurers
- Draft pleadings
- Retain, consult, and prepare expert witnesses
- Depose parties and witnesses
- Conduct discovery in addition to depositions
- Prepare and argue procedural and dispositive motions and petitions
- Represent clients at mediation and settlement conferences
- Try cases at administrative level, arbitration, and trial
- Practice before appellate courts.

2003 - 2005 — *Of Counsel*
Civil litigation.
Duties like contract attorney as above.

1996 - 2002	PERRY & SPANN, P.C. *Attorney* Civil litigation, Nevada & California. Maintain defense practice caseload as above.	Reno, NV
1992 - 1996	PUBLIC SERVICE COMMISSION OF NEVADA *Commissioner's Attorney* Legal Advisor for Public Utility Commissioner.	Carson City, NV
1990 - 1992	LEVERTY & ASSOCIATES LAW, CHTD. *Attorney* Civil litigation. Substantial experience in the civil litigation process up to trial.	Reno, NV
May-August, 1988	GOLD, ROTATORI, SCHWARTZ & GIBBONS *Law clerk*	Cleveland, OH
May-August, 1987	BROWNFIELD AND CRAMER *Law clerk*	Columbus, OH

EDUCATION

1986 - 1989	CASE WESTERN RESERVE UNIVERSITY *Juris Doctor* Dean Dunmore Moot Court Competition, 1987-1988. Overall Competition Rank: 27/115.	Cleveland, OH
1982 - 1986	TULANE UNIVERSITY *Bachelor of Arts, major in English* *Cum laude.* Dean's List.	New Orleans, LA

REFERENCES

Available upon request.

V. EXPERT REPORTS AND SCIENTIFIC EVIDENCE

A. Assessing the Potential Weight of Scientific Evidence

NRS 50.275 authorizes testimony by experts "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge." Expert testimony is not restricted to the field of scientific inquiry. Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 243 n.6, 955 P.2d 661, ___ n.6 (1998).

In a nutshell, NRS 50.275 defines for counsel how to assess the potential weight of scientific evidence at trial in any given case: will the evidence assist the trier of fact to understand the evidence or determine a fact in issue? If the answer is yes, especially on a material issue that could control on meeting a burden of proof, the expert should be disclosed and designated to testify.

In some cases, the testimony of certain experts is of such a potential weight that it is required for the party to meet the burden of proof at trial. For example, NRS 41A.100 requires expert medical testimony to make a case for medical malpractice. Proof of causation by expert testimony may be necessary for a plaintiff to meet his or her burden of proof in a product liability action. See, e.g., Jeep Corporation v. Murray, 101 Nev. 640, 708 P.2d 297 (1985) (causation proved by plaintiff's expert and by plaintiff). Proof of causation by expert testimony may also be necessary in certain criminal prosecutions to meet the burden of proof. In Lord v. State, 107 Nev. 28, 33-34, 806 P.2d 548, ___ (1991), the court held in a criminal case that a police detective could not offer an opinion on the cause of the defendant's injuries because he was not qualified as a medical expert, but the court upheld the conviction nonetheless based on other strong evidence of guilt. See also, 4 Weinstein's Federal Evidence section 702.06[2][c][i] (2013). But in some instances it has been held specifically that expert testimony is not required. "[E]xpert testimony is not always necessary to establish the existence of a manufacturing defect" or entitlement to an award of damages for future pain and suffering. Krause Inc. v. Little, 117 Nev. 929, 937, 34 P.3d 566, ___ (2001). In Krause, the court held that the unexpected, dangerous malfunction of an articulated ladder gives rise to an inference of a manufacturing defect and that a broken ankle was a common enough for a jury to estimate future pain and suffering. Id. at 937-39. Expert testimony is not required for a plaintiff to offer a value of his or her property on a property damage claim. Dugan, supra at Part III.B., 117 Nev. at 288.

Regardless of whether an expert's testimony may be necessary to sustain a burden of proof, counsel should give thorough consideration to offering expert testimony on any material issue where the trier of fact may be easily confused or misled without the testimony. By the same token, common sense requires that counsel limit expert testimony only to material issues such as not to cause unnecessary expense to the client, waste of the court's time, or even confusion of the trier of fact. As a practical matter, I usually attempt to limit expert witness presentation only to those issues that, without the testimony, may leave doubt on meeting a burden of proof; to my mind, expert witness testimony on other issues must meet a higher standard for avoiding confusion of the issues before I would offer it.

In the medical context, the Supreme Court of Nevada has addressed several times the weight of the evidence needed to meet whatever burden of proof applies. In that context, to avoid speculation, the court has held that "a medical expert is expected to testify only to matters that conform to the reasonable degree of medical probability standard." Brown v. Capanna, 105 Nev. 665, 671-72, 782 P.2d 1299, 1304 (1989). The court has since clarified that, while not all medical expert testimony must be stated to that standard, the standard applies especially to medical opinions regarding standard of care and causation. Morsicato v. Sav-On Drug Stores, Inc., 121 Nev. 153, 158, 111 P.3d 1112, _____ (2005).

The court has held further that, where an adverse medical expert witness offers an opinion containing an independent theory of causation, the opinion must meet the standard, but where the adverse medical expert offers opinions that merely contradict the opposing party's position those opinions need not meet the standard. Williams v. Eighth Judicial Dist. Court, 127 Nev.Adv.Op. No. 45 at __, 262 P.3d 368-69 (2011). Therefore, where a medical expert will be offering in a case on direct opinions on issues of medical standard of care or causation, or offering his or her own independent theories in response, counsel must be certain to confirm before trial that the testimony will be of such a weight as to be admissible: to a reasonable degree of medical probability.

B. Qualifying Experts and Verifying Methodologies/Theories

1. Generally

In Nevada, the blueprint for qualifying expert witnesses to testify at trial is set forth in NRS 50.275: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge." Higgs v. State, 126 Nev.Adv.Op., No. 1, 222 P.3d 648, 658 (2010).

Under that statute, in order to testify, the expert must have "special knowledge, skill, experience, training or education" and only then may testify within the scope of that knowledge in a way that "will assist the trier of fact to understand the evidence or to determine a fact in issue." See also, Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646 (2008). NRS 50.275 mirrors FRE 702. Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 243, 955 P.2d 661, ___ (1998). In Hallmark, supra, the court set forth requirements underlying the statute for an expert witness to testify. The court held that the expert witness must satisfy the following requirements: "(1) he or she must be qualified in an area of scientific, technical, or specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue (the assistance requirement); and (3) his or her testimony must be limited to matters within the scope of [his or her specialized] knowledge (the limited scope requirement)." [citations and quotations omitted] 124 Nev. at 498.

2. The Qualification Requirement

To qualify an expert means to show that he or she has the "special knowledge, skill, experience, training or education" that the statute requires (qualification requirement). Over the years, the Supreme Court of Nevada has addressed in various contexts the applicability of this requirement in various contexts. The court has held that it "will not disturb a district court's sound discretion in determining the competency of an expert witness absent a clear abuse of discretion," Yamaha Motor Co., supra, 114 Nev. at 244, and that "[D]istrict courts have wide discretion, within the parameters of NRS 50.275 . . . to evaluate the admissibility of expert testimony." Williams, supra, 127 Nev. Adv. Op. No. 45 at 7 [internal quotations omitted]. In Hallmark, supra, the court expanded upon the requirement set forth above for an expert to testify. The court set forth four factors for the trial judge to consider on what it called the "qualification requirement" of NRS 50.275: "(1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training." 124 Nev. at 499. The court stated that "these factors are not exhaustive, may be accorded varying weights, and may not be equally applicable in every case."

Some noteworthy examples of holdings by the Supreme Court of Nevada on the issue of expert witness qualification follow: an owner of property may testify to its value without being qualified as an expert, Dugan v. Gotsopoulos, supra, 117 Nev. at 288, expert witnesses may testify to subjects broadly within the area of their expertise and need not be licensed in a given field in order to testify as an expert, Wright v. Las Vegas Hacienda, 102 Nev. 261, 263, 720 P.2d 696, ___ (1986); Hanneman v. Downer, 110 Nev. 167, 179, 871 P.2d 279, ___ (1994), an expert witness in a medical malpractice case need not necessarily be licensed to practice medicine, Freeman v. Davidson, 105 Nev. 13, 15, 768 P.2d 885, ___ (1989); Williams, supra, 127 Nev.Adv.Op. No. 45 at __, on-the-job training can lead to qualification as an expert witness, Emmons v. State, 107 Nev. 53, 57, 807 P.2d 718, ___ (1991), and expert testimony is not required to prove future pain and suffering from a common, objective ailment such as a broken bone, Krause, Inc., supra, 117 Nev. at 938-39.

Under NRS 50.275, the expert need not only be qualified to testify on the subject matter and issues for which he or she is offered. The substance of that expert's testimony must also be of a type that "will assist the trier of fact to understand the evidence or to determine a fact in issue" (assistance requirement). That is, the expert's testimony must be relevant to the issues and cannot be mere personal opinions or speculative ramblings—the expert's testimony must be anchored in scientifically verified methodologies and theories. Hallmark v. Eldridge, supra, 124 Nev. 492.

3. **The Assistance Requirement**

NRS 50.275 does not define what it means for expert testimony to "assist the trier of fact." District judges also have considerable discretion in determining when an expert's testimony would assist the trier of fact. Of course, that discretion is not absolute, and is also subject to review on a clear abuse of discretion standard. See, e.g., Morsicato, supra, 121 Nev. at 157; Williams, supra, 127 Nev.Adv.Op. No. 45 at 7. The Supreme Court of Nevada has commented that "the threshold test for the admissibility of expert testimony turns on whether the expert's specialized knowledge will assist the trier of fact in understanding the evidence or an issue in dispute," with the goal being to provide the trier of fact a resource for ascertaining truth in relevant areas outside the ken of ordinary laity. Yamaha Motor, supra, 114 Nev. at 243; Townsend v. State, 103 Nev. 113, 117-18, 734 P.2d 705, 708 (1987). The court further stated that "the admissibility of such evidence must also satisfy prerequisites of all relevant evidence, *i.e.*, that its probative value is not substantially outweighed by its prejudicial effect." Id. Expert testimony is not limited to the field of scientific inquiry; nonscientific testimony is admissible when it assists the trier of fact to understand the evidence or to determine a fact in issue. Yamaha Motor Co., supra, 114 Nev. at 243.

In Hallmark v. Eldridge, supra, 124 Nev. at 500-01, the court addressed specifically what it calls the "assistance requirement" of NRS 50.275. The court set forth various factors to consider in determining whether the testimony will assist the trier of fact in understanding the evidence or determining a fact in issue. NRS 50.275. The court held that the testimony will assist the trier of fact when it is relevant and the product of reliable methodology. In determining whether expert testimony is the product of reliable methodology, the trial judge should consider "whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subject to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization." 12 Nev. at 500-501.

Additionally, "[i]f the expert formed his or her opinion based upon the results of a technique, experiment, or calculation, then a district court should also consider whether 1) the technique, experiment, or calculation was controlled by known standards; (2) the testing conditions were similar to the conditions at the time of the incident; (3) the technique, experiment, or calculation had a known error rate; and (4) it was developed by the proffered expert for purposes of the present dispute." 124 Nev. at 501-02. The court noted that the factors are not exhaustive and may be accorded varying weights and may not apply equally in every case. 124 Nev. at 502.

4. A Philosophical Divide: the Vitality of *Daubert* in Nevada

There is a philosophical divide that underlies the analysis for admissibility of expert testimony, however, and it is one that has been touched upon and was eventually discussed at length by the Supreme Court of Nevada. Although the law on these issues in Nevada remains grounded in the language of NRS 50.275, counsel should be aware of the underlying debate in order to more fully appreciate how the Supreme Court of Nevada views the admissibility of expert testimony.

In Frye v. United States, 293 F. 1013, 1014 (1923), the Court of Appeals of the District of Columbia (now known as the United States Court of Appeals for the District of Columbia Circuit) held that an expert opinion based on a scientific technique is inadmissible unless the technique has "gained general acceptance in the particular field in which it belongs." For many years, this holding was the standard in evaluating the admissibility of expert testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 585, 113 S.Ct. 2786, 2792, 125 L.Ed.2d 469, 478 (1993). Subsequently, in 1975, FRE 702 was enacted and provided originally that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." As noted above, this rule mirrors NRS 50.275. Yamaha Motor Co., supra, 114 Nev. at 243.

Dispute arose in the years since the enactment of FRE 702 whether that rule abrogated the "general acceptance" standard set forth in Frye. In Daubert, supra, the U.S. Supreme Court resolved that dispute by holding that FRE 702 in fact did abrogate Frye in the sense that Frye was too narrow in defining the trial judge's discretion in admitting expert testimony; the supreme court believed that the language of FRE 702 evinced an intention to broaden the admissibility of expert testimony. In the court's view, "general acceptance" by the scientific community was too narrow of a standard and could serve to exclude some testimony that may be within the design of the rule. In its holding, however, the court did not lay down a specific standard for the admission of expert testimony under FRE 702. Rather, it designated certain guideposts that lower court judges must consider as "gatekeepers" in evaluating the admissibility of expert testimony. 509 U.S. at 597.

The court held that the trial judge must first determine whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. According to the court, "[t]his entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." 509 U.S. at 592-93. The trial judge should also consider whether the technique has been subject to peer review and publication. 509 U.S. at 593. The trial judge should also consider the known or potential rate of error for any particular scientific technique. 509 U.S. at 594. Finally, the court recognized, "general acceptance" can have a bearing but is no longer controlling. 509 U.S. at 594. The court emphasized that the inquiry is a flexible one and that is focus is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. 509 U.S. at 594-95. The supreme court subsequently confirmed the broad discretion trial judges have in admitting expert testimony and extended Daubert to include all expert testimony, not only scientific expert testimony. General Electric Co.

v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) ; Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); Higgs v. State, 126 Nev.Adv.Op., No. 1, 222 P.3d 648 (2010).

Although Daubert and its progeny are controlling in federal courts and not in Nevada state courts, the Supreme Court of Nevada for many years since the issuance of Daubert skated around the holding and its applicability in Nevada courts. In Yamaha Motor Co., supra, the first Nevada case to meaningfully address Daubert, the court recognized the holding in Daubert but construed it to apply only to expert testimony that relies upon a scientific method and held that the issues before the court were not strictly matters of a scientific method. 114 Nev. at 243. In Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1482, n.3, 970 P.2d 98, 142 n.3 (1998), the court explicitly declined to adopt Daubert because it was still "a work in progress" in the federal courts, and the court wanted to observe its further development in federal courts before deciding whether to adopt it. In Krause, supra, 117 Nev. at 934, the court, without further explanation, specifically observed that it had declined to adopt Daubert previously (citing to Mahlum) and reaffirmed the application of NRS 50.275 as the standard in Nevada.

In Hallmark v. Eldridge, supra, 124 Nev. at 498, the court once again recognized that it had not adopted Daubert as the standard in Nevada but observed that Daubert and federal court interpretations of it are persuasive authority in Nevada. But in Higgs, supra, 126 Nev.Adv.Op., No. 1, 222 P.3d 648, the court rejected the notion that in Hallmark it implicitly adopted the Daubert standard. The court in Higgs held that in Hallmark it had observed merely that Daubert and cases construing it were persuasive authority in Nevada and had approved of Daubert to the extent that it espouses a flexible approach to the admissibility of expert testimony but did not approve of applying the Daubert guideposts in a mechanical factor. 126 Nev.Adv.Op. No. 1 at 15-16. The court noted that, since the issuance of Daubert, FRE 702 has been amended to incorporate the guideposts set forth by that case whereas NRS 50.275 has no such guideposts and offers potentially even more flexibility than Daubert or FRE 702. 222 P.3d at 658-59. Therefore, under Higgs, the language of NRS 50.275 and the factors in Hallmark control on the admissibility of expert testimony, and Frye and Daubert are merely persuasive authority. In the court's view, this approach has the advantages of giving judges wide discretion in ruling upon the admissibility of expert testimony and creates an inquiry that is based more in legal, rather than scientific, principles. Higgs, supra, 126 Nev.Adv.Op. No. 1 at 16.

The Supreme Court of Nevada in Higgs has stated a preference for the evaluation of the admissibility of expert testimony to be flexible as provided in NRS 50.275 and not constrained by undue reliance on abstract guideposts like those set forth in Daubert. In my view, like a lot of jurisprudence on the admissibility of expert testimony, the approach of the Nevada court is no less confounding than that of Daubert and its progeny. Whereas Daubert offers several general, abstract guideposts for trial court consideration, the Nevada court in Hallmark and Higgs explicitly requires analysis of five factors that a trial court should consider in evaluating whether an opinion is based upon reliable methodology. Hallmark, 124 Nev. at 500-01. Then the court adds four more factors a trial court should consider when the expert's testimony is based upon the results of a technique, experiment, or calculation. 124 Nev. at 501-02. Most of these nine factors are hardly more instructive in any given case than the guideposts in Daubert. The court claims in Higgs that it wants Nevada trial judges to be free from mechanical reliance on abstract guideposts like those in Daubert that could be applied too literally over time but at the same time holds that NRS 50.275 requires consideration of up to nine various factors, some hardly less obtuse than those in Daubert, that are not even mentioned in the statute. What is to stop judges in Nevada from relying mechanically on the factors set forth in Higgs in much the same way the court in Higgs criticizes the federal courts for doing with those in Daubert? 126 Nev.Adv.Op. No. 1 at 13-14.

The court's opinion in Higgs on the issues of expert testimony admissibility speaks from both sides of its mouth and seems merely to rearrange the deckchairs laid out by Daubert. The Higgs opinion on this issue may justifiably cause a trial judge to wonder how much discretion the court actually has on the admission of expert testimony—will the supreme court almost always be deferential barring an obvious statutory or other legal error, or will the supreme court use non-compliance with the factors to justify reversal and remand? If the former, then what is the point in having the factors? If the latter, then how broad can this discretion be? If a mixture of both, then how is a trial judge to evaluate the admissibility of expert testimony in a way that will ensure the court complies with the supreme court's holdings?

Finally, at least in its design, Daubert is meant to offer a very liberal standard for admissibility. Is the standard announced in Higgs meant to give judges broader discretion—and be even more liberal toward admissibility—than that in Daubert? In Hallmark, upon which Higgs relies, the court used the factors it announced to potentially *exclude* expert testimony. Given the court's statement of principles in Higgs about offering trial judges broad discretion on the admissibility of expert testimony while not risking mechanical adherence to any guideposts or factors, perhaps the court in Higgs should simply have held that Daubert was persuasive but not controlling authority, reaffirmed the broad discretion of trial judges on this issue, adhered to the language in NRS 50.275, and announced that future cases will be determined on a case-by-case basis consistent with the court's already-existing body of law on this issue. Perhaps this was the court's true intention in Higgs.

With my comments above, I do not intend to cast aspersions on the court's holdings but, rather, suggest that the issue of evaluating the admissibility of expert testimony may appear deceptively simple but in reality is often confounding. Issues on the admissibility of expert testimony are notoriously technical and fact-specific to the expert and to the issues involved in the case. It must be maddening for a court to attempt to define the outer limits of broad discretion on an issue that in any given case on any given testimony can have so many technical angles. Although the opinion of the Supreme Court of Nevada in Higgs is certainly subject to scrutiny, the court has good company because there is a plethora of articles and other commentary on Daubert. The difficulty of this subject area is revealed in the internal inconsistencies on this issue in Higgs. Perhaps the Supreme Court of Nevada will drift over time more explicitly to the case-by-case basis I mention above.

My analysis and comments are meant to offer an overview of the challenges that exist in evaluating or challenging the admissibility of the testimony of an expert witness. As a practical matter, the issue of the admissibility of expert testimony is always ripe for litigation whenever the expert's qualifications do not seem to match the subject area of his or her testimony or whenever the expert proposes to testify on an area of expertise that seems novel or difficult to grasp. The successful challenge to the testimony of an expert witness can sometimes make the difference between winning and losing a trial. Be prepared for the steep climb that may be required to make that challenge. Be prepared to avoid falling into the legal and analytical quicksand that is Daubert and Higgs.

C. Admissibility of What You Give Your Expert

The facts or data that are relied upon by an expert who is retained, or regularly used as an employee, to provide expert testimony at trial are discoverable. Any expert (or employee) who is retained or used to testify as an expert at trial must prepare a written, signed report. The report is disclosed along with the designations of the witness as an expert for trial. Among other things, that report shall contain "the data or other information considered by the witness in forming the opinions" and "any exhibits to be used as a summary of or support for the opinions." NRCP 16.1(a)(2)(B); FRCP 26(a)(2)(B).

Expert witnesses also may be deposed but not until after the expert report has been provided per NRCP 16.1. NRCP 26(b)(4)(A); FRCP 26(b)(4)(A). Although counsel often stipulate on setting the depositions of experts, I have been in the habit, where feasible, of also serving the expert to be deposed with a subpoena duces tecum demanding the expert's appearance for deposition and production of the expert's entire file at or before the deposition. NRCP 45(a); FRCP 45(a). In my view, the subpoena protects against responsibility for attorney fees should the expert not appear, especially where the action has numerous parties and attorneys, and helps to ensure full disclosure of anything the expert may know or have considered in addition to those items identified in the expert report. NRCP 30(g); NRCP 45(a); FRCP 30(g); FRCP 45(a).

Kate Marshall, Esq.
[redacted]

October 21, 2016

Mr. Joseph C. Reynolds,
Chairman,
Public Utilities Commission of Nevada
C/O Bre Potter,
Commission Secretary
4300 South Maryland Pkwy.
Las Vegas, NV 89119

Dear Chairmen Reynolds:

Re: General Counsel position

I wish to apply for the position of General Counsel for the Public Utilities Commission of Nevada. You will find my resume, and writing sample attached. I hope you will consider my application.

The resume I attach documents skills and experience that support the needs of this position. I served many years as an attorney for the U.S. Department of Justice, and I was brought to Nevada by Frankie Sue Del Papa, then Attorney General, to establish Nevada's first antitrust division. In 2006, I was elected and served two terms as Nevada State Treasurer. The bulk of my legal practice both with the Attorney General's office and in private practice has been in administrative hearings before the Public Utilities Commission of Nevada.

In addition, as an attorney for the U. S. Department of Justice, I oversaw both criminal and civil cases of antitrust violations, managing teams of attorneys, economists, expert witnesses and paralegals. Similar to the matters before the Public Utilities Commission, antitrust cases encompass a wide range of industries and activities. Such cases are often very complex, both in terms of the legal analysis required and in how they are managed.

As State Treasurer, I chaired and was a member of a number of boards, which provided me with substantial experience with Nevada's Open meeting laws. I also oversaw the creation of regulations pertinent to the Treasurer's office, the successful passage of legislation for the benefit of the office and participated in budgetary and other proceedings before the Nevada State Legislature.

I attach two writing samples. The first is a letter drafted while I was president of the National Association of State Treasurers (NAST). The letter was in response to Congressional budget sequestration. While many states' agencies and offices were negatively affected by sequestration, and their respective national associations tried to respond, only NAST was able to negotiate a bipartisan statement on our concerns to Congress.

The letter does not provide a legal analysis, but my ability to draft and negotiate a letter that all members could agree upon required the balancing of many conflicting interests with care and discretion. However small a feat, it is nonetheless an achievement that I am proud of.

The second sample is an order in a case I had before first Judicial Court of the State of Nevada. The judge in that case chose to use the draft order submitted by the Nevada Attorney General's office and written by me as his findings of fact and conclusions of law. Thus, although my name is not attached to the order it may be seen as an example of my legal writing skills.

The skills and experience I would bring to the position – as exemplified by my accomplishments as an attorney and as Treasurer for the State of Nevada – would allow me to take on the responsibilities of General Counsel immediately.

I look forward to meeting with you to discuss the position further, and I thank you for your time and consideration.

Regards,

Kate Marshall

KATE MARSHALL

[redacted] E-mail: [redacted]

EXPERIENCE

MARSHALL LEGAL CONSULTING 1/2015 - present

Confidential part-time legal consulting for counsel to prominent western universities on matters related to patents, royalties and other intellectual property issues, and to small businesses on engaging state and federal consumer policy makers.

OPPORTUNITY ALLIANCE NEVADA 1/2015 – 2/2016

Executive Director for a non-profit that works to improve the financial capability of low and moderate-income families. Lead board through successful application for 501(c)(3) status, development of a strategic plan and implementation of an action plan to successfully meet their mission and goals. Facilitated the creation of the first Nevada financial coaching certification program and a network of volunteer coaches for low and moderate-income service agencies and churches. Obtained bi-partisan state legislative support for review of best practices to increase financial security among Nevadans. Engaged the Washoe County School district in a pilot to assist children eligible for deferred action immigrant status through the creation of lending circles and in creating an "Asset Map" for Title I schools.

NEVADA STATE TREASURER 1/2007 – 12/2014

Elected to two terms as constitutional officer, managing 40-45 staff members. My responsibilities included the investment of state funds, management of the state's cash, issuance of the state's debt obligations and protection of the state's bond rating.

- Responsible for the financial management of Nevada's College savings programs and the Governor Guinn Millennium Scholarship.
- Served on the State Board of Finance and the Executive Branch Audit Committee.
- Chaired the Board of Trustees for Nevada's College Savings Plans.
- Created Nevada's first in-state private equity fund to help fund education.
- Created matching-grant programs for college savings including the nation's first matching grant program for military families that save for college.
- Created the College Kick Start program, the first statewide program of its kind, seeding college savings accounts for every public kindergartener in Nevada.
- Created Nevada Women's Money Conferences to promote financial stability for women, including the nation's first Spanish-only conference for Latina women.
- Received EIFLE Award (2013) from the Institute of Financial Literacy
- Elected President of the National Association of State Treasurers (2012), with a record of effective management and nonpartisan advocacy.

- Developed a pilot program for teaching financial literacy in public schools, involving approximately 4,000 ninth-grade children in Clark County over several semesters. Students were tested before and after each program, and the results of the program are the subject of a forthcoming research article by Papadovasilaki, et al., in *Perspectives on Economic Education Research.*

LAW OFFICES OF KATE MARSHALL, Reno, NV 3/2002 – 12/2006
Private practice representing clients such as AT&T and GE Capital in antitrust and telecommunication matters before federal and state enforcement agencies, including U.S. Department of Justice, Federal Communications Commission, Federal Trade Commission, State Attorneys General, and State Public Utilities Commissions.

ADVANCED TELECOM GROUP, INC., Reno, NV 2/2000- 2/2002
Executive Director and primary advocate for small telecommunications company. Specific work included representation before the Federal Communications Commission, U.S. Department of Justice, U.S. Congress and State Public Utilities Commissions on administrative, regulatory and policy issues, including merger enforcement, broadband policy and regulation.

NEVADA ATTORNEY GENERAL'S OFFICE, Reno, NV 11/1997 – 1/2000
Senior Deputy Attorney General that established an antitrust enforcement unit for the State of Nevada. Represented Attorney General's office before Public Utility Commission. Streamlined and modernized Nevada's antitrust statutes. Analyzed and investigated potential antitrust violations such as price-fixing, bid-rigging, exclusive dealing, tying arrangements and mergers.

U.S. DEPARTMENT OF JUSTICE, Antitrust Division 9/1990 – 10/1997

Telecommunications Task Force, Washington, D.C. 3/1994 – 10/1997
Trial Attorney responsible for antitrust enforcement and competitive analysis of telecommunications markets. Practice involves all aspects of civil (non merger) and merger investigations, including preparation and negotiation of Civil Investigative Demands, depositions of fact and expert witnesses, planning litigation strategy and settlement negotiations.

San Francisco Field Office 9/1990 – 2/1994
Trial Attorney focused on antitrust enforcement and criminal prosecution under the Sherman Act. Practice involved analysis, litigation and prosecution of criminal and civil antitrust matters. Involved in all stages of trial work from the initial complaint through the investigation, indictment or filing of a complaint or consent decree, trial and sentencing.

LAXALT, WASHINGTON, PERITO & DUBUC, Wash., D. C. 6/1989 – 8/1989
Summer Associate

BAKER & McKENZIE, San Francisco, CA 6/1988 – 8/1988
Summer Associate

U.S. PEACE CORPS, Kenya 10/1983 – 12/1985
Teacher

EDUCATION

UNIVERSITY OF CALIFORNIA, BERKELEY, Boalt Hall School of Law
Juris Doctorate 5/1990

UNIVERSITY OF CALIFORNIA, BERKELEY
Bachelor of Arts, Political Science and English 6/1982

MISCELLANEOUS

Admitted to State Bar in both Nevada and California

Board member, United Way of Northern Nevada and the Sierras 2016 -

Examiner, California State Bar Exam 1991 – 1992

Coauthor, *Implementation of the Torture Convention into United States Law and Practice* (Berkeley Studies in International Law & Organization, 8/1990).

Coauthor, newspaper columns in *Las Vegas Sun* and *Nevada Appeal*, including:
- "State economy is improving, but it's time to look to the future," 12/28/2014.
- "The state of the state budget," 1/11/2015.
- "Public education for the new Nevada," 1/25/2015.
- "Falling wages for Nevada's team," 2/22/2015.
- "Retirement security is an issue for all Nevadans," 3/15/2015.
- "Balancing Nevada's need for higher education," 3/29/2015.
- "Improving financial security for all Nevadans," 4/12/2015.
- "Understanding the limitations - and benefits - of government," 5/4/2015.
- "Campaign finance reform matters; here's why," 5/17/2015.
- "Poverty traps Nevadans like quicksand, and it's rising distressingly quickly here," 6/21/2015.
- "Money alone can't fight poverty," 6/28/2015.

REFERENCES AVAILABLE UPON REQUEST

CASE NO. 11 OC 00092 1B

DEPT NO. 2

REC'D & FILED
2011 APR 20 AM 9:38
ALAN GLOVER
CLERK
BY [signature] DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA IN AND FOR CARSON CITY

In the matter of:

THE PETITION OF THE STATE TREASURER FOR A JUDICIAL DETERMINATION THAT FUNDS HELD IN THE PERMANENT SCHOOL FUND MAY BE INVESTED WITHOUT VIOLATING SECTION 9, ARTICLE 8 OF THE NEVADA CONSTITUTION

(PROPOSED) DECLARATORY ORDER

The State Treasurer's Request for Declaratory Order came before this honorable court in chambers on April 17, 2011.

In her Petition, the State Treasurer sought a declaration from this court that she may invest the money contained in the Permanent School Fund in the common or preferred stock of a corporation without violating NEV. CONST. art. VIII, § 9.

Having carefully considered the pleadings, the Court enters the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to NRS 30.040 the State Treasurer may seek a declaratory order regarding the construction of a statute, including a constitutional provision. NRS 30.040 provides: "any person...affected by a statute...may have determined any question of construction or validity arising under the... statute..." Therefore, this court has jurisdiction to adjudicate this matter.

The State Treasurer seeks to invest a portion of the money of the Permanent School Fund in the common or preferred stock of a corporation using an outside fund manager as required in NRS 355.060(3).

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Las Vegas, NV 89101

NRS 355.060(3) requires the Treasurer to seek a judicial opinion that the proposed investment does not violate Nev. Const. art. VIII, § 9 prior to making the investment.

NEV. CONST. art. VIII, § 9 provides: "The State shall not donate or loan money, or its credit, subscribe to or be, interested in the stock of any company, association, or corporation, except corporations for educational or charitable purposes." NEV. CONST. art. VIII, § 9 was enacted to protect the State's solvency and prevent itself from becoming largely indebted through the issuance of state bonds or the lending of credit to aid private companies, primarily railroad companies. *See*, Constitutional Debates and Proceedings in the Constitutional Convention of the State of Nevada, p. 166, et seq. (1866).

While article VIII, § 9 of the Nevada Constitution appears to be a blanket prohibition of state ownership of stock, exceptions exist. Nevada courts have recognized exceptions to the lending of credit prohibition of NEV. CONST. art. VIII, § 9 as well as the debt limit provision of NEV. CONST. art. IX, §3. *See State ex rel. Brennan v. Bowman*, 89 Nev. 330, 333, 512 P.2d 1321, 1323 (1973); *Morris v. Board of Regents*, 97 Nev. 112, 114, 625 P.2d 562 (1981).

The Special Fund doctrine is a well established exception to the constitutional proscription against the use of state funds to aid private corporations. *Morris v. Board of Regents* at 114; *Employers Ins. Co. of Nev. v. State Board of Exam'rs*, 117 Nev. 249, 256 (2001). Under the Special Fund doctrine, funds managed by a state which (1) do not receive general fund monies and (2) which do not create any additional liability or indebtedness for the state if losses are incurred do not infringe on the purpose of state constitutional prohibitions, such as NEV. CONST. art. VIII, § 9. *See, Morris v. Board of Regents,* at 114; *Employers Ins. Co. of Nev.* at 256; *Oxnard v. Dale*, 290 P.2d. 859, 861-862 (Cal. 1955).

Nevada courts recognize the Special Fund doctrine. The Nevada Supreme Court has applied the Special Fund doctrine to allow issuance of bonds outside the

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555 E. Washington, Suite 3900
Las Vegas, NV 89101

constitutional constraints contained in NEV. CONST. art. XI, § 3. *Morris v. Board of Regents*, at 114. In *Morris v. Board of Regents*, 97 Nev. 112, the Board of Regents of the University of Nevada wanted to issue bonds in excess of the limits set forth in NEV. CONST. art. IX, § 3. Student user fees were to be used to satisfy the obligations. The Nevada Supreme Court found that because the student user fees were not revenues of the state, the bonds could be issued beyond the constitutional debt limitation.

The Oregon Supreme Court applied the Special Fund doctrine and determined that Oregon may own stock in a private corporation where the money used to purchase the stock was money held in a Special Fund, even where, as in Nevada, Oregon's constitution limited that state's purchase of stock. In *Sprague v. Straub*, 451 P.2d 49 (Or. 1969), the Oregon Supreme Court analyzed whether the Oregon Investment Council could invest the monies in its Industrial Accident Fund and its Public Employees Retirement Fund directly in the stock of any company, association or corporation without violating a constitutional provision nearly identical to NEV. CONST. art. VIII, § 9.[1]

The *Sprague* Court recognized that its constitutional provision constituted a general prohibition against the purchase of corporate stocks by the state of Oregon. *Sprague* at 55. But, because Oregon had no proprietary interest in the money used to purchase the stock, the stock would not be owned by the state of Oregon. In its analysis, the Sprague court noted that the constitutions of other states including Nevada's contain the same general prohibition. *Id.*

The Permanent School Fund is not made up of money collected from the general taxes. Thus, for the same reasons articulated by the *Sprague* court, the State Treasurer may invest the monies in the State Permanent School Fund in corporate stock, NEV. CONST. art. VIII, § 9 notwithstanding.

. . .

[1] The Oregon constitutional provision was subsequently amended to clarify that the provision was not a blanket prohibition against state ownership of stock.

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Las Vegas, NV 89101

The monies in the Permanent School Fund cannot be diminished nor repossessed by the state legislature. NEV. CONST. art. XI, § 3. The Permanent School Fund was created by NEV. CONST. art. XI, §3. In establishing the Fund, the constitution provides that the money in the Fund "must not be transferred to other funds for other uses." Further, the interest earned on the fund "must be apportioned by the legislature among the several counties for educational purposes." NEV. CONST. art. XI, §3. Thus, the legislature can neither use its power to repossess the monies in the Permanent School Fund for other uses, nor may it use its legislative powers to diminish the Fund.

In *Sprague*, this type of fund structure led the Oregon Supreme Court to identify two of its funds as trusts which, because the monies in the funds were not available for the general enrichment of the state, the investments of the funds in stock did not violate the constitutional proscription against aid to corporations.

Sprague, at 53.

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555 E. Washington, Suite 3900
Las Vegas, NV 89101

Similarly the Permanent School Fund is set up to hold the monies transferred into it, in trust, not for the general enrichment of the State, but for its beneficiaries, which are identified in the Nevada Constitution as educational purposes among the several counties. NEV. CONST. art. XI, §3.

Finally, investment losses in to the Permanent School Fund would not create any debt or liability upon the State General Fund nor any legal obligation for a legislative appropriation.

For these reasons, the Permanent School Fund is a Special Fund and meets the criteria established by the Special Fund doctrine. As a Special Fund, the monies and investments of the Permanent School Fund lie outside the constraints of NEV. CONST. art. VIII, §9 and art. IX, §3.

ORDER

Based on the foregoing findings of fact and conclusions of law, this Court hereby enters the following order:

. . .

That the State Treasurer may invest the monies in the Permanent School Fund in the common or other stock of corporations without violating NEV. CONST. art. VIII, § 9 because the Permanent School Fund is a Special Fund.

IT IS SO ORDERED.

DATED this 20th day of April, 2011.

For James T. Russell
JAMES E. WILSON, JR.
DISTRICT COURT JUDGE

Submitted by:

CATHERINE CORTEZ MASTO
Attorney General

By:____________________

BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 9001
Office of the Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101
Telephone: (702) 486-3095
Facsimile: (702) 486-3416
Attorneys for the State Treasurer

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

ANDY MOORE
[redacted]
Email: [redacted]

October 21, 2016

Joe Reynolds, Chairman
Public Utilities Commission of Nevada
c/o Bre Potter, Commission Secretary
Email – bpotter@puc.nv.gov

Re: General Counsel Position

Dear Chairman Reynolds:

I write to express my interest in the General Counsel job currently available with the Public Utilities Commission of Nevada ("PUCN"). I heard about the job opening via the State of Nevada Career Opportunities Website (nvjobs.nv.gov/Jobs/Current_State_Job_Openings). I believe that my professional experiences over the past eleven years in Nevada make me an excellent candidate to serve as General Counsel of the PUCN.

After graduating from law school in May 2004, I clerked for then-District Court Judge David Wall for a year. Following my clerkship, I worked as a litigation associate and gaming associate at Kummer Kaempfer Bonner Renshaw & Ferrario ("KKBRF") and Greenberg Traurig ("GT") from 2005 to 2010. During my time at KKBRF and GT, I handled numerous civil litigation matters and gaming transactional matters under limited supervision.

I started working in Brownstein Hyatt Farber Schreck's ("BHFS") Gaming Department in April 2010. For six years at BHFS, I advised clients on various gaming regulatory and transactional matters. I have appeared before the Nevada Gaming Control Board (the "Board") and Nevada Gaming Commission (the "Commission") numerous times on licensing and disciplinary matters. As a gaming attorney I have extensive experience communicating with federal, state, and local regulators and have assisted clients who were undergoing extensive and detailed investigations conducted by the Board. Additionally, I have handled live entertainment tax matters, including appeals, before the Board and the Commission. I have worked with local licensing agencies and governmental bodies in assisting clients to obtain special use permits or liquor licenses. As a gaming attorney, I have drafted and reviewed numerous commercial agreements and I spent four months working in-house for a BHFS casino client reviewing and negotiating commercial agreements in 2013. I have drafted and reviewed ordinances, policies, and internal controls for casino clients and a tribal gaming agency in California. Lastly, I have advised clients on issues pertaining to their promotional and advertising efforts.

Given my experience handling litigation matters, regulatory matters, and drafting agreements, ordinances, and policies over the past eleven years in private practice, I believe I am strongly qualified for the General Counsel job with the PUCN. I have extensive experience in arguing matters before the state and federal courts in Las Vegas and before numerous state and local regulatory agencies. I have years of experience with interpreting statutes and regulations in order to identify the best compliance practices for gaming clients. In my experience working at law firms, I have supervised and mentored associate attorneys and paralegals and have led numerous teams of associates and paralegals on large scale regulatory projects. Although I do not have any direct experience in handling public utility issues, I believe that my experience as a litigation and transactional/regulatory attorney will allow me to excel at the General Counsel position. With my experience in handling gaming regulatory matters before the Board and Commission, I believe I am well-suited to be able to provide legal advice to the PUCN and would be able to thrive in the role of serving as legal counsel to the PUCN in its public meetings.

Please contact me if I can provide you with any additional information. I hope to have the opportunity to interview for the General Counsel job with the PUCN in the near future.

Thank you for considering my interest, and I look forward to hearing from you.

Sincerely,

/s/ Andy Moore

ANDY MOORE

[redacted]

Email [redacted]

EDUCATION

UNIVERSITY OF OREGON SCHOOL OF LAW · Eugene, Oregon

J.D., May 2004

Activities: · *Journal of Environmental Law & Litigation*, Staff Editor 2002-2003 & Executive Editor 2003-2004
· Judicial Extern to Judge Ann Aiken – United States District Court, District of Oregon, January 2004 - May 2004
· Prosecution Clinic - Lane County District Attorney's Office, August 2003 - December 2003
· Lane County Law & Advocacy Center Volunteer, October 2002 - April 2003
· Research Assistant for Professor Tom Lininger, September 2002 - December 2002
· Legal Research and Writing Program Tutor, August 2002 - May 2004
· Start Making a Reader Today (SMART) Program Volunteer, October 2001 - April 2003

UNIVERSITY OF CALIFORNIA, SANTA BARBARA

B.A. History, June 1998

Activities: · UCSB Rowing Team
· Orientation Staff Advisor

EXPERIENCE

BROWNSTEIN HYATT FARBER SCHRECK, LLP · Las Vegas, Nevada

Attorney, April 2010 – July 2016 (Associate, April 2010 – December 2013; Shareholder, January 2014 – July 2016)

· Assisted clients with gaming regulatory and licensing matters before the Nevada Gaming Commission, Nevada Gaming Control Board, and local agencies
· Assisted clients, including institutional investors, on multi-jurisdictional licensing matters
· Reviewed and drafted assorted transactional documents and agreements
· Assisted drafting opinion letters
· Advised clients regarding National Indian Gaming Commission and tribal gaming agency requirements related to various transactions
· Assisted clients with live entertainment tax matters before the Nevada Gaming Control Board and Commission
· Assisted clients with liquor licensing matters and land use issues in various local jurisdictions
· Advised clients regarding sweepstakes, contests, and other promotions; draft rules for promotions
· Drafted and argued motions in Clark County District Court (on pro bono matters)
· Past Chairman of Karma Committee for Las Vegas office (organized various charitable and philanthropic events throughout year involving Brownstein employees)

GREENBERG TRAURIG, LLP · Las Vegas, Nevada

Associate Attorney, June 2009 – March 2010

· Assisted clients with gaming regulatory and licensing matters before the Nevada Gaming Commission, Nevada Gaming Control Board, and local jurisdictional bodies
· Reviewed and drafted assorted transactional documents and agreements
· Assisted client with live entertainment tax appeal to the Nevada Gaming Commission
· Assisted clients with liquor licensing matters in assorted local jurisdictions
· Assisted client with real property tax appeal to the Clark County Board of Equalization
· Researched gaming and liquor licensing issues for attorneys in bankruptcy department
· Drafted assorted sweepstakes rules for clients
· Drafted and argued motions in state court

KUMMER KAEMPFER BONNER RENSHAW & FERRARIO · Las Vegas, Nevada

Associate Attorney, August 2005 – May 2009

- Assisted clients with gaming regulatory matters before the Nevada Gaming Commission, Nevada Gaming Control Board, and local agencies
- Drafted various legal pleadings and documents, including motions for summary judgment and motions to dismiss
- Represented clients at numerous hearings in state and federal court
- Conducted and defended numerous depositions
- Negotiated numerous settlements and drafted related settlement documents
- Assisted lead trial attorneys with trial preparation
- Represented pro bono clients through Legal Aid Center of Southern Nevada
- Organized and managed Kummer Kaempfer softball team in Clark County Parks Dept. league

EIGHTH JUDICIAL DISTRICT COURT · Las Vegas, Nevada

Judicial Law Clerk for Judge David Wall, August 2004 – August 2005

- Reviewed motions and drafted bench memoranda for Judge Wall for weekly hearing calendars (civil & criminal)
- Performed assorted research tasks
- Reviewed and approved written orders submitted to chambers
- Served as liaison between court and counsel

DUNN CARNEY ALLEN HIGGINS & TONGUE · Portland, Oregon

Summer Associate May 2003 – August 2003

- Researched and drafted memoranda on a variety of litigation and real estate issues
- Drafted motions, demand letters, and agreements

OREGON DEPARTMENT OF JUSTICE, CORRECTIONS LITIGATION UNIT · Salem, Oregon

Law Clerk May 2002 – March 2003

- Researched and drafted responses/answers to federal habeas corpus petitions
- Drafted motions for summary judgment, affidavits, and discovery requests

PROFESSIONAL AFFILIATIONS/COMMUNITY INVOLVEMENT/RECOGNITIONS

STATE BAR OF NEVADA (Admitted to practice in October 2004)

AMERICAN AND CLARK COUNTY BAR ASSOCIATIONS

LEGAL AID CENTER OF SOUTHERN NEVADA PRO BONO PROJECT

- 50 Hours Club in 2010, 2011, 2015; 100 Hours Club in 2012-2014

LEADERSHIP LAS VEGAS · 2014 CLASS

- Leadership development program sponsored by Las Vegas Metro Chamber of Commerce

LEADERSHIP NORTH LAS VEGAS · 2010 CLASS

- Leadership development program sponsored by North Las Vegas Chamber of Commerce

BIG BROTHERS BIG SISTERS OF SOUTHERN NEVADA

- Served as big brother from September 2005 through November 2010

***VEGAS INC.*, 40 UNDER 40 AWARD - 2016**

***SUPER LAWYERS*, MOUNTAIN STATES RISING STARS - 2012-2016**

***NEVADA BUSINESS JOURNAL*, LEGAL ELITE - 2010, 2013-2016**

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Costanza Insurance Company's ("Plaintiff") Second Amended Complaint in Subrogation ("Second Amended Complaint") lacks the necessary factual allegations to support the First Cause of Action and the Third Cause of Action against Defendant Vandelay Industries ("Vandelay"). The Second Amended Complaint claims that Defendants are responsible for monetary damages incurred by Irwin R. Fletcher ("Fletcher"), Plaintiff's insured, due to leaky and defective plumbing fittings and pipes allegedly designed, manufactured, distributed, sold, and installed by the named Defendants in this matter. The Second Amended Complaint seeks damages due to an alleged constructional defect. Therefore, the requirements of NRS Chapter 40 must be followed. Plaintiff's First and Third Causes of Action against Defendant Vandelay should be dismissed because Plaintiff neglected to follow the requirements of NRS Chapter 40.

II. STATEMENT OF RELEVANT FACTS AS ALLEGED IN COMPLAINT[1]

A. Factual Background to Allegations

Prior to October 19, 2008, the home owned by Fletcher located at 6633 Saccamano Place, Las Vegas, Nevada 89169 ("Subject Residence") sustained damages due to allegedly leaky and defective plumbing fittings and pipes.[2] The allegedly defective plumbing fittings and pipes were allegedly designed, manufactured, distributed, sold, and installed by Defendants Vandelay, Lippman Home, Inc. ("Lippman"), Davola Plumbing Enterprises, Inc. ("Davola"), and The Drake General Contractors ("Drake").[3] The repair costs attributable to the allegedly faulty

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[1] The facts, as stated in this motion, are taken from Plaintiff's Complaint only for the purposes of this motion to dismiss pursuant to Nev. R. Civ. Pro. 12(b)(5) and Defendant Vandelay takes no position as to the truth or accuracy thereof.

[2] *See* Second Amended Complaint attached hereto as Exhibit A at ¶¶ 9-10.

[3] *Id.* at ¶ 11.

plumbing fittings and pipes totaled $715,937.23.[4] Fletcher purchased a policy of insurance from Plaintiff which provided homeowner's coverage for the Subject Residence and this policy of insurance was in place on October 19, 2008.[5] Plaintiff, as the homeowner's insurance provider for Fletcher, was required to pay $715,937.23 to effectuate said repairs to the Fletcher home.[6]

B. Procedural Background

Plaintiff originally filed a Complaint in Subrogation on June 30, 2009 naming only Lippman and Davola as Defendants. On July 21, 2009 Plaintiff filed its First Amended Complaint in Subrogation naming Lippman, Davola, and Drake as Defendants. Plaintiff served Lippman with the First Amended Complaint on August 4, 2009 and Lippman filed an Answer to the First Amended Complaint on October 16, 2009. On October 21, 2009 Plaintiff filed its Second Amended Complaint naming Vandelay, in addition to Lippman, Davola, and Drake as Defendants.

Because Lippman filed an Answer to Plaintiff's First Amended Complaint, Plaintiff's filing of the Second Amended Complaint violates Nev. R. Civ. P. 15(a) in two ways. The rule provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . ."[7] Following that, a party may amend "the party's pleading only by leave of court or by written consent of the adverse party . . . ."[8] Once Lippman filed its Answer to Plaintiff's First Amended Complaint on October 16, 2009, Plaintiff was required under the Nevada Rules of Civil Procedure to seek leave of court or written consent in order to amend the First Amended Complaint. Additionally, Nev. R. Civ. P. 15(a) only allows a party to amend its pleading once as a matter of course at any time before a responsive pleading is

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[4] *Id.* at ¶ 12.
[5] *Id.* at ¶ 9.
[6] *Id.* at ¶ 13.
[7] Nev. R. Civ. P. 15(a).
[8] *Id.*

served. Even if Plaintiff represents that it did not receive notice of Lippman filing an Answer before Plaintiff filed its Second Amended Complaint, the rules require leave of court in order to be able to amend the Complaint a second time before a responsive pleading is served.

Defendant Vandelay acknowledges that because this matter is in its early stages and because Nev. R. Civ. P. 15(a) provides that leave to amend a complaint is generally freely given, an argument that the Second Amended Complaint is improper based upon the amendment requirements of Nev. R. Civ. P. 15 is not determinative. Vandelay, however, wanted to illustrate Plaintiff's failure to abide by the Nevada Rules of Civil Procedure to support Vandelay's main argument in this Motion to Dismiss that Plaintiff has failed to follow the clear tenets of Nevada's construction defect statute - Chapter 40.

In fact, following service of Plaintiff's Second Amended Complaint on Vandelay, counsel for Vandelay sent a letter to Plaintiff's counsel on November 10, 2009 demanding that Plaintiff's counsel voluntarily dismiss the Second Amended Complaint because it violates the provisions of NRS Chapter 40.[9] Plaintiffs' counsel, however, did not voluntarily dismiss the Second Amendment Complaint which necessitated the filing of this Motion to Dismiss. Due to Plaintiff's failure to abide by the requirements of NRS Chapter 40, Plaintiff's Second Amended Complaint should be dismissed.

III. LEGAL ARGUMENT

A. Plaintiffs' First and Third Causes of Action Against Defendant Vandelay Should Be Dismissed for Failure to State a Claim.

1. Standard of Review for Motion to Dismiss.

Dismissal under Nev. R. Civ. P. 12(b)(5) is appropriate where the allegations of the complaint, taken at "face value," and construed favorably on the claimant's behalf, fail to state a

[9] *See* Letter attached hereto as Exhibit B.

cognizable claim for relief.[10] "Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief."[11] Although the factual allegations in the complaint must be regarded as true with all inferences being drawn in favor of the nonmoving party, "conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss."[12]

In 1998, Nevada amended Nev. R. Civ. P. 12(b) to conform to the language of Fed. R. Civ. P. 12(b) and has looked to federal case law in interpreting the amended rule.[13] The United States Supreme Court recently revised the standards applicable to dismissal under Fed. R. Civ. P. 12(b)(6), which is identical to Nev. R. Civ. P. 12(b)(5). Previously, the Supreme Court had held that dismissal was appropriate "only if it appears the plaintiff can prove no set of facts which entitle him to relief on his claim."[14] However, the *Conley* "no set of facts" mantra was expressly "retired" by the Supreme Court in a 2007 decision.[15] Under the *Bell Atlantic Corp.* decision, a plaintiff's factual allegations must now "be enough to raise a right to relief above the speculative level . . . . "[16] While a plaintiff's complaint "does not need detailed factual allegations" it is nonetheless "a plaintiff's obligation to provide the grounds of his entitlement to relief [which] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[17]

The factual assertions alleged against Defendant Vandelay in the First and Third Causes of Action in Plaintiff's Second Amended Complaint Claim do not present viable Breach of Express Warranties of Merchantability and Fitness for a Particular Purpose, Implied Warranties

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[10] *Morris v. Bank of America Nevada*, 110 Nev. 1274, 886 P.2d 454 (1994).
[11] *Brent G. Theobald Constr., Inc. v. Richardson Constr., Inc.*, 122 Nev. 1163, 1166, 147 P.3d 238, 241 (2006).
[12] *Id.* at 1166, 240-41; *see also Puckett v. Park Place Entm't, Corp.*, 332 F. Supp. 2d 1349, 1352 (D. Nev. 2004).
[13] *See Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 655-56, 6 P.3d 982,985 (2000).
[14] *Conley v. Gibson* 355 U.S. 41, 45-46 (1957).
[15] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562 (2007).
[16] *Id.* at 555 (internal citations omitted).
[17] *Id.*

of Merchantability and Fitness for a Particular Purpose, and Negligence claims against Vandelay because there are no allegations that Plaintiff or Fletcher, its insured homeowner, followed the requirements of NRS Chapter 40 before filing the Second Amended Complaint.

2. In a Subrogation Action, the Insurer Steps Into the Rights of its Insured.

A subrogation action arises only "with respect to the rights of an insured against a third party to whom the insurer owes no duty."[18] Generally, "an insurer that pays its insured in full for claimed losses is subrogated by operation of law to the rights, if any, which the insured may have had against the tortfeasor before payment was made."[19] In subrogation cases, the insurer "is the sole party in interest and the only one who may assert a claim against those thought to be ultimately liable."[20] In a dissenting opinion from a 1991 case, Justice Robert Rose of the Nevada Supreme Court summed up the underlying tenets of subrogation as follows: "An insurance company subrogated to the rights of an injured party should have the same rights as its insured and we should encourage its reimbursement from third-party tortfeasors when possible."[21] An "insurer can take nothing by subrogation but the rights of the insured, and is subrogated to only the rights the insured possesses at the time the insurer pays the insured."[22]

In this matter, Plaintiff has filed a subrogation action. Therefore, Plaintiff assumes its insured's rights and responsibilities related to any claim Plaintiff asserts against those thought to be ultimately liable. Plaintiff's dispute with Defendants involves an alleged constructional

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[18] *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 218, 606 P.2d 1095, 1097.
[19] *Duboise v. State Farm Mut. Auto. Ins. Co.*, 96 Nev. 877, 879, 619 P.2d 1223, 1224 (1980) *citing Valley Power Co. v. Toiyabe Supply*, 80 Nev. 458, 460-61, 396 P.2d 137, 138 (1964).
[20] *Valley Power Co.*, 80 Nev. at 460-61 and 396 P.2d at 138.
[21] *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Pratt & Whitney Canada, Inc.*, 107 Nev. 535, 546, 815 P.2d 601, 608 (1991).
[22] 44A Am. Jur. 2d Insurance § 1775 citing *Maryland Casualty Co. v. Bailey & Sons, Inc.*, 35 Cal. App. 4th 856, 41 Cal. Rptr. 2d 519 (4th Dist. 1995).)

defect related to alleged defective plumbing fittings and equipment. Therefore, Plaintiff, as the insurer and the sole party in interest, was required to follow the requirements of Chapter 40 before bringing any type of claim against Defendants related to alleged damages caused to the Subject Residence.

3. The Requirements of NRS Chapter 40.

a. Despite Pleading Breach of Warranty, Plaintiff's Claims Are Derived from a Construction Defect and Are Therefore Governed by NRS Chapter 40.

NRS 40.600 through NRS 40.695 apply to claims related to constructional defect. Pursuant to NRS 40.615, a constructional defect is "a defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance and includes, without limitation, the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance:

> 1. Which is done in violation of law, including, without limitation, in violation of local codes or ordinances;
> 2. Which proximately causes physical damage to the residence, an appurtenance or the real property to which the residence or appurtenance is affixed;
> 3. Which is not completed in a good and workmanlike manner in accordance with the generally accepted standard of care in the industry for that type of design, construction, manufacture, repair or landscaping; or
> 4. Which presents an unreasonable risk of injury to a person or property."

In the Second Amended Complaint, Plaintiff contends that its insured's house "sustained severe damages due to leaky and defective plumbing fittings and pipes."[23] Accordingly, Plaintiff's alleged damages derive from a constructional defect as defined in NRS 40.615.

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[23] Exhibit A at ¶ 10.

b. Plaintiff Failed to Provide a Notice of Defect and an Opportunity for Vandelay to Inspect and Repair.

Because Plaintiff's alleged damages derive from a constructional defect, certain procedural requirements must be met before Plaintiff may file a lawsuit in Nevada. NRS 40.645 requires a claimant to give written notice by certified mail to the contractor before a claimant may commence an action.[24] There is no allegation in Plaintiff's Second Amended Complaint that Plaintiff or Plaintiff's insured provided Vandelay with written notice of a possible constructional defect.

NRS 40.647 also provides that "after notice of a constructional defect is given pursuant to NRS 40.645 [and] before a claimant may commence an action or amend a complaint to add a cause of action for a constructional defect against a contractor [or] subcontractor . . . , the claimant must: (a) Allow an inspection of the alleged constructional defect . . ; and (b) Allow the contractor [or] subcontractor . . . a reasonable opportunity to repair the constructional defect or cause the defect to be repaired if an election to repair is made pursuant to NRS 40.6472."

Before commencing an action, claimants are generally required to give detailed notice to the contractor of the defects, damages, or injuries related to the perceived constructional defect.[25] In a 2007 case, the Nevada Supreme Court stated that the "provisions of NRS Chapter 40, concerning constructional defect actions, reveal that the [Nevada] Legislature intended to provide contractors with an opportunity to repair constructional defects in order to avoid litigation."[26]

The legislative discussions which culminated in the current version of NRS Chapter 40 support Vandelay's argument that Plaintiff has failed to follow the requirements of the statute

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[24] *See* NRS 40.645(1)(a).
[25] *Shuette v. Beazer Homes Holdings*, 121 Nev. 837, 853, 124 P.3d 530, 541 (2005).
[26] *D.R. Horton, Inc. v. Eighth Judicial Dist. Ct.*, 123 Nev. 468, 168 P.3d 731, 737 (2007).

and, therefore, the First and Third Causes of Action in the Second Amended Complaint should be dismissed. Testimony during the 1995 legislative session provided that Senate Bill 395 (the precursor to NRS Chapter 40) "requires, before a cause of action is brought against a home builder, that the claimant give written notice . . . ."[27] Additional testimony noted that NRS Chapter 40 was enacted to allow the average homeowner to "walk themselves through the system and not be harmed by it, and be able to accomplish a timely repair and resolution of their problems" with such a process commencing with the provision of notice to the contractor of an alleged constructional defect.[28] In discussions related to what a homeowner does in the event a contractor is not responsive, the predicate act of providing notice is required: "the home owner has the capability to go ahead and make repairs if he feels the response is not sufficiently expeditious."[29]

c. Even in Cases Where the Defect Creates a Threat to Life or Heath, Notice and an Opportunity to Cure Are Still Required.

Even in cases in which the alleged defect creates an imminent threat to life or health, the predicate act of providing notice underscores the discussion at the legislative sessions related to NRS Chapter 40. During the 1997 legislative session, a lobbyist on behalf of the Nevada Trial Lawyers Association noted that Section 17 of Senate Bill 480, which amended NRS Chapter 40, relating to defects that pose significant risk to a homeowner did not go far enough and noted that such defects should be repaired immediately because there should not be significant waiting periods before repair to allow experts to determine the severity of the defect.[30] The specific provision related to defects which pose imminent threats is NRS 40.670.

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[27] Hearing on S.B. 395 Before the Senate Judiciary Comm., 68th Leg. (Nev., May 10, 1995).
[28] *Id.*
[29] Hearing on S.B. 395 Before the Senate Judiciary Comm., 68th Leg. (Nev., June 15, 1995).
[30] Hearing on S.B. 490 Before the Senate Judiciary Comm., 68th Leg. (Nev., June 26, 1997).

Given the allegedly high repair costs to the Subject Residence in this matter, Vandelay acknowledges that Plaintiff will likely point to NRS 40.670 as a means around the notice and opportunity to cure provisions found at NRS 40.645 and 40.647. But even NRS 40.670 sets forth a notice requirement that a claimant must follow which reads, in pertinent part: "A contractor [or] subcontractor . . . who receives written notice of a constructional defect resulting from work performed by the contractor [or] subcontractor . . . which creates an imminent threat to the health or safety of the inhabitants of the residence shall take reasonable steps to cure the defect as soon as practicable."[31] It is only after the contractor or subcontractor fails to cure the defect in a reasonable time that "the owner of the residence may have the defect cured and may recover from the contractor [or] subcontractor . . . the reasonable cost of the repairs . . . ."[32]

d. Plaintiff's Failure to Follow Chapter 40 Is a Fatal Flaw.

Because Plaintiff's Second Amended Complaint makes no allegation that Vandelay was ever provided notice of an alleged defect at Plaintiff's insured's home, the First and Third Causes of Action in Plaintiff's Second Amended Complaint should be dismissed. Plaintiff's First Cause of Action against Vandelay alleges a breach of express and implied warranties. Plaintiff's Third Cause of Action against Vandelay sets forth a negligence cause of action. Warranty claims are within the ambit of NRS Chapter 40.[33] Negligence claims "can be alleged in a construction defects cause of action initiated under Chapter 40."[34] Plaintiff's causes of action against Vandelay fall within the purview of NRS Chapter 40. Therefore, this Court should follow the procedural requirements of NRS 40.647(2) which, in the event a claimant files suit without first complying with NRS 40.647(1) or NRS 40.645, requires the court to:

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[31] NRS 40.670(1).
[32] NRS 40.670(1).
[33] *See Olson v. Richard*, 120 Nev. 240, 243, 89 P.3d 31, 33 (2004) (the legislature's intent in enacting NRS Chapter 40 in no way limits a homeowner's recovery to construction defects covered by a contract or warranty).
[34] *Id.* at 244 and 33.

> (a) Dismiss the action without prejudice and compel the claimant to comply with those provisions before filing another action; or
>
> (b) If dismissal of the action would prevent the claimant from filing another action because the action would be procedurally barred by the statute of limitations or statute of repose, the court shall stay the proceeding pending compliance with those provisions by the claimant.[35]

Plaintiff never alleges that it or its insured ever provided notice of a constructional defect as required under NRS 40.645(1)(a) or allowed an inspection of the alleged constructional defect as required under NRS 40.647(1). The reason behind the lack of such allegations is because no notice and opportunity to cure the alleged constructional defect was ever provided to Defendant Vandelay. Therefore, this Court should follow the tenets of NRS 40.647(2) and dismiss Plaintiff's Second Amended Complaint.

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[35] NRS 40.647(2).

October 10, 2016

Sent via email to: bpotter@puc.nv.gov

Joe Reynolds
Chairman
Public Utilities Commission of Nevada
c/o Bre Potter, Commission Secretary
1150 E. William Street
Carson City, NV 89701-3109

Re: General Counsel position:
Public Utilities Commission

Dear Mr. Reynolds:

Please accept the enclosed resume as an application for the General Counsel position with the Public Utilities Commission of Nevada ("PUCN"). I heard about this position on the State of Nevada's Employment website. I am looking for an exciting and challenging career in which my management, supervisory, and legal experience are all necessary and required for the position. I am familiar with the role of the PUCN, as well as litigating in state and federal courts and administrative proceedings.

I have over 20 years of experience as an attorney in Nevada. I have represented many State of Nevada agencies, boards and commissions over the years and have testified before the Nevada Legislature. My career also includes work in private practice as an associate attorney. I recently represented the Nevada Housing Division as their general and issuer counsel for their tax-exempt multi-family bond program. My Bachelor of Science degree from the University of Nevada is in finance. I currently represent a variety of clients as a sole practitioner.

Recently I was Corporate Counsel and Interim Executive Director for the Nevada Hardest Hit Fund (NVHHF), which was a nonprofit that administered federal funding in the amount of $150,000,000.00 to assist homeowners in Nevada who were experiencing hardship and the possibility of losing their home. In this capacity, I made presentations and participated in educational seminars about the various programs and worked with banks, lenders, credit counseling agencies, brokers and real estate agents to promote the programs. I collaborated with the Board of Directors and senior employees to implement, refine and provide educational information and counseling to the distressed homeowners, as well as amended program guidelines as needed.

As Interim Executive Director, I also prepared and reviewed budgets and expenditures, underwent an audit, and worked with the United States Department of Treasury to implement programs. I reviewed administrative appeals and appeared before the Executive Board to update the overall operations and performance of the programs. I oversaw the day to day functions of both the Reno and Las Vegas offices, including personnel issues, data management, expenditures, customer service, and program administration. As Corporate Counsel, I drafted and amended office and personnel procedures and ensured compliance with all applicable statutes, rules and regulations. I also hired and terminated employees when necessary and handled the personnel and human resource issues that occurred.

While I worked at the Office of the Attorney General, I was promoted to Supervising Senior Deputy Attorney General. In this capacity, I supervised and mentored five attorneys and oversaw their legal work, as well as my own and also provided coverage when attorneys were on leave. I approved time sheets, reviewed legal work and oversaw the distribution of cases and performed evaluations. I served as counsel to the Public Employees' Retirement System Board and am familiar with Nevada's Open Meeting Laws and the public records and ethics in government laws.

I have excellent communication and interpersonal skills. Serving as general counsel to many agencies, boards and their employees, has enhanced my problem solving and organizational skills. My legal and managerial positions have allowed me to supervise support staff, loan counselors, accountants, investigators, attorneys and administrative positions. I am a proactive and forward thinking attorney. I believe strongly in positive collaboration between co-workers, partners and colleagues.

I am available for a personal interview at your convenience. Thank you in advance for your consideration.

Sincerely,

Christine S. Sullivan

Christine S. Sullivan
Attorney at Law
[redacted]

CHRISTINE SULLIVAN

PROFILE:

- Attorney admitted to practice in Nevada's state and federal courts since 1993;

- Many years of experience as corporate, general and in-house counsel for various high profile public and private entities;

- Legal and professional experience includes employment as an associate attorney for a commercial litigation firm, a Deputy Attorney General for the Department of Prisons, a Senior Deputy Attorney General for the Nevada Housing Division and as a Supervising Senior Deputy Attorney General for the Public Employees' Retirement System of Nevada;

- Executive Director for a state nonprofit (NAHAC) - Nevada's Hardest Hit Fund;

- Currently serves as general counsel, corporate counsel and tax-exempt bond issuer counsel to the Nevada Housing Division;

- Previous supervision of attorneys and employees;

- Have developed long lasting relationships with my clients, their employees, and other counsel, trustees, lending institutions, and vendors;

- Familiar with Nevada's Open Meeting Law, employment law and all aspects of state regulations and procedures; as well as governmental relations and Nevada's legislative process.

EXPERIENCE:

GENERAL/CORPORATE COUNSEL, NEVADA HOUSING DIVISION, 2010 TO 12/2015

Represented the Division as general counsel and advised them in day to day legal issues, including contract review, regulation and bill review and appearances before the Board of Finance, and contract review and preparation. Acted as Issuer Counsel for Multi-family and Single family tax-exempt bond issuances. Advised the Division regarding loan servicing and program issues. Provided legal advice and opinions on various legal matters and litigation avoidance. Assisted with audit letters and worked with bond counsel, trustees and financial advisors in developing and obtaining approval for new loan programs and tax-exempt bond issuances and redemptions. Advised and acted as counsel concerning the low-income housing tax credit program. Consulted and advised the Division and housing developers/ sponsors about the Division's programs, regulations, and compliance issues.

CORPORATE COUNSEL AND EXECUTIVE DIRECTOR, NEVADA AFFORDABLE HOUSING ASSISTANCE CORPORATION(NAHAC) (NEVADA'S HARDEST HIT FUND) 2010-2013

Served as corporate counsel to the Nevada Affordable Housing Assistance Corporation and acted as Interim Executive Director, providing advice and services that implemented this "start up" nonprofit entity. Provided legal representation and worked to implement the Hardest Hit Funds (HHF) grant to the State of Nevada and provide assistance to homeowners. Developed policies, procedures, employment standards and created and implemented various programs to assist distressed homeowners. Worked with the Department of Treasury to oversee the programs administration and all aspects of the HHF services and distribution of grant money. Promoted, and provided education and information to banks, realtors, financial advisors and government officials about the HHF programs and hosted seminars to assist homeowners. Drafted and reviewed contracts and participation agreements with banks, vendors and service providers to NAHAC and the Hardest Hit Fund.

[redacted] Email: [redacted]

CHRISTINE SULLIVAN

SUPERVISING SENIOR DEPUTY ATTORNEY GENERAL FOR THE PUBLIC EMPLOYEES RETIREMENT SYSTEM OF NEVADA; SENIOR DEPUTY ATTORNEY GENERAL FOR THE NEVADA HOUSING DIVISION; DEPUTY ATTORNEY GENERAL FOR THE NEVADA DEPARTMENT OF PRISONS
1995-2010

Represented the Public Employees' Retirement System of Nevada. Attended Board meetings and advised with open meeting law issues and Board legal questions. Drafted published opinions and reviewed contracts, policies, procedures and Qualified Domestic Relation Orders. Advised staff in all legal matters and represented PERS in litigation and administrative actions. Represented the Housing Division and the Department of Prisons in litigation and employment matters. Drafted regulations, policies and procedures.

ASSOCIATE ATTORNEY, GORDON, SILVER & BEESLEY 1993-1995

Worked as an associate attorney in a commercial litigation and bankruptcy firm. Performed research, legal writing and made appearances in federal and state court.

EDUCATION:

OKLAHOMA CITY UNIVERSITY - JURIS DOCTORATE, *MAGNA CUM LAUDE*, 1993

UNIVERSITY OF NEVADA (RENO)- BACHELOR OF SCIENCE IN FINANCE 1988

ACTIVITIES AND AWARDS:

- Oklahoma City University School of Law Scholarship; Oklahoma Bar Association Scholarship; Iva B. Kelly Scholarship; American Jurisprudence Awards for Torts I, Constitutional Law I and Remedies.

- Previous member of the *Nevada Lawyer* Publications Committee for the State Bar of Nevada from 1999-2002

- Appointed member of the Standing Committee on Judicial Ethics and Election Practices by the State Bar of Nevada from 2003-2011

REFERENCES AVAILABLE UPON REQUEST

[redacted] Email: [redacted]

CHRISTINE S. SULLIVAN

ATTORNEY AT LAW

[redacted]

August 17, 2015

Nevada Housing Division
1535 Old Hot Springs Road
Carson City, NV 89706

Zions First National Bank
One South Main Street
Salt Lake City, UT 84133

Citibank, N.A.
390 Greenwich Street
New York, NY 10013

Orrick, Herrington & Sutcliffe LLP
405 Howard Street
San Francisco, CA 94105

Reno 633, L.P.
c/o USA Properties Fund, Inc.
3200 Douglas Blvd.
Roseville, CA 95661

RE: $11,000,000.00 Nevada Housing Division
Multi-Unit Housing Revenue Note
(Terracina at Reno Apartments) Series 2015B

Dear Sir or Madam:

I have acted as counsel to the Nevada Housing Division (the "Governmental Lender") in connection with the execution and delivery of its $11,000,000 aggregate face amount Nevada Housing Division Multi-Unit Housing Revenue Note (Terracina at Reno Apartments) Series 2015B (the "Governmental Lender Note").

The Governmental Lender Note is executed and delivered pursuant to the provisions of the Nevada Assistance to Finance Housing Law, as amended, being Chapter 319 of the Nevada Revised Statutes (the "Act"), and evidences the obligation of the Governmental Lender to repay a loan (together, the "Funding Loan") made to the Governmental Lender by Citibank, N.A. (the "Funding Lender") pursuant to a Funding Loan Agreement, dated as of August 1, 2015 (the "Funding Loan Agreement"), among the Governmental Lender, the Funding Lender and Zions First National Bank, as fiscal agent (the "Fiscal Agent"). Capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Funding Loan Agreement.

In my capacity as Governmental Lender's counsel, I have examined the constitution, laws and regulations of the State of Nevada including the Act, a true and correct copy of: the Funding Loan Agreement, the Borrower Loan Agreement, the Regulatory Agreement, and the Tax Certificate (collectively the "Governmental Lender Documents'), and a true and correct copy of the Certificate of Approval by the State Board of Finance executed on August 9, 2015, relating to the Governmental Lender Note (the "Certificate of Approval").

I have also examined the General Certificate of the Governmental Lender (the "Certificate"), dated as of this date, and I have had conversations with representatives of the Governmental Lender and the Attorney General of the State of Nevada (the "Attorney General's Office") which forms the basis of the opinion listed in paragraph 3 below.

Regarding questions of fact material to my opinion, I have relied upon representations and certifications contained in the Governmental Lender Documents, the Certificate of Approval, and the Certificate and upon the above described discussions with the Attorney General's Office without undertaking to verify the same by independent investigation. I have also assumed the genuineness of all signatures, other than the Governmental Lender and anyone signing on behalf of the Governmental Lender and the conformity of the originals to all photocopies, facsimile transmissions and electronic copies of documents reviewed by me.

Based solely upon my examination as stated above and in reliance upon my discussions with the Attorney General's Office and the Certificate with respect to the opinion listed in paragraph 3 below, it is my opinion as of the date hereof that:

1. The Governmental Lender has been duly created and organized and exists under the constitution and laws of the State of Nevada as a division within the Department of Business and Industry and has full legal right, power and authority pursuant to the Act to enter into and perform its obligations under the Governmental Lender Documents;

2. The Governmental Lender Documents have been duly authorized by the Governmental Lender, duly executed and delivered by the authorized officials of the Governmental Lender, and assuming due authorization, execution and delivery by the other parties thereto, constitute valid, legal and binding obligations of the Governmental Lender enforceable in accordance with their respective terms, subject to applicable bankruptcy, reorganization, insolvency, moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application, regardless of whether enforcement is sought in a proceeding in equity or at law. I express no opinion with respect to any indemnification, contribution, penalty, and choice of law, choice of forum or waiver provisions contained in the Governmental Lender Documents.

3. To the best of my knowledge, no action, suit, proceeding, inquiry or investigation, at law or in equity, before or by any court, regulatory agency, public board or body has been served upon the Governmental Lender and is pending or is otherwise known to be threatened in any way affecting the existence of the Governmental Lender, or the titles of the Governmental Lender officials to their respective offices, or seeking to restrain or to enjoin the execution and delivery of the Governmental Lender Note or the application of the proceeds thereof in accordance with the Funding Loan Agreement, or the collection or application of the Pledged Revenues (as defined in the Funding Loan Agreement) to pay the principal of and interest on the Governmental Lender Note, or in any way contesting or affecting the validity or enforceability of the Governmental Lender Documents or any action of the Governmental Lender contemplated by any of said documents, or in any way contesting the powers of the Governmental Lender or its authority with respect to its obligations pursuant to the Governmental Lender Documents or any action on the part of the Governmental Lender contemplated by any of said documents.

4. The Governmental Lender has validly pledged the Pledged Revenue and Security for the Governmental Lender Note as set forth in the Funding Loan Agreement, subject in all cases to the provisions of the Funding Loan Agreement permitting the application thereof for the purposes and on the terms and conditions set forth therein.

5. The issuance of the Governmental Lender Note and the application of the proceeds thereof as provided in the Funding Loan Agreement and the Borrower Loan Agreement do not violate or contravene any applicable law, rule or regulation of the Governmental Lender or the State of Nevada.

The opinions expressed in this opinion letter are subject to the following:

The obligations of the Governmental Lender pursuant to the Governmental Lender Documents are subject to the reasonable exercise in the future by the State of Nevada and its governmental bodies of the police power inherent in the sovereignty of such State and to the exercise by the United States of America of the powers delegated to it by the U.S. Constitution, including, without limitation, bankruptcy powers.

In connection with the issuance of the Governmental Lender Note, I have represented the Governmental Lender, which is my only client in this transaction. Delivery of this opinion letter to the other addressees does not establish an attorney-client relationship between such addressees and me. I assume no obligation to advise you of any changes in the foregoing subsequent to the delivery of this opinion letter.

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This opinion letter is delivered to the addressees hereof in connection with the initial issuance of the Governmental Lender Note by the Governmental Lender and may not be relied upon by the addressees hereof for any other purpose or relied upon by any other party without the prior written consent of the undersigned.

Sincerely,

Christine S Sullivan

Christine S. Sullivan
Attorney for the Nevada Housing Division

OHSUSA:762973166.2

[redacted]

October 20, 2016

Joe Reynolds, Chairman
Public Utilities Commission of Nevada
1150 E. William Street
Carson City, NV 89701-3109

Dear Mr. Reynolds:

Thank you for the opportunity to apply for the General Counsel position with the Public Utilities Commission. I learned about this position through the NEATS website. I enjoyed our partnership as volunteers for the MacBeth Appeal at Pioneer High School, and I am excited about the prospect of working with you again.

I have been a practicing attorney for eight years. The first four years I spent in private practice and the last four years I have spent at the Attorney General's Office. My current position is as Deputy Attorney General representing the Nevada Division of Environmental Protection and the Agency for Nuclear Projects. As counsel for the NDEP, I had the opportunity to collaborate with the PUC on planning for implementation of the Clean Power Plan (CPP). While the CPP is currently held in abeyance pending legal review, should the plan be upheld, my expertise in the area would be of great use to the PUC.

I have represented clients and obtained favorable outcomes at the 9th Circuit Court of Appeals, The Nevada Supreme Court, State and Federal District Courts, and administrative boards. I currently sit as counsel for the Nevada Commission on Nuclear Projects and previously held the position of Executive Director for the Technological Crimes Advisory Board, so I have experience complying with and advising on Nevada's Open Meeting Law as well as other state applicable laws, regulations, and policies. I oversee a multimillion dollar contract for outside counsel on Yucca Mountain and review and supervise the work product of said counsel. I provide general legal advice to NDEP and have helped draft and review regulations and legislation. I've also assisted NDEP in negotiations with industry, including utilities and mines, to achieve environmental compliance while balancing the needs of the industry and avoiding hindrances to economic growth.

My experience aligns nicely with the requirements of this position, and my areas of expertise would prove a benefit to the PUC. I look forward to the chance to speak with you further about this position.

Sincerely,

Belinda A. Suwe

Belinda A. Suwe

BELINDA A. SUWE

[redacted]

EDUCATION

DePaul University College of Law, Chicago, IL
Juris Doctor, *Cum Laude*, conferred May 2008
GPA: 3.48/4.00, Top 25%

University of Nevada, Reno, Reno, NV
Bachelor of Science, With Honors, Chemical Engineering, conferred May 2005
GPA: 3.52/4.00
Activities: Women's Varsity Rifle Team, Kappa Alpha Theta

EXPERIENCE

Nevada Attorney General Carson City, NV
Deputy Attorney General September 2013 - Present

- Successfully represented NDEP before the State Environmental Commission, State Supreme Court, U.S. District Court, and the 9th Circuit Court of Appeals.
- Counseled NDEP on a variety of issues including statutory interpretation, bankruptcy, contracts, open meeting law, and legislative processes.
- Negotiated complex settlement agreements to resolve environmental liabilities and collaborated with industry on new regulations and enforcement guidance.
- Assumed representation of the Agency for Nuclear Projects including managing a multimillion dollar contract with outside counsel and serving as open meeting law and substantive counsel for the Commission for Nuclear Projects.

Executive Director, Technological Crime Advisory Board January 2013 - September 2013

- Oversaw Technological Crime Advisory Board meetings.
- Drafted and tracked legislation regarding technological crimes.
- Collaborated with law enforcement agencies on enforcing technological crimes.

KerrIP Group Reno, NV
Attorney November 2011- December 2012

- Drafted patent applications and persuasively responded to rejections from the United States Patent and Trademark Office.

TraskBritt Salt Lake City, UT
Attorney May 2008 - May 2011

- Counseled clients on acquisition and enforcement of intellectual property rights.
- Prepared and prosecuted domestic and foreign patent applications with emphasis on electrical, mechanical, and chemical technologies.

BAR ADMISSIONS

- Nevada, Utah, and United States Patent Bar.

BEFORE THE STATE ENVIRONMENTAL COMMISSION

STATE OF NEVADA

In Re: Appeal of NOAV No. XXXX, issued to Appellant	**NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S MOTION TO DISMISS APPEAL, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT**

A. INTRODUCTION

The Nevada Division of Environmental Protection, Bureau of Air Pollution Control (the "NDEP"), by and through counsel, Catherine Cortez Masto, Attorney General for the State of Nevada, and Belinda Suwe, Deputy Attorney General, hereby moves to dismiss the appeal of Notice of Alleged Air Quality Violation and Order No. XXXX (the "NOAV") issued to Appellant ("Appellant"). *See* NOAV XXXX attached as Exhibit 1. On August 11, 2014, Appellant filed an appeal with the State Environmental Commission to Request an Appeal Hearing for the NOAV. *See* Form 3 and Statement combined and attached as Exhibit 2.

Appellant fails to state a claim upon which relief could be granted because it fails to allege in its appeal a valid basis or claim for the State Environmental Commission ("SEC") to determine that the NOAV was incorrect or unwarranted, and, therefore the Appeal should be dismissed. Appellant asserts that the NDEP violated constitutional rights and other laws by issuing the NOAV, but Appellant fails to identify those laws and how they allegedly were violated. Generally speaking, Appellant argues that the NDEP erred by failing to inform Appellant that Appellant's permit had expired, but the NDEP has no such legal obligation. Appellant does not dispute that it operated without a valid air permit from July 15, 2013 until June 3, 2014. It follows, therefore, that the NOAV was properly issued, and none of Appellant's allegations, if proven, provides a legal basis for a withdrawal or modification of the NOAV. Accordingly, the appeal should be dismissed.

Alternatively, the NDEP should be granted Summary Judgment. Summary Judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment

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as a matter of law. NRCP 56(c); see Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). In this case, there is no genuine issue of material fact. Appellant does not dispute that it operated without a valid air permit from July 15, 2013 until June 3, 2014. Additionally, as evidenced herein by Exhibits 1-7, the NDEP proceeded in accordance with all applicable laws during the investigation and issuance of the NOAV. It follows, therefore, that the NOAV was properly issued and the NDEP is entitled to Summary Judgment on the merits.

B. BACKGROUND INFORMATION

Appellant operates a facility in Nye County, Nevada. From July 15, 2008 to July 15, 2013 Appellant operated under Class II Air Quality Operating Permit XXXX (the "2013 permit"). In August 2010, Appellant was issued Notice of Alleged Violation No. XXXX for exceeding the permitted emission limit for particulate matter during operation. *See* NOAV No. XXXX attached as Exhibit 3.

As a courtesy, the NDEP sent a notification letter by certified mail to Appellant on February 11, 2013 to notify Appellant that its permit was to expire on July 15, 2013 and that a renewal application needed to be timely submitted. *See* Letter and Certified Mail Receipt attached as Exhibit 4. In spite of the five-month advance notice, Appellant once again failed to submit a timely renewal application. On June 3, 2014, the NDEP conducted a site visit to Appellant. The site visit was to verify the facility's status and determine if the facility was still in operation. At this visit, the NDEP confirmed that Appellant was still in operation, but did not have a valid permit. An employee of Appellant confirmed to the NDEP that no kind of permit application had been submitted to the NDEP since the July 15, 2013 expiration of the 2013 permit. On June 3, 2014, the same day as the site visit, the NDEP issued Stop Order No XXXX to Appellant for failure to apply for and obtain an operating permit. *See* Stop Order No XXXX attached as Exhibit 5. Appellant submitted a Class II air quality permit application to the NDEP on June 11, 2014 and the new permit was issued July 2, 2014.

On June 24, 2014, the NDEP held an Enforcement Conference with Appellant to discuss the NOAV. The Enforcement Conference was held via telephone to accommodate Appellant's concerns regarding the expense and inconvenience of traveling to Carson City.

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During the enforcement conference, Appellant was unable to provide any evidence that the violation associated with the NOAV did not occur and that the violation should not be issued. At the enforcement conference, Appellant was given a copy of the penalty matrix that illustrated how the NDEP reached its recommended penalty. That recommendation is scheduled to be heard at the October 8, 2014 SEC hearing. *See* Penalty Matrix attached as Exhibit 6.

C. APPELLANT'S APPEAL FAILS TO ALLEGE GROUNDS TO MODIFY OR REVOKE THE NOAV AND THE APPEAL MUST BE DISMISSED ON THAT BASIS

1. None Of Appellant's Constitutional Or Statutory Rights Have Been Violated By The NOAV

In its appeal, Appellant alleges that the NOAV violates its constitutional or statutory rights. *See* Exhibit 2, Form 3, Section 3 (boxes checked). However, Appellant fails to identify how its constitutional or statutory rights have been violated. In attached pages, Appellant sweepingly alleges that the circumstances, the NOAV, and the penalty relating to the NOAV (which has not yet been issued by the SEC and is not an issue for appeal) violate Appellant's constitutional rights, both procedural and substantive. *See* Exhibit 2, Statement for Form for Requesting an Appeal Hearing, attached to Form 3 (hereinafter referred to as "Statement") at p. 2. The issuance of the NOAV did not violate any of Appellant's statutory or constitutional rights.

To the contrary, the NDEP is legislatively mandated to issue an NOAV for operating without a permit. NRS 445B.450(a) states "the Director shall issue a written notice of an alleged violation to any owner or operator for any violation, including, but not limited to: failure to apply for and obtain an operating permit." There are multiple reasons underscoring the importance of obtaining a permit prior to commencing operations. Unlike other media, air pollution cannot be cleaned up or mitigated after the fact. Once a facility has polluted, there is no way to capture those molecules and dispose of them. Therefore, for air pollution, it is

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especially important that the facilities subject to permit requirements submit an application so that the NDEP may evaluate the amount of air pollution that will be emitted and ensure that the pollution will not negatively impact the national ambient air quality standards. Those standards are established to be protective of public health and welfare, and it is by that measure that the NDEP is able to ensure that air pollution does not negatively impact public health or welfare. There is no dispute that Appellant failed to apply for and obtain a valid permit while it operated from July 15, 2013 until July 2, 2014. The NOAV, therefore, was issued in accordance with the law.

2. The NDEP Followed Lawful Procedures When Issuing the NOAV and None of Appellants Legal Rights were violated

a. Appellant Had No Legal Right to Receive Notice that Its Permit Had Expired and Appropriate Notice Was Given to Appellant by the NDEP

Appellant's first assertion is that the NDEP failed to give Appellant adequate notice that its permit was pending expiration or expired. Statement at 1. By statute, Class II operating permits expire after 5 years and the date of expiration is called out in bold on the last page of the Operating Permit. *See* NAC 445B.3473. It is the permittee's responsibility to file a renewal application and there is no legal requirement that the NDEP provide notice to a permittee prior to or upon expiration of an operating permit. Accordingly, the NDEP had no legal obligation to provide notice to Appellant that its permit expired. Nonetheless, the NDEP provided a courtesy Notice of Expiration to Appellant on February 11, 2013. *See* Exhibit 4. The Notice of Expiration was sent by certified mail and was received by Appellant on February 19, 2013. *See* Exhibit 4. Thus, even though the NDEP was not legally required to give Appellant notice that Appellant's permit was expiring, the NDEP did, in fact, provide a courtesy notice to Appellant.[1]

[1] This was not the first time that Appellant has failed to timely submit a renewal application. Appellant failed to file a permit renewal application in 2008, which should have put Appellant on high alert for the 2013

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Appellant also alleges that the NOAV was issued improperly because the NDEP failed to advise Appellant about the expiration of its permit at the June 3, 2014 site visit. The NDEP issued Stop Order No 2014-06 on June 3, 2014, the same day as the site visit, after the NDEP confirmed that Appellant was still in operation. *See* Exhibit 5. Accordingly the Stop Order and the NOAV that followed were both issued appropriately and in accordance with the law.

b. None of Appellant's Procedural Legal Rights Were Violated When Appellant Dismissed the Appeal of the Stop Order

Appellant next alleges that its rights were somehow comprised when it voluntarily dismissed its appeal of Stop Order No. 2014-06. Statement at 1. The NDEP explained to Appellant that the most expeditious way for Appellant to resume operation and have the Stop Order lifted was to file a new application and to get a new permit issued. *See* Exhibit 1 at 4 and Declaration of Francisco Vega at 2 attached as Exhibit 7. Appellant filed an application on June 11, 2014 with the assistance of the NDEP and the new permit was issued July 2, 2014, a mere 15 business days after filing the application. Under NRS 445B.3457, the Director has 60 days after the official date of submittal of an application to issue a Class II operating permit. The NDEP issued Appellant's permit in less than half the statutorily allowable time in order to assist Appellant in resuming operations. In light of the NDEP's assistance and quick issuance of the permit, Appellant voluntarily chose to withdraw its appeal of the Stop Order. None of Appellant's legal rights were violated.

c. The NOAV Is Not Inherently Inconsistent and it Does not Violate any of Appellant's Procedural Legal Rights Because of any Supposed Inconsistency

Appellant's next allegation is that the NOAV is inconsistent because the letter accompanying the NOAV referred to Appellant's previous permit number and a violation of

permit's expiration. The fact that Appellant failed to timely apply for a renewal permit once again demonstrates its disregard of permitting requirements and is becoming a pattern of behavior by this facility.

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said previous permit. Statement at 1. The letter accompanying the NOAV referred to Appellant's previous permit number as a record keeping reference. *See* Exhibit 1 at 1. The actual NOAV is clear that the NOAV is issued because of a failure to apply for and obtain an operating permit. *See* Exhibit 1 at 3. Accordingly the NOAV is not inconsistent and it does not violate any of Appellant's legal rights.

d. The Enforcement Conference Held by the NDEP and Attended by Appellant Was Done Appropriately and Did Not Violate any of Appellant's Procedural Legal Rights

Appellant next alleges that the enforcement conference was improper. Statement at 1-2. First, there is no legal requirement that the NDEP hold an enforcement conference. Therefore, Appellant had no legal rights that could have been violated by the enforcement conference. Furthermore, even if Appellant did have a legal right to an enforcement conference, the enforcement conference was held properly. First, Appellant alleges that the enforcement conference was improper because it was conducted via telephone. Statement at 2. However, the NDEP offered to do the enforcement conference via telephone in response to Appellant expressed concerns regarding the expense and inconvenience of traveling to Carson City for the enforcement conference. See Exhibit 7 at 2. Holding the enforcement conference telephonically was done to accommodate Appellant. Furthermore, Appellant was unable to provide *any* evidence at the enforcement conference that the violations did not occur, so the enforcement conference being held telephonically did not in any way hinder Appellant's ability to produce evidence. *See* Exhibit 1, NOAV at 4. Finally, Appellant alleges that the NDEP acted improperly by sending a copy of the State Environmental Commission's Penalty Matrix to Appellant shortly before the Enforcement Conference. Statement at 2. First, the Penalty Matrix only becomes relevant after it has been determined that a violation has occurred and an NOAV is issued, so the penalty matrix

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cannot be grounds for proving the NOAV was issued improperly. Providing the penalty matrix to a violator at the Enforcement Conference is done at the SEC's bequest and is not required by law. Furthermore, the penalty matrix is typically discussed in the Enforcement Conference only after it has been confirmed that the violator cannot provide any evidence to mitigate the violation. In this case, the NDEP provided Appellant with a copy of the matrix before the telephonic enforcement conference so that Appellant would have a copy that could be reviewed during the Enforcement Conference only if and when it was established that Appellant did not have any mitigating evidence. Accordingly, the NDEP acted properly during all steps of the Enforcement Conference and the NOAV was not issued upon unlawful procedure.

e. The NOAV Correctly Refers to Appellant's Previous Violation and Does Not Violate any of Appellant's Procedural Legal Rights

Finally, Appellant alleges that the NOAV is improper because it states that it is Appellant's second air quality violation in the past 60 months. Statement at 2. In August 2010, Appellant was issued Notice of Alleged Violation No. XXXX for exceeding the permitted emission limit for particulate matter during operation. *See* NOAV No. XXXX attached as Exhibit 3. Accordingly, the NOAV adequately reflects the record and is not a violation of Appellant's rights.

3. NDEP's Issuance of the NOAV Was Not Clearly Erroneous, Arbitrary or Capricious or Characterized by Abuse of Discretion

Appellant also checked the box on its Form 3 alleging that its grounds for appeal include that "the final decision was arbitrary or capricious or characterized by abuse of discretion." *See* Exhibit 2, Form 3. Appellant has failed to identify any facts that support these claims as a basis for modification or withdrawal of the NOAV. None of Appellant's allegations demonstrate that the NDEP acted erroneously, arbitrarily or capriciously or abused its discretion. The law is clear based on the facts of this case and the NDEP acted in accordance with the law. NRS 445B requires that "the Director shall issue a written notice of

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an alleged violation to any owner or operator for any violation, including, but not limited to: failure to apply for and obtain an operating permit." There is no dispute that Appellant failed to apply for and obtain a valid permit while it operated from July 15, 2013 through July 2, 2014. The NOAV, therefore, was issued in accordance with the law and was not erroneous, arbitrary or capricious, or characterized by abuse of discretion.

D. CONCLUSION

For the foregoing reasons, the NDEP respectfully requests that the appeal be dismissed, or, alternatively, the NDEP respectfully requests the SEC grant the NDEP's motion for summary judgment. Should the SEC entertain an evidentiary hearing on this matter, the NDEP requests that an expedited briefing schedule be ordered, including dates for an opening brief by Appellant and a response brief by NDEP.

DATED this 5th day of September, 2014.

CATHERINE CORTEZ MASTO
Attorney General

By: Belinda A. Suwe

BELINDA A. SUWE
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701
Attorneys for the State of Nevada

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

Garrett Weir
[redacted]

October 11, 2016

The Honorable Joseph C. Reynolds, Chairman
Public Utilities Commission of Nevada
C/O Breanne Potter, Commission Secretary
1150 East William Street
Carson City, NV 89701

RE: General Counsel Position

Dear Chairman Reynolds:

I am writing to express my strong interest in serving as General Counsel for the Public Utilities Commission of Nevada. I have worked within the Commission's Office of General Counsel for nearly seven years, and I believe that my experience has equipped me with the knowledge and skills necessary to successfully perform the duties of the Office's chief attorney. Having served in an "Acting General Counsel" role at many times throughout the past few years, I am very familiar with the wide range of matters that fall within the General Counsel's responsibilities. In addition to regularly navigating Nevada's Administrative Procedure Act, Open Meeting Law, Public Records Act, Ethics in Government Law, and State Personnel System, I have developed an expertise in the technical subject matter of the regulatory proceedings over which the Commission presides. My experience also includes complex litigation and participation in federal regulatory proceedings.

Moreover, I am uniquely qualified to manage the Commission's team of attorneys, as I have held each of the positions supervised by the General Counsel. Further, I possess strong working relationships with the existing members of the team, and my familiarity with their individual talents will allow me to maximize their effectiveness.

Please find my attached resume, which highlights my work history and educational background. Also, please find the attached writing sample, an answering brief recently filed with the First Judicial District Court of Nevada. If you require any clarification or additional information, please do not hesitate to contact me. Thank you for your consideration of my application.

Sincerely,

Garrett Weir

Enclosures

Garrett C. Weir [redacted]

EXPERIENCE

Public Utilities Commission of Nevada Carson City, NV
Assistant General Counsel - July 2012 to present
- Provide legal advice to commissioners, hearing officers, administrative attorneys, and administrative personnel.
- Research legal issues and draft internal memoranda; design and implement agency policies/procedures consistent with Nevada's Administrative Procedure Act, Public Records Act, Open Meeting Law, Ethics in Government Law, and State Personnel System, as well as the Americans with Disabilities Act and federal employment law.
- Draft public briefing memoranda, present recommendations to the Commission, and draft resulting orders.
- Represent the Commission in state and federal courts; develop litigation strategies; engage in settlement negotiations; draft pleadings; present oral arguments.
- Review and edit orders, notices, briefing memoranda, letters, and other Commission-issued documents.
- Respond to public records requests and Open Meeting Law complaints.
- Monitor and draft legislative proposals; represent the Commission in legislative meetings; testify during hearings.
- Provide legal counsel regarding employment and personnel matters; participate in interviewing and hiring.
- Monitor and participate in federal regulatory proceedings.

Administrative Attorney for the Commission - June 2011 to July 2012
- Provided legal advice to commissioners and hearing officers.
- Worked on cases involving general rate adjustments, integrated resource planning, deferred energy accounting, renewable energy program planning, demand-side management, environmental permitting, rulemaking, and petitions.
- Drafted Commission orders, regulations, reports, and notices.
- Scheduled and participated in hearings, workshops, oral arguments, and prehearing conferences.
- Collaborated with policy advisors, presiding officers, and other attorneys to construct and articulate legal arguments, recommendations, and resolutions.

Administrative Attorney and Legal Case Manager for the Office of General Counsel - February 2010 to June 2011
- Drafted Commission orders and notices; reviewed Commission filings; coordinated with applicants, petitioners, and commenters to repair procedurally-deficient filings; fielded inquiries regarding Commission procedures and other utility-related legal issues; provided legal guidance to administrative personnel; revised internal procedures to streamline operations and ensure statutory and regulatory compliance.

Aruze Gaming America, Inc. - September 2009 to February 2010 Las Vegas, NV
Regulatory Compliance Officer. Prepared and submitted personal and corporate gaming license applications to jurisdictions throughout the world; monitored state and tribal gaming laws to ensure regulatory compliance.

Public Utilities Commission of Nevada - June 2009 to September 2009 Carson City, NV
Legal Intern. Observed regulatory proceedings; completed research assignments; drafted memoranda.

Snell & Wilmer, LLP - January 2009 to June 2009 Carson City, NV
Legislative Extern. Lobbied to advance the interests of clients; researched and monitored bills; discussed/developed strategies with clients; attended legislative committee hearings and testified on behalf of clients; met with legislators; provided the Governor with language for veto messages.

The Honorable Lloyd D. George, US District Court, Dist. of Nevada - Fall 2008 Las Vegas, NV
Judicial Extern. Observed civil and criminal court proceedings; researched and analyzed various legal issues; wrote draft opinions; discussed legal arguments with the Judge and his law clerks.

EDUCATION

William S. Boyd School of Law, University of Nevada, Las Vegas - J.D., May 2010 Las Vegas, NV
Honors: Full Tuition Academic Scholarship

University of Oklahoma - B.A. in Economics, July 2007 Norman, OK
Honors: National Merit Scholarship (full tuition)

Garrett Weir, Esq., NV Bar No. 12300
Hayley Williamson, Esq., NV Bar No. 13619
1150 E. William Street
Carson City, NV 89701-3109
Tel: (775) 684-6185
Fax (775) 684-6188

Attorneys for: *Public Utilities Commission of Nevada*

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

VOTE SOLAR, Petitioner,	
vs.	CASE NO. 16-OC-00521B
THE PUBLIC UTILITIES COMMISSION OF NEVADA, Respondent.	DEPT. II

<u>RESPONDENT PUBLIC UTILITIES COMMISSION OF NEVADA'S ANSWERING BRIEF</u>

Pursuant to the Nevada Revised Statutes ("NRS") 703.373(7), the Public Utilities Commission of Nevada, by and through its legal counsel, respectfully submits its Answering Brief in this matter. The Answering Brief is based upon the Points and Authorities attached hereto and all pleadings and papers on file herein.

Dated the 11th day of July, 2016.

by: ______________________

GARRETT WEIR, ESQ.
Nevada Bar No. 12300
HAYLEY WILLIAMSON, ESQ.
Nevada Bar No. 13619
1150 East William Street
Carson City, NV 89701
Tel: 775-684-6185
Fax: 775-684-6186
gweir@puc.nv.gov
hwilliamson@puc.nv.gov
Attorneys for the Public Utilities Commission of Nevada

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POINTS AND AUTHORITIES

I. INTRODUCTION

The Public Utilities Commission of Nevada (the "Commission" or "PUCN") does not establish the energy policy of the State of Nevada; that role is reserved for the Nevada Legislature. The Alliance for Solar Choice ("TASC"), the Solar Energy Industries Association ("SEIA"), and Vote Solar (together, the "National Rooftop Solar Industry"), along with member organizations of Nevadans for Clean Affordable Reliable Energy ("NCARE"), participated in the 78th (2015) Session of the Nevada Legislature and aggressively lobbied legislators to extend the policy of incentivizing the installation of rooftop solar energy systems through a prescribed rate design for electricity customers who participate in net energy metering ("NEM").[1] Despite their efforts, the National Rooftop Solar Industry and various members of NCARE were unable to convince the Legislature to continue allowing what the Legislature suspected was an unreasonable shifting of costs from NEM participants (customer-generators) to customers who do not participate in NEM. Having failed to obtain their desired outcome during the legislative session, these rooftop solar advocates now seek to overturn the administrative decision that sets rates in accordance with the legislatively-mandated policy of eliminating unreasonable cost-shifts associated with NEM rates.

The Commission's Modified Final Order, issued on February 17, 2016, in Docket Nos. 15-07041 and 15-07042, approves cost-of-service studies and adopts revised NEM tariffs for the

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[1] The Nevada Attorney General's Bureau of Consumer Protection ("BCP") also participated in legislative discussions regarding NEM rate design, but it consistently supported the concept of allowing the Commission to adopt new rates to appropriately recover costs from customer-generators to avoid shifting costs to other customers. (Hearing on SB 374 before the Assembly Committee on Commerce and Labor, 78th Session of the Nevada Legislature (May 20, 2015) ("C&L Tr. 5-20-15") at 59.) In fact, even prior to the 2015 legislative session, BCP strongly supported the creation of a separate customer class for NEM customers to provide the Commission with the flexibility to impose higher fixed charges on customers who participate in NEM. *See* BCP's Petition in Docket No. 14-03026 and the investigation that was subsequently opened in Docket No. 14-06009, wherein the Commission examined whether separate customer classes should be established for NEM customers. *See also* BCP's Comments, filed on August 6, 2014, in Docket No. 13-07010, stating that "the BCP believes that low-income customers are not the customers generally participating in the NEM program and thus those low-income customers could be providing a subsidy to the higher-income customers participating in the NEM program." (BCP Comments at 2.) BCP further stated, "If NEM service customers remain in the same classes of service as full-requirement customers, then policymakers will be faced with the dilemma. Should basic service charges be increased in order to reduce intraclass subsidies that benefit a relatively small number of NEM customers—even if doing so removes the benefit of relatively low basic service charges for the larger number of lower-income customers?" (BCP Comments at 5.) In its memorandum of points and authorities, BCP does not raise substantive concerns; rather, BCP takes issue with the notice provided to customer-generators who were participating in NEM prior to the Commission approving new NEM rates.

customers of Nevada Power Company d/b/a NV Energy ("Nevada Power") and Sierra Pacific Power Company d/b/a NV Energy ("Sierra") (together, "NV Energy") pursuant to Senate Bill ("SB") 374 of the 2015 Legislative Session. The National Rooftop Solar Industry, NCARE, BCP, and Great Basin Solar Coalition (collectively, the "Petitioners") request that this Court vacate the Modified Final Order and remand this case to the Commission to somehow implement SB 374 in a way that preserves the cost-shifting rate design that the Legislature intended to eliminate through the passage of SB 374. This Court must deny the Petitioners' requested relief and affirm the Modified Final Order because the Modified Final Order does not prejudice the substantial rights of the Petitioners or any other persons in any of the ways enumerated in Nevada Revised Statutes ("NRS") 703.373(11).

II. BACKGROUND

A. Legislative History of SB 374

Prior to the passage of SB 374, NRS 704.773 provided that electric utilities in this State were only required to offer NEM "until the cumulative capacity of all [NEM] systems operating in this State is equal to 3 percent of the total peak capacity of all utilities in this State." As the sponsoring legislators of SB 374 recognize, the Legislature originally established a 1-percent cap on NEM to minimize the degree to which non-participants in NEM would potentially pay higher rates to compensate for the under-recovery of fixed costs from NEM customers. (CR at 7807.) The sponsoring legislators further explain that the intent to mitigate non-participants' exposure to increased rates "was reiterated in 2013 when the Legislature voted to [only] increase the NEM cap...to 3 percent of the utilities' peak demand." (*Id.*) "At that time, the Legislature was not likely to [further] increase the cap due to the increased cost to the [non-participant] ratepayers." (*Id.*) In 2015, SB 374 removed the cap on NEM, allowing NEM to continue beyond the fast-approaching 3-percent limit. However, the Legislature was only willing to allow NEM to continue if it was possible to ensure that non-NEM customers would be protected from the potential cost-shifts that the cap had originally been instituted to avoid. Thus, the Legislature outlined in SB 374 a framework through which the Commission would require electric utilities to continue offering NEM, but only under terms that avoided the unreasonable shifting of costs.

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In their memoranda of points and authorities, the National Rooftop Solar Industry, NCARE, and Great Basin Solar Coalition[2] (together, the Rooftop Solar Advocates) paint a rosy picture of SB 374 as a bill drafted primarily to allow further incentivizing of rooftop solar installations in Nevada; they make only a passing reference to the true purpose of the bill: to address cost-shifting from customer-generators (NEM customers) to other customers. For instance, TASC states, "In several ways, SB 374 affirmed Nevada's strong commitment to rooftop solar" (TASC Mem. at 8), while Vote Solar suggests that the policy and purpose of promoting rooftop solar energy is what "spurred the creation of SB 374." (Vote Solar Mem. at 7.) SEIA announces that it was "the Legislature's clear intention that [NEM] be made available on terms that support the growth of the program, such that the growth of [NEM] encourages private investment in [NEM] systems [and] stimulates economic growth in the [rooftop solar] industry..." (SEIA Mem. at 19.) The Rooftop Solar Advocates focus on the fact that SB 374 did not amend the legislative policy goals set forth in NRS 704.766 and NRS 701B.190 to support their argument that the goal of the bill was to incentivize rooftop solar energy development.

Given their participation during the 2015 legislative session, the Rooftop Solar Advocates are surprisingly confused as to the clear purpose of the legislation at issue in this case. TASC's representations to this Court regarding the intent of SB 374 are especially questionable when the Chief Executive Officer of one of its primary members has quite vocally criticized the bill. Lyndon Rive of SolarCity presented testimony on SB 374 before the Assembly Committee on Commerce and Labor on May 20, 2015. When asked by Assemblyman and Committee Chairman Kirner whether he liked the bill, Mr. Rive replied, "The word 'like' is an aggressive word... Given the alternative of death, we support it." (C&L Tr. 5-20-15 at 70.) Mr. Rive was no less forthcoming in the media.[3] On January 11, 2016, Bloomberg News reported:

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[2] Great Basin Solar Coalition joined in the memoranda of points and authorities filed by the National Rooftop Solar Industry.

[3] On appeal, a court may take judicial notice of facts generally known or capable of verification from a reliable source, whether requested to or on its own accord. *See Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009).

> SolarCity Chief Executive Officer Lyndon Rive said his company agreed to support the law because utilities were about to reach the state's self-imposed limit on rooftop solar installations and sales would have stopped without a compromise to lift it. He expects the [Commission] to reconsider the ruling as the ramifications became more clear. **"We literally had a gun against our head to support it," Rive said in an interview Monday.**

It is difficult to review the legislative history of SB 374 and not conclude that the Commission performed the difficult task that the Legislature directed the Commission to perform. A review of this history is illuminating. SB 374 began as a bill addressing energy conservation standards, with no provisions for NEM. After extensive lobbying efforts by the National Rooftop Solar Industry, and with support from the member organizations of NCARE, SB 374 was amended to address the impending 3-percent cap. The revised version of the bill was first introduced to the Assembly Committee on Commerce and Labor on May 20, 2015, by Senators Farley and Atkinson. In her introductory remarks, Senator Farley stated:

> I would like to explain the importance of the provisions regarding net metering and this bill. Nevada is a national leader in renewable energy with one of the most aggressive portfolio standards in the nation. We have had net metering for close to two decades. Today, Nevada enjoys robust jobs in the renewable energy industry that include rooftop solar as well as large-scale solar, geothermal, and wind developments. ***Over the years, this body has placed limits on the amounts of net metering that can occur because of financial impacts to other customers who do not install solar generation. Rather than having to revisit this cap issue every legislative session, this amendment requires the Public Utilities Commission of Nevada (PUCN) to do a thorough analysis of what the appropriate costs and subsidies are that should or should not be borne by utility customers in this state.***

(C&L Tr. 5-20-15 at 39.) After Senator Farley's initial presentation, the Chairman of the Committee allowed committee members to comment and ask questions. Committee member Assemblywoman Kirkpatrick made several pointed statements regarding her knowledge of the policy history behind Nevada's net metering program, and she voiced her long-held concerns related to cost-shifting:

> ***In the beginning, we wanted to grow it [the rooftop solar industry].*** [Senator Atkinson] and I had that discussion, and we had people like Black Rock Solar who were here long before, and they are not even in the building this session. There was Mr. Brooks who had been doing this long before any of us got here, ***and we always said we were going to lower the subsidies to where it came to a point it was affordable.*** From my perspective, I think the emails that were sent by the current companies are from misguided folks, which is great because I have 1,800 emails that say, "How dare we [the Legislature] go back on our word?" ***I believe it was very clear all along in 2007 on what the expectation was...***

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> I think it is important that people know, this is not our first rodeo when it comes to solar. ***Since the solar company killed my consumer bill, I want to make sure that we have a real discussion on what the expectation is of this state.*** I believe Senator Atkinson, Mr. Thomsen, Ms. McKinney-James, former Assemblyman Bobzien, Mr. Kyle Davis, and I went out on a limb to bring solar to our state, not to be browbeaten on why it is going better than expected. I just want to be clear on that.
>
> ***It has always been our attempt to back down the subsidies because at some point, why should the neighbor next door have to compensate for that to work?...***
>
> [A]t the end of the day, ***we as legislators have a responsibility to ensure that we take care of all the ratepayers. We have always had a number. We have always said if it grows to this, we will be great...***

(*Id.* at 45-6.)

Senator Atkinson, co-sponsor of SB 374, shared the concerns of Assemblywoman Kirkpatrick. In discussing the effect of raising a cap on the amount of NEM under the prior rates, and specifically the costs that would shift to non-NEM customers, Senator Atkinson said:

> When I look at this Committee, I think you understand that that is our job. ***It is our job to protect the ratepayer.*** I believe that we, as a legislative body, over the years have said that we will do what is right when it comes to the ratepayer. ***We have never thought that it was a good idea to go from 1 percent to 10 percent,[4] and we have done that in increments to give this industry the opportunity to get off the ground.*** We gave them 1 percent three sessions ago. Then we increased it to 2 percent the session after that, and then last session, they came to us and said, "We need another percent. Help us, help us, help us, please." ***We said, "Is this it? This is the last time. We are not doing this again."***
>
> ***You mentioned subsidies; we are not going to continue to allow a company to continue to be subsidized, as you said, by folks who are not using the system.*** Their argument will be yes, but it is making it cheaper for the folks who are not. The problem I have always had with the solar industry is that if you can afford it, you can get a system. ***For the folks who really need reduction and need help with their energy bills, they cannot afford a solar system. You have these folks subsidize the folks who can pay for a system.*** I know someone in this building who just bought a solar system and it is paid for 100 percent. That would be nice, but you and I cannot do that. ***We have done that and have gone up in 1 percent increments so when I saw this year that they were trying to go from 3 percent to 10 percent, I was alarmed. I asked what that number would mean to the ratepayer...***
>
> ***I believe that the more you continue to put these subsidies in that the ratepayer has to suffer. So, the reason for S.B. 374 (R2), which is why I signed on to it with the Chairwoman from the Senate Committee on Legislative Operations and Elections, is that it does give the PUCN the flexibility to deal with this issue.***

(*Id.* at 47.)

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[4] During the legislative session, the National Rooftop Solar Industry had privately proposed the idea of lifting the cap on NEM from 3 percent to 10 percent, while keeping the prior, statutorily-prescribed NEM rate design in place.

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Throughout the hearing, Assemblywoman Kirkpatrick maintained her concern over cost-shifting, even so far as to object to a temporary tariff to bridge the gap between the date the cap could be hit and the final implementation of new NEM rates.

> I am concerned ***because the whole goal is to get them up and running*** and, as we do with any industry, we give a subsidy to encourage people to come to Nevada and now, Mr. Thomsen will tell you it is a $6 billion industry within our state. That is mostly large-scale matters—that is not even the outer stuff. ***I do not know if I agree with having a bridge because the point was, at least in all of my discussions, that this was it. This was the time frame that it was available. This was factored into the plan, and at some point, we were going to have people start going to a different amount.***

(*Id.* at 50.) As to whether the lack of a bridge tariff would affect existing customers and rooftop solar jobs, Assemblywoman Kirkpatrick stated, "I get it. I get that people could lose their jobs, but the Legislature did their job and carried out their responsibility. You want to give them a subsidy?" (*Id.* at 51.)

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Finally, the legislators discussed the need for the rooftop solar industry to transition to a new business model less reliant on subsidized rates:

> **Chairman Kirner:**
>
> So there is a bigger question for me, and this may be related to something Assemblywoman Kirkpatrick said. We, basically, are subsidizing this industry; that is, the federal government is. At some point, the federal government subsidies are going to go away, correct? Maybe we will get testimony where they can talk about their business model, but I am wondering how the business model will look, even if we do what we say we are going to do in this bill. Going forward, what happens—and that is speculation, perhaps?
>
> **Senator Atkinson:**
>
> I think you just hit the nail on the head, which is what some of us have been talking about for quite some time. Assemblywoman Kirkpatrick is shaking her head because we had this discussion, but you are absolutely right. **When these things go away, you do have to change your business model somewhat.** If you have made billions of dollars the last few years, you should be able to afford to do that. While we will have some people disagree with that, that is exactly what we believe. **Some of these industries will have to change their business model to fit what Nevada is going to be doing.**

(*Id.* at 50.)

The legislative history speaks for itself. The Legislature anticipated that the passage of SB 374 would result in the Commission setting new NEM rates that would disrupt the business model of the rooftop solar industry by eliminating cost-shifts from customer-generators to other customers. In passing SB 374, the Legislature prioritized the protection of non-NEM ratepayers over incentivizing the installation of rooftop solar energy systems.

B. Legal Effect of SB 374

Section 2.3 of SB 374 requires NV Energy to obtain Commission approval of NEM tariffs outlining the rates applicable to customer-generators. Section 2.95 provides that the Commission-approved NEM tariffs will apply after NV Energy has received completed applications for NEM systems totaling 235MW. The new NEM tariffs need not conform to the rate design outlined at 704.775.[5] In fact, the rate design outlined at NRS 704.775 is the form of NEM that the Legislature suspected created a cost-shift. Section 2.3(2)(e) of SB 374 explicitly mandates that the Commission "shall not...authorize any rates or charges for [NEM] that unreasonably shift costs from customer-generators to other customers of the utility."

By eliminating the requirement to adhere to NRS 704.775 in designing NEM rates, the Legislature directed the Commission to do what it normally does—set accurate, cost-based rates. Prior to the passage of SB 374, the Commission set inaccurate NEM rates, which were only "just and reasonable" because the law required the Commission to inaccurately distribute costs among customers, to the benefit of customer-generators. SB 374 freed the Commission to exercise its duty to ensure that rates are just and reasonable.

In the absence of a legislatively-prescribed rate design for NEM customers, the Commission's consideration of new NEM rates is governed by the same provisions that apply to all of the Commission's ratemaking and regulatory decisions. NRS 704.001 confers upon the Commission the power to regulate public utilities "to provide for the safe, economic, efficient, prudent and reliable operation and service of public utilities" and "to balance the interests of customers and shareholders of public utilities by providing public utilities with the opportunity to earn a fair return on their investments while providing customers with just and reasonable rates." The Nevada Supreme Court has emphasized the Commission's duty to ensure that rates are just and reasonable, stating that "[t]he only limit on the Commission's authority to regulate utility rates is the legislative directive that rates

[5] Once the 235MW threshold is met, NRS 704.775 will only apply to the existing NEM systems to the extent that the Commission chooses not to apply the new NEM rates, as provided in Section 2.3(3) of SB 374.

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charged for services provided by a public utility must be 'just and reasonable' and that it is unlawful for a public utility to charge an unjust or unreasonable rate." *Nevada Power Co.* 102 P.3d at 584 (citing NRS 704.040).

C. The Modified Final Order

The Modified Final Order, which approves cost-of-service studies that identify annual cost-shifts of $623 per customer-generator in Nevada Power's service territory and $471 per customer-generator in Sierra's service territory, finds that the NEM rates that were in effect prior to 2016 allowed customer-generators to avoid paying their full share of the fixed costs of electricity service. (CR at 413.) The under-recovery of fixed costs from customer-generators caused other customers to pay more than their fair share of fixed costs, resulting in an expected $16 million annual cost-shift, if left unaddressed. (CR at 457, 476, 519-20.) The Modified Final Order finds that this shift of costs from customer-generators to other customers is unreasonable. Accordingly, the Modified Final Order adopts revised rates for customer-generators to gradually eliminate the unreasonable cost-shift.

The Modified Final Order gradually implements the following changes to NEM rates, with the changes occurring in five incremental steps (one every three years) over a total period of 12 years: 1) fixed monthly charges (the Basic Service Charges) increase to provide for the recovery of certain fixed costs of providing standby electric service to customer-generators; 2) volumetric rates (the Base Tariff General Rates) decrease to account for the recovery of fixed costs through fixed charges; 3) netting (measuring the difference between kilowatt-hours ("kWh") received from the utility and kWh fed back to the grid) occurs once each hour, rather than once each month; and 4) the compensation provided for net excess electricity decreases from the retail rate to a value-based rate.[6]

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[6] The Petitioners repeatedly refer to the Modified Final Order as nearly tripling fixed charges for NEM customers and reducing the compensation for net excess electricity by over 70 percent. (TASC Mem. at 10, 15; Vote Solar Mem. at 2, 9.) The Petitioners neglect to remind the Court that those numbers are based on estimates assuming that costs and market conditions will be the same in 12 years as they are now. In reality, the total magnitude of the adjustment to rates is unknown at this time and could change in customer-generators' favor if, for example, the price of natural gas increases. It is worth noting that the Modified Final Order's gradual implementation of new NEM rates has initially resulted in only de minimus changes to customers-generators' bills.

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III. STANDARD OF REVIEW

The Commission consists of three Commissioners, appointed by the Governor, to supervise and regulate the operation and maintenance of public utilities. *See* NRS 703.030 and NRS 703.150 *et. seq.* With regard to the Commission's statutory authority and duty to regulate utility rates, the Nevada Supreme Court has described the Commission's power as being "plenary," meaning that it is "broadly construed." *Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada*, 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); NRS 704.040. Therefore, this Court must "not interfere with [the Commission's rate-setting] decisions other than to keep them within the framework of the law." *Nevada Power Co. v. Public Service Comm'n*, 105 Nev. 543, 545, 779 P.2d 531, 532 (1989). Moreover, when assessing whether the Commission's actions are within the framework of the law, courts give "great deference...to the administrative agency's interpretation when it is within the language of the statute" because "[a]n agency charged with the duty of administrating an act is impliedly clothed with power to construe it as a necessary precedent to administrative action." *State v. State Engineer,* 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).

NRS 703.373(11) requires that this Court, in reviewing a Commission decision, shall not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact and shall affirm the decision of the Commission unless "the substantial rights of the petitioner have been prejudiced because the final decision of the Commission is: (a) In violation of constitutional or statutory provisions; (b) In excess of the statutory authority of the Commission; (c) Made upon unlawful procedure; (d) Affected by other error of law; (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) Arbitrary or capricious or characterized by abuse of discretion."

IV. ISSUES PRESENTED

(1) Whether the Modified Final Order is contrary to statute.

(2) Whether the Modified Final Order is arbitrary or capricious.

(3) Whether the Modified Final Order violates the due process rights of the Petitioners.

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(4) Whether the Modified Final Order violates the due process rights of existing customer-generators and, if so, whether such violation prejudiced the substantial rights of the Petitioners.

(5) Whether the Modified Final Order violates the Contract Clause of the United States Constitution.

V. ARGUMENT

This Court must affirm the Commission's Modified Final Order because it is not in violation of constitutional or statutory provisions, in excess of the statutory authority of the Commission, made upon unlawful procedure, affected by other error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, arbitrary or capricious, or characterized by abuse of discretion. With regard to the specific issues raised by the Petitioners, the Modified Final Order: 1) is not contrary to statute; 2) is not arbitrary or capricious; 3) does not violate any person's due process rights; and 4) does not violate the Contract Clause of the United States Constitution.

A. The Modified Final Order Is Not Contrary to Statute.

1. The Modified Final Order is consistent with legislative declarations regarding renewable energy and economic development.

Citing NRS 704.766 and NRS 701B.190, the Rooftop Solar Advocates argue that the Modified Final Order "violates express Nevada law mandating the promotion of distributed solar generation and the rooftop solar industry in Nevada." (TASC Mem. at 13.) Yet, the Rooftop Solar Advocates fail to identify any language suggesting that the rooftop solar industry is entitled to unique preferential treatment following the exhaustion of the $255,270,000 dedicated to the installation of rooftop solar energy systems under NRS 701B.005. The Rooftop Solar advocates misinterpret NRS 704.766 and NRS 701B.190 and incorrectly suggest that the passage of SB 374 was a "re-emphasis" of those statutes, requiring the Commission to undertake a separate analysis in which it applies general legislative declarations to any new rate design. In actuality, the legislative declarations contained at NRS 704.766 and NRS 701B.190 pre-date SB 374 and simply serve to inform statutory interpretation regarding the creation of the NEM framework. Nonetheless, the Commission's interpretation and application of SB 374 is consistent with NRS 704.766 and NRS 701B.190, and the Modified Final Order explicitly considers the relevant legislative declarations. (CR at 529-32.)

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a. NRS 704.766

In citing NRS 704.766, the Rooftop Solar Advocates refer to a legislative declaration that does not single out the "rooftop solar industry" or "distributed solar generation" but instead refers generally to "renewable energy resources." They misinterpret NRS 704.766 as applying only to a single sub-industry within the greater renewable energy industry and statewide economy.

NRS 704.766 reads as follows:

> It is hereby declared to be the purpose and policy of the Legislature in enacting NRS 704.766 to 704.775, inclusive, [(the provisions governing NEM)] to:
> 1. Encourage private investment in renewable energy resources;
> 2. Stimulate the economic growth of this State;
> 3. Enhance the continued diversification of the energy resources used in this State; and
> 4. Streamline the process for customers of a utility to apply for and install [NEM] systems.

The Modified Final Order is consistent with each of the goals listed at NRS 704.766. The Rooftop Solar Advocates' arguments to the contrary rely on an interpretation in which all statutes regarding NEM exist exclusively to benefit the rooftop solar industry. They suggest that by making NRS 704.766 applicable to the new provisions of SB 374, the Legislature "expressly reaffirmed the State's commitment to promoting investment in rooftop solar and bound the Commission to furthering that goal when implementing SB 374." (*Id.* at 14.) The Rooftop Solar Advocates ignore that the purpose of SB 374 was not to promote rooftop solar, but rather to curtail the State's promotion of rooftop solar as necessary to eliminate the unreasonable shifting of costs. SB 374 unambiguously contemplates the elimination of preferential treatment of NEM customers by precluding the Commission from approving any rates that unreasonably shift costs from customer-generators to other customers.[7] Applying the Rooftop Solar Advocates' logic, SB 374's prohibition on unreasonable cost-shifting is at odds with NRS 704.766, which the Rooftop Solar Advocates apparently believe protects the rooftop solar industry from any rate changes that have the effect of not promoting investment in

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[7] *See* SB 374 Sec. 2.3(2)(e), which states that the Commission "shall not...authorize any rates or charges for [NEM] that unreasonably shift costs from customer-generators to other customers of the utility."

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rooftop solar. Their peculiar reasoning overlooks the fact that regulatory provisions are often designed to reign in the industries that are subject to regulation.

NRS 704.766(1) applies to all forms of renewable energy and does not specifically refer to rooftop solar energy. NRS 704.7715, which appears within the statutes addressing NEM, defines "renewable energy" as including a) biomass, b) geothermal energy, c) solar energy, d) waterpower, and e) wind.[8] Thus, the policy of "encourag[ing] private investment in renewable energy resources" does not prevent the Commission from adjusting NEM rates in a way that, in removing certain incentives that had exclusively encouraged investment in rooftop solar, encourages private investment in other forms of renewable energy. For example, by moving toward value-based rates for compensating net excess electricity production, the Commission has encouraged investment in other forms of renewable energy, such as large-scale solar and geothermal energy, which are more cost-effective than rooftop solar at this time. (CR at 529.) The Legislature used the defined term "renewable energy" for a reason. It could have used the defined term "net metering system," but it instead used the more inclusive "renewable energy" to ensure that the State's NEM framework is consistent with the larger goal of promoting all forms of renewable energy.

Just as NRS 704.766(1) applies to all forms of renewable energy and not just to rooftop solar, NRS 704.766(2) applies not just to the economic growth of the rooftop solar industry but to the economic growth of the entire State. While it is possible that the rooftop solar industry has experienced or will experience a reduction in growth as a result of the Modified Final Order, the rooftop solar industry is only one part of the State's economy; in fact, it is merely one part of the *solar energy industry*. Given the absence of data suggesting that rooftop solar provides greater benefits than other, less expensive forms of renewable energy, the record supports the notion that shifting away from preferential treatment for rooftop solar will stimulate the State's economy. No evidence was presented in Docket Nos. 15-07041 or 15-07042 demonstrating a negative macroeconomic effect from

[8] NRS 704.7715 incorporates the definition contained in NRS 704.7811.

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implementing cost-based NEM rates.[9] In the absence of any such evidence, the Commission ordered the gradual elimination of cost-shifting, which will stimulate the statewide economy in two ways: 1) the vast majority of Nevada's residential ratepayers will pay less for electricity, leaving them with more money to spend elsewhere within the State; and 2) by avoiding the massive addition of new customer-generators whose unused electricity must be purchased by the utility, Nevada's electric utilities will have greater flexibility in meeting customers' energy needs through cost-effective forms of renewable energy derived from projects developed in Nevada.

With regard to subsections 3 and 4 of NRS 704.766, the Modified Final Order both "[e]nhance[s] the continued diversification of the energy resources used in this State" and "[s]treamline[s] the process for customers of a utility to apply for and install [NEM] systems." As previously noted, the move toward value-based rates for compensating net excess electricity production will encourage investment in other forms of renewable energy, thus providing utilities with the ability to meet customers' energy demands through a diverse range of resources. Also, the Modified Final Order does not change the process through which customers may apply to interconnect and install NEM systems, but it did adopt a gradual transition toward cost-based rates, rather than imposing a sudden drop-off; therefore, the application and installation process under the Modified Final Order implements the requirements of SB 374 in as streamlined a way as possible.

[9] In its Memorandum of Points and Authorities, TASC makes several unsupported assertions regarding the economic impact of the Modified Final Order. Specifically, TASC states that "[t]he installation of rooftop solar in Nevada has effectively ceased" (TASC Mem. at 12); "[t]he Order *ends* the expansion of solar distributed generation in Nevada" (TASC Mem. at 15); "hundreds of Nevadans...are now out of work" (TASC Mem. at 12); "[u]tility consumers are divesting from—not investing in—renewable energy" (TASC Mem. at 16); and "the rooftop solar industry has all but ceased operations in Nevada" (TASC at 16). TASC's assertions are inaccurate, and the press releases, news articles, and public comments cited as support for its assertions are unpersuasive, as they include unverified statements from individuals whose statements were neither made under oath nor subject to cross-examination. In most instances, the articles and press releases are reporting on statements made by the National Rooftop Solar Industry itself; this is not reliable evidence—it is an echo-chamber. To the extent that TASC cites actual witness testimony as support for these assertions, the testimony does not support the sweeping conclusions that appear in TASC's pleading. Also relevant to the issue of economic impact to the State is TASC reference to "an estimated 5,900 Nevadans" employed by the solar industry. (TASC Mem. at 5). During the proceedings in Docket Nos. 15-07041 and 15-07042, TASC refused to provide any information to corroborate the job numbers supplied by TASC to the media. The only evidence on record suggests that the 5,900 jobs number is unreliable and that the number of "solar jobs" actually affected by the Modified Final Order is much, much, smaller. (CR at 15149-15155.) When examining the economic impact to the State, other potentially relevant information that was not introduced during the proceedings includes information regarding the extent to which revenues derived from rooftop solar companies are reinvested in Nevada.

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b. NRS 701B.190

In addition to citing NRS 704.766, the Rooftop Solar Advocates refer to NRS 701B.190 as evidence of the Legislature's supposed intent to preserve rates that ensure the success of the rooftop solar industry. NRS 701B.190 identifies the goals of the Legislature in creating the Solar Energy Systems Incentive Program ("Rooftop Solar Rebate Program"), which provides additional incentives to reduce the costs of installing rooftop solar energy systems. The $255,270,000 allocated to this program is entirely separate from the incentives associated with NEM. The cash subsidies paid to customer-generators by this program are funded through the Renewable Energy Program Rate ("REPR"), which is paid by all of NV Energy's ratepayers. The Modified Final Order does not address the Rooftop Solar Rebate Program or the REPR.

Though NRS 701B.190 does not apply to the statutes governing NEM, the Commission agrees with the Rooftop Solar Advocates that it provides useful insight regarding the extent to which the Legislature intended to incentivize the rooftop solar industry. NRS 701B.190, which is effective through December 31, 2025, reads as follows:

> The Legislature hereby finds and declares that it is the policy of this State to:
> 1. Expand and accelerate the development of solar distributed generation systems in this State; and
> 2. Establish a sustainable and self-sufficient solar renewable energy industry in this State in which solar energy systems are a viable mainstream alternative for homes, businesses and other public entities.

Because NRS 701B.190 identifies the policy behind the creation of a rebate program that explicitly subsidizes the installation of rooftop solar energy systems, it makes sense that it would include the language, at NRS 701B.190(1), specifying the intent to expand and accelerate the development of solar distributed generation systems (rooftop solar energy systems). The inclusion of this language, however, does not amount to a legislative mandate that expands beyond the Rooftop Solar Rebate Program. Likewise, the language at NRS 701B.190(2) does not apply to programs or decisions unrelated to the Rooftop Solar Rebate Program, but it does illuminate the fact that the Legislature did not intend to permanently subsidize the rooftop solar industry.

First, the legislative policy outlined at NRS 701B.190, like all of the statutes governing the Rooftop Solar Rebate Program, has a specific term, lasting from January 1, 2014, through December

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31, 2025. Second, NRS 701B.190(2) very clearly memorializes the Legislature's expectation that the rooftop solar industry must eventually stand on its own as a "sustainable and self-sufficient" industry and that rooftop solar energy systems must eventually be a "viable" mainstream alternative for customers. The planned expiration of the rebate program in 2025, combined with the intent to create a sustainable, self-sufficient industry, is consistent with SB 374's requirement that rooftop solar customers be prohibited from receiving additional incentives that result in costs shifting to other customers. The Modified Final Order's 12-year, gradual implementation of cost-based rates, which will take full effect on January 1, 2028, fits perfectly within the Legislature's plan to transition away from incentivizing the rooftop solar industry. It is far from a "complete reversal" of Nevada's energy policy. (TASC Mem. at 1.)

In arguing that NRS 701B.190(2) "ensures that [NEM] systems remain a 'viable mainstream alternative'" (*Id.* at 15.), the Rooftop Solar Advocates mischaracterize the Legislature's policy declaration, which was to "establish" a "sustainable and self-sufficient" rooftop solar industry capable of offering rooftop solar energy systems to consumers without needing assistance from other ratepayers. The word "viable" in this instance refers to the ability of rooftop solar energy to be a mainstream alternative that can survive on its own, without incentives. Black's Law Dictionary defines "viability" as the "capability of living," noting that the term is "used to denote the power a new-born child possesses of continuing its *independent* existence." (emphasis added.)[10] Here, the Legislature intended for rooftop solar to eventually become capable of surviving independently, which is a concept in stark contrast to the Rooftop Solar Advocates' suggestion that the Legislature intended to require the perpetual incentivizing of the rooftop solar industry to ensure that rooftop solar energy systems remain an attractive option to consumers.

As part of their flawed argument that the Legislature intended to ensure the everlasting marketability of rooftop solar panels, the Rooftop Solar Advocates inaccurately suggest that the Commission's decision "erode[s] the economic viability of rooftop solar" (Vote Solar Mem. at 2.), that it "renders [rooftop solar] uncompetitive" (SEIA Mem. at 19.), and that "[t]he Commission voted

[10] Black's Law Dictionary 1404 (5th ed. 1979).

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to...mak[e] rooftop solar prohibitively uneconomical." (TASC Mem. at 1.) In reality, it was not the Commission that made rooftop solar uncompetitive, uneconomical, or economically unviable. If rooftop solar is uneconomical and uncompetitive, it is due to factors far beyond the Commission's control, such as the price of labor, administrative costs,[11] and the relatively low costs of competing forms of energy.[12] The Commission's decision merely establishes a transition to cost-based rates that reflect the costs of providing electric service and the true value of the net excess electricity produced by rooftop solar energy systems.

For certain customer-generators, such as those who utilize a large portion of the energy that they produce, the new NEM rates will remain economical. However, the Commission is not required to ensure that rooftop solar is a financially sound investment for all customers. The Commission bases its decisions on the evidentiary record, which in this case reveals that NEM customers are not less expensive to serve than other customers and that the net excess electricity produced by NEM systems is not worth the price at which it was (and will be for the next 12 years) compensated by NV Energy and its other ratepayers.

It is important to note that, pursuant to the Commission's decision, customer-generators continue to receive preferential treatment even after the new rates take full effect in 12 years. Currently, and in the future, customer-generators have the ability to "net" their production of electricity against their use of electricity, providing them with the opportunity to receive full retail rate credit for electricity that they produce. The ability to "net" their unused electricity generation is in addition to their ability to avoid the retail rate by consuming their on-site generation as it occurs. So, to be clear, the new NEM rates do not discriminate against customer-generators by imposing costs that are not also

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[11] It has been widely reported that executives of rooftop solar companies are some of the highest-paid executives in the technology sector. For example, Lyndon Rive of SolarCity reportedly receives an annual salary of $77 million. Other rooftop solar industry executives appearing on the "highest-paid" lists include Tanguy Serra, also of SolarCity, and Lynn Jurich of Sunrun, Inc. (Stephen Lacey, *SolarCity CEO Lyndon Rive Tops the 2016 List of Highest Paid Execs in the Bay Area*, Greentech Media, Jun. 9, 2016; Riley McDermid, *The 20 Highest-Paid Bay Area Executives Under 40 in 2016*, Jun. 8, 2016.)

[12] In the past year, the Commission has approved power purchase agreements totaling 329MW of energy capacity derived from large-scale solar energy projects, at prices averaging just 4.1 cents per kWh, which is roughly a third of the retail rate that the Rooftop Solar Advocates are proposing customer-generators receive for their net excess electricity. (See Commission Docket Nos. 15-11025, 15-11027, 15-11028, and 15-11029; CR at 529.)

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paid by other types of customers. The new NEM rates actually preserve certain incentives not available to standard customers. Nonetheless, the Rooftop Solar Advocates repeatedly suggest that the Modified Final Order "discourages Nevada's customers from installing rooftop solar" (TASC Mem. at 13) or that it "disincentiviz[es] the development of [NEM] systems." (*Id.* at 19.) Again, the Rooftop Solar Advocates struggle with the notion that decreasing a competitive advantage is not the same thing as imposing a competitive disadvantage. The Commission's decision simply creates a transition toward a more level playing field on which customers are treated fairly and competition can occur among different energy resources. In fact, compared to immediate implementation of cost-based rates, the Commission's decision to create a gradual, 12-year transition for both new and existing customer-generators provides rooftop solar businesses the ability to "review and revise their business models over time" and to develop[] sustainable practices." (CR at 524.)

c. TASC's Misrepresentations regarding the Commission's "Staff"

Throughout its Memorandum of Points and Authorities, TASC refers to the Regulatory Operations Staff of the Commission as "the Commission's staff" or "the Commission's *own staff*" in a manner implying that the Regulatory Operations Staff is somehow directly affiliated with the Commission. (TASC Mem. at 1, 4, 11, 17, 24, 28.) As TASC's local counsel in this matter is well aware, the Regulatory Operations Staff is completely separate from the Commission and appears as an equal litigant before the Commission in all contested proceedings pursuant to NRS 703.301. Essentially, the Regulatory Operations Staff is part of the "Public Utilities Commission of Nevada" as the term refers to the *agency*, but it is not part of the Commission as the term refers to the Commissioners and the Commissioners' staff who are involved in the decision-making process. There is no overlap of staff between the advocacy and quasi-judicial functions housed within the agency. Accordingly, the Regulatory Operations Staff's positions or recommendations as a litigant are not the positions of the Commission itself.

Recognizing that the Regulatory Operations Staff is separate from the Commission, it is troubling that TASC dedicates substantial attention to a discussion of whether the Regulatory Operations Staff performed an analysis regarding whether its proposed rate structure advances the legislative goals identified at NRS 704.766 and NRS 701B.190. (*Id.* at 17.) The Regulatory Operations

Staff is merely one of several parties that participated in Docket Nos. 15-07041 and 15-07042. The Petitioners are seeking judicial review of the Commission's Modified Final Order, not the recommendations of a party in the underlying proceeding. Yet, TASC is attacking the testimony of the Regulatory Operations Staff as though it is a finding of the Commission.

2. NV Energy continues to offer "net metering" under the tariffs approved in the Modified Final Order.

The Rooftop Solar Advocates declare throughout their memoranda that "Nevada law requires that utilities offer [NEM] to their customers," citing a portion of NRS 704.773(1) that was left unchanged by SB 374 and requires utilities to "offer net metering" in accordance with the framework outlined in SB 374 (Vote Solar Mem. at 11.). In the absence of any conflicting language, this requirement "to offer [NEM]" would be enough to unequivocally determine that NEM must always be offered to utility customers. However, Section 2.3(2)(b) and (c) of SB 374 clarify that, in carrying out the provisions of Section 2.3 (the Section that outlines the transition to a new NEM rate design), the Commission "[m]ay establish...limitations on enrollment in [NEM] which the Commission determines are appropriate to further the public interest" and "[m]ay close [the new NEM tariffs] to new customer-generators...if the Commission determines that closing the tariff to new customer-generators is in the public interest." The language of SB 374 belies the Rooftop Solar Advocates' attempts to impress upon this Court the Legislature's allegiance to [NEM] and its continuation in Nevada.

Notwithstanding the Commission's authority under Section 2.3(2)(b) and (c) of SB 374 to limit enrollment in NEM and to close NEM to new customer-generators, the Modified Final Order does neither and provides that NEM will continue to be offered to both existing and future customer-generators. The Rooftop Solar Advocates' argument that the Commission has eliminated NEM reflects either outrageous ignorance or a shameful intent to mislead this Court. The degree to which the Rooftop Solar Advocates embrace this patently false narrative is shocking. They state that "[t]he Commission Order...eliminates [NEM]"[13] and that "the energy generated by the [NEM] customer and

[13] TASC Mem. at 21. TASC adds that "[t]he utility—NV Energy—will not be netting, i.e., 'measuring the difference between,' customer-generated [kWh] of electricity as an offset to NV Energy-supplied electricity (measured in [kWh])." (TASC Mem. at 23.)

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delivered to the utility is no longer measured against the energy generated by the utility and delivered to that customer."[14] In reality, the Modified Final Order preserves "net metering" exactly as it is defined by the Rooftop Solar Advocates themselves.[15] The "bedrock" of NEM, as Vote Solar describes it, remains intact: electric utilities in Nevada continue to "tak[e] the difference between (i) the electricity a customer generates and sends to the utility, and (ii) the electricity that a utility sends to the customer." (Vote Solar Mem. at 11.) The Modified Final Order simply increases the frequency of the "netting" so that it occurs on an hourly basis over the billing cycle. (CR at 515.)

The Rooftop Solar Advocates mislead this Court by suggesting the Modified Final Order eliminates NEM and replaces NEM with an arrangement where customer-generators purchase all utility-delivered electricity at retail rates and sell all of their excess production at a lower rate. (TASC Mem. at 23.) Such an arrangement would require two meters (one for the total output of the generating system and one for the customer's total usage) and require NV Energy to enter into a separate contract with every NEM customer under the Public Utility Regulatory Policies Act as a Qualifying Facility subject to jurisdiction of the Federal Energy Regulatory Commission. In reality, the Modified Final Order maintains NEM with one meter that measures the bi-directional flow of energy—any energy produced by the NEM generating system and simultaneously consumed by the customer-generator onsite is not measured by the meter. Given how brazenly the Rooftop Solar Advocates proclaim their inaccurate narrative, it is likely that they simply do not understand that *net excess electricity*, which is valued at a market-based rate, is different from *netted electricity*, for which customer-generators

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[14] SEIA Mem. at 5. Vote Solar states that the Modified Final Order: replaces net metering with a "scheme [that] does not net the electricity rooftop solar customers generate and send to their utility against the electricity they receive from their utility;" "ended NEM;" caused there to be "no more NEM;" and caused "NV Energy [to] not net exported customer-generated electricity (measured in kWh) against NV Energy-supplied electricity (measured in kWh)." (Vote Solar Mem. at 1, 12, 16.) NCARE states, "Instead of preserving [NEM] for the affected rate classes, the Commission eliminated it." (NCARE Mem. at 3.)

[15] "[T]hrough [NEM], a kWh that a [NEM] customer provides to her utility has the same value as the utility-supplied kWh that it offsets." (Vote Solar Mem. at 5.) Vote Solar also embraces NV Energy's definition, under which "[t]he term 'net metering' comes from the billing arrangement that allows for excess or returned kWh energy...to offset, or to be 'netted' against, the energy delivered to the customer by the utility..." (Vote Solar Mem. at 5, citing CR at 18984, 21646.) SEIA states that "the [NEM] rate design has been founded measuring the difference between the electricity supplied by utility to the [NEM] customer and the electricity supplied by the [NEM] customer to the utility and billing the customer for the difference in terms of [kWh]." (SEIA Mem. at 4.)

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receive full retail rate compensation in the form of an offset to the electricity delivered by the utility.[16] Their confusion is apparent when they suggest that net excess electricity no longer exists under the approved tariffs (Vote Solar Mem. at 14, FN10) and that *all* electricity sent to NV Energy by customer-generators "receive[s] a monetary credit...at a different (and substantially lower) rate" than the retail rate.[17]

NCARE's characterization of the Regulatory Operation Staff's testimony further highlights the Rooftop Solar Advocates' misunderstanding of a crucial component of the Modified Final Order. (NCARE Mem. at 9.) NCARE mistakes a description of the treatment of net excess electricity for a description of the treatment of netted electricity. When the Regulatory Operations Staff witness discusses the transition to valuing unused electricity based on a price per kWh, rather than a quantity of kWh, she is referring to not allowing net excess electricity to offset electricity delivered by the utility in future netting periods. The Regulatory Operations Staff's proposal, which was adopted by the Commission, "recommends netting delivered loads against the excess generation on an hourly basis, and recommends netting the value credited to [NEM] customers' [net] excess generation on a monthly basis against the customers' billed amounts." (CR at 7804, 7695, 8230-32.) Essentially, the Regulatory Operations Staff proposed that the quantity (kWh) of electricity produced by the customer-generator be netted hourly and that the value of any net excess electricity be netted against utility-delivered electricity on a monthly basis. Although the testimony referenced by NCARE provides no support for the Rooftop Solar Advocates' arguments, it is again worth noting that the Regulatory Operations Staff's opinions do not amount to findings of the Commission. The Petitioners should

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[16] "Netted electricity" describes all of the electricity that a customer-generator feeds back to the grid that does not exceed the amount of electricity delivered by the utility within the netting period. Any electricity produced in excess of the electricity supplied by the utility is "net excess electricity." The former is used as a kWh offset to the utility-delivered electricity, while the latter is credited to the customer-generator's bill at the market-based rate developed by the Commission.

[17] Vote Solar Mem. at 13; NCARE asserts that, under the Modified Final Order, "all kWh delivered by the utility [is] billed at one rate, and *all* kWh fed back into the grid [is] credited at a different and lower rate." (NCARE Mem. at 8) (emphasis added). SEIA states that "the [NEM] customer will merely be able to sell, at a greatly reduced price, energy he or she produces and delivers to the utility..." (SEIA Mem. at 5.)

focus their attention on the Commission's findings, and this Court should reject all arguments that fail to address the actual order under judicial review.

The Commission's decision to increase the frequency of the kWh netting reflects advancements in metering technology that allow for greater accuracy. Prior to the installation of advanced metering infrastructure, the utility could only obtain readings through physical examination of a customer's meter at the customer's premises. TASC provides a thorough explanation of how the utility previously measured both net electricity delivered and net excess electricity produced by comparing meter readings on a monthly basis. (TASC Mem. at 5.) The newly-installed advanced meters, however, allow for readings as often as every 15 minutes. Accordingly, the Modified Final Order uses the capabilities of the new technology to supply better, more granular data for the netting process.[18]

Presumably, the Rooftop Solar Advocates desire a rate structure that will make rooftop solar energy systems an attractive investment for residential customers who are not at home during the day. They want customers to be able to apply energy produced throughout the day, when the customers do not need it, toward offsetting the customers' use of utility-supplied energy when the customers do need it. The problem with such an approach is that it results in the utility essentially being forced to trade its valuable energy (the energy supplied during peak periods of demand, which occur after work hours as the sun, and rooftop solar energy production, goes down) for less valuable energy (the energy produced by rooftop solar energy systems during the day, when people are away from their homes and demand for energy is relatively low.)

By instituting hourly netting of kWh, the Modified Final Order increases the accuracy of the price signals being provided to customer-generators and prevents arbitrage. Customer-generators are still being over-compensated through their receipt of retail rate credit for their netted electricity production, but they are at least encouraged to use electricity at times when their use of electricity does not impose additional costs upon the utility system. Applying the terms of the Modified Final Order to the example provided by Vote Solar, if, in the course of an hour, a customer-generator feeds 100 units

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[18] Increased accuracy of data will also aid in transitioning to time-of-use and time-of-production rates for NEM customers, allowing them to "change their behavior to produce savings based on a price signal." Indeed, "[t]he changing technology landscape makes time-variant pricing a viable and important element of future NEM rate design." (CR at 513.)

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of electricity to the grid, while receiving 300 units from the utility, the customer-generator would only be charged for 200 units, thus receiving retail rate credit for 100 units of electricity. (Vote Solar Mem. at 5-6.) For customer-generators like the one in this example, the new NEM rates remain very appealing because, in general, the Modified Final Order rewards customer-generators who use electricity during periods when their systems are producing electricity.

Hourly kWh netting reduces cost-shifting and, consistent with the definition of "net metering" at NRS 704.769, "measur[es] the difference between the electricity supplied by a utility and the electricity generated by a customer-generator which is fed back to the utility over the applicable billing period." The words "over the applicable billing period" simply clarify that "net metering" does not describe calculations that include energy consumption or production that occurred during separate billing periods; essentially, the words provide a maximum netting period. However, if the Court believes that the words "over the applicable billing period" impose the requirement of a single calculation in which aggregate amounts are measured at the end of a billing period, as the Rooftop Solar Advocates argue (TASC Mem. at 22; Vote Solar Mem. at 16; NCARE Mem. at 11; SEIA Mem. at 7), the Modified Final Order satisfies that interpretation as well. Under the Modified Final Order, at the conclusion of a monthly billing cycle, the utility measures the difference in value between the utility-delivered electricity and the net excess electricity produced by the customer-generator. NRS 704.769 merely provides for measuring the difference between the different types of electricity—it does not mandate a particular unit of measurement. In this case, the utility measures value in terms of dollars. As the Regulatory Operations Staff noted in its legal brief addressing the definition of NEM, the Rooftop Solar Advocates' interpretation substitutes "netting" for "measuring," reflecting their contention that NRS 704.775 still applies to the NEM tariffs approved pursuant to SB 374. (CR at 7694-95.)

The Rooftop Solar Advocates' argument that the Modified Final Order ends "net metering" depends on the inaccurate premise that the Commission must design NEM rates as prescribed by NRS 704.775. (TASC Mem. at 22-3; Vote Solar Mem. at 4, 6, 15, 24-26; SEIA Mem. at 6-12.) The Rooftop Solar Advocates completely disregard the fact that the Legislature passed SB 374 specifically to enable the Commission to adopt a different rate design that eliminates unreasonable cost-shifting. In fact, SB

374 explicitly provides that NRS 704.775 is applicable only to the NEM rates offered prior to the date on which the cumulative capacity of NEM systems reaches 235MW. Pursuant to Section 2.95 of SB 374, a utility shall offer NEM under one of two separate frameworks, depending on whether the 235-MW threshold has been hit.

> A utility shall offer net metering:
>
> (a) In accordance with the provisions of this section, NRS 704.774 and 704.775, to the customer-generators operating within its service area until the date on which the cumulative capacity of all net metering systems for which all utilities in this State have accepted or approved completed applications for net metering is equal to 235 megawatts.
>
> (b) After the date on which the cumulative capacity requirement described in paragraph (a) is met, in accordance with a tariff filed by the utility and approved by the Commission pursuant to section 2.3 of this act.

The NEM rates at issue in this case are the rates that apply "after the date on which the cumulative capacity requirement is met." The 235MW threshold was reached on August 20, 2015. (CR at 16145.) Thus, all NEM rates offered *after that date*, including the rates offered to existing customer-generators, need not comply with the requirements of NRS 704.774 and 704.775; instead, all NEM rates must simply comply with tariffs approved by the Commission. As Senator Atkinson explained during the legislative hearing on SB 374, the Legislature "[gave] the PUCN the flexibility" to approve appropriate NEM rates moving forward. (C&L Tr. 5-20-15 at 46-7.) For example, the Commission can approve tariffs offering NEM under different terms for different classes of customers (e.g., residential versus large commercial customers), as long as the different versions of NEM comply with the definition of NEM at NRS 704.769.[19] The version of NEM outlined in the Modified Final Order was not applied to medium and large commercial customers because those customers take

[19] NCARE argues that the Commission cannot apply different rate designs to different classes of customers. (NCARE Mem. at 12.) NCARE's argument is misplaced, though, because, while the Commission cannot discriminate between customers within the same rate class, it is free to treat customers in separate rate classes differently based on their different characteristics, such as load profiles, etc. The Commission is free to adopt different NEM rate designs for larger customers, so long as the rates are just and reasonable.

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electric service under a rate design that includes a demand charge through which fixed costs can be adequately recovered. (CR at 374-75.) No parties proposed applying the new NEM rates to the medium commercial or large commercial classes of customers, and the Rooftop Solar Advocates opposed the concept of adopting a residential NEM demand charge, arguing that it was too complicated for customers to understand. (CR at 436-37; CR at 11113-11117; CR at 442-44; CR at 12809-12810, 12852-12859.)

Based on the evidence presented in Docket Nos. 15-07041 and 15-07042, the Commission found that the rate design prescribed at NRS 704.775, which mirrors the rate design proposed by the Rooftop Solar Advocates, shifts costs from customer-generators to other customers by overcompensating customer-generators for the energy fed to the grid by rooftop solar energy systems. Therefore, consistent with Section 2.3 of SB 374, the Commission adopted a rate design that differs from the rate design prescribed at NRS 704.775. The Rooftop Solar Advocates do not explain how the Commission could eliminate the unreasonable cost-shifts if it were required to preserve a rate design that unreasonably shift costs.

To be clear, the Rooftop Solar Advocates are making the absurd argument that SB 374 does not authorize the Commission to change NEM rates. NRS 704.775 outlines a framework through which customer-generators receive full retail rate compensation for all of the electricity that they produce. For example, NRS 704.775(2)(a) requires that kWh netting calculations occur only once per billing period to measure "the *net* electricity produced or consumed during the billing period" (emphasis added), and NRS 704.775(1) states that "[t]he billing period for [NEM] must be a monthly period." Then, any net excess electricity is carried forward to be netted against future consumption that occurs during the next billing cycle.[20] The requirement to perform the NEM calculation using the *net* electricity produced or consumed during a *monthly* billing period imposes a restriction on kWh netting that does not exist within the broader definition of "net metering" under NRS 704.769.

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[20] This process is what the Commission calls "banking" in the Modified Final Order. (CR at 513-14.) The Rooftop Solar Advocates confuse "banking" with "netting." (Vote Solar Mem. at 15; NCARE Mem. at 4.) The Commission's decision to eliminate banking did not eliminate netting. "Banking" refers to a method of using the net excess electricity that results from "netting." NCARE describes the Modified Final Order as replacing the "netting of electricity" with the "netting of dollars," but the Order is actually just replacing the "banking of electricity" with the "banking of bill credits."

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Simply put, *any* change to the prior NEM compensation methodology would have run afoul of NRS 704.775, which is why the Legislature made it inapplicable to the new NEM rates. Given that the Legislature clearly intended and anticipated a change to NEM rates to eliminate unreasonable cost-shifting (*See* Sec. 2.3 of SB 374 and C&L Tr. 5-20-15 at 50, "Some of these industries will have to change their business model..."), it is impossible that the Legislature intended to require the continuation of the prior NEM rate design that unreasonably shifts costs.

B. The Modified Final Order Is Not Arbitrary or Capricious.

For a court to find that an administrative agency's decision is arbitrary and capricious, the agency's decision "must be in disregard of the facts and circumstances involved." *Meadow v. Civil Service Bd. of LVMPD,* 105 Nev. 624, 627, 781 P.2d 772, 774 (1989). The Commission's decision in this case is not arbitrary or capricious because the Commission did not disregard the facts or circumstances involved. To the contrary, the Commission's Modified Final Order arrives at its findings and conclusions only after detailed review of the evidence on the record and thoughtful consideration of the general principles of rate design, which include: 1) economic efficiency; 2) equity; 3) bill stability; 4) revenue stability; and 5) customer satisfaction.

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1. The Modified Final Order is based on the record and supported by substantial evidence.

Nevada courts have traditionally upheld Commission decisions "if there [is] substantial evidence in the record to support the [Commission's] orders." *Public Service Comm'n of Nevada v. Continental Tel. Co.*, 94 Nev. 345, 348, 580 P.2d 467, 469 (1978). Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *Nevada Power Co. v. Public Utilities Commission, et al.*, 122 Nev. 821, 834, 138 P.3d 486, 495 (2006).

Here, the Commission relied on substantial evidence in the form of extensive cost-of-service studies and voluminous testimony submitted by various parties to the proceedings. The Commission reviewed all of the evidence contained within a record that totals 21,738 pages and reached a finding that customer-generators cause NV Energy to incur costs that were not being recovered from customer-generators under the prior NEM rates. Based on the evidence, the Commission imposed increased fixed charges on customer-generators to ensure that NV Energy is not forced to recover from other ratepayers the fixed costs associated with providing standby electric service to customer-generators. Additionally, the substantial evidence in the record supports the Commission's market-based valuation of the net excess electricity produced by customer generators. The Rooftop Solar Advocates might disagree with the Commission's weighing of the evidence, but they cannot in good faith argue that there was not substantial evidence presented to support the positions adopted in the Modified Final Order.[21] Consequently, their attacks on the Commission's findings ignore the massive amount of evidence supporting those findings and ask this Court to do what it cannot do: substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact such as the cost of serving customer-generators or the value of net excess electricity.

a. The cost-of-service studies reflect the costs of providing service to customer-generators.

The Rooftop Solar Advocates' primary criticism of the Commission's cost-of-service analysis is that it does not consider alleged cost-savings, or benefits, associated with customer-generators using their own electricity and feeding unused electricity back to the grid.[22] The Rooftop Solar Advocates' criticism reflects a misunderstanding of the nature and purpose of a cost-of-service study. The Commission's cost-of-service analysis does not include benefits because it is not a costs *and benefits* analysis. To design accurate rates that fairly allocate costs, the Commission must first examine the marginal costs that a utility actually incurs in providing electric service to different types of customers. These costs include facilities costs (e.g., service drops, transformers, secondary distribution), customer costs (e.g., meter-related expenses, customer accounting expenses, and customer service expenses), distribution demand-related costs (e.g., non-revenue distribution feeders, substations, and high-voltage

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[21] SEIA, when attempting to make an argument related to notice, unwittingly highlights that the Modified Final Order is based on substantial evidence by referring to "[t]he extensiveness of the supporting documentation" of the Regulatory Operation Staff's proposal, which includes "almost 700 pages of prefiled testimony and exhibits and [sic] offered through four (4) witnesses...in addition, of course, to the evidentiary support presented by NV Energy..., which [is] comprised of over 1,000 pages of application materials and the presentation of twelve (12) direct witnesses and more than 800 pages of rebuttal testimony offered through nine (9) rebuttal witnesses." (SEIA Mem. at 17.) In addition to the evidence cited by SEIA, the Regulatory Operations Staff and NV Energy submitted 271 and 571 pages, respectively, of supplemental testimony.

[22] The Rooftop Solar Advocates assert that the approved cost-of-service studies "did not capture the substantial generation, transmission, and distribution capacity cost savings" that rooftop solar energy systems "provide the utility by delivering electricity to the grid that the utility can use to serve neighboring customers." (TASC Mem. at 32.)

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distribution), transmission demand-related costs, generation demand-related costs, and energy costs. Once the Commission determines the cost of serving a particular class of customers, the Commission can design rates that ensure those costs will be recovered from the customers who cause them. Any benefits attributable to excess rooftop solar generation should be quantified and recognized in the rate at which net excess electricity is compensated. The cost-of-service analysis should not be conflated with the "value of net excess electricity" analysis, as the Rooftop Solar Advocates propose.

The parties all agree that NV Energy incurs costs in providing service to its customers. The dispute is over the extent to which NEM customer-generators are responsible for those costs. As the Modified Final Order states, "[w]hen determining the rates that ratepayers pay for electric service, the revenue requirement is allocated to ratepayers based on the actual, measureable costs of providing service... External societal costs and benefits are not included in the cost recovery that NV Energy's rates provide for any class. No exception should be made for NEM ratepayers." (CR at 412.)

In addition to arguing that the cost-of-service analysis should include benefits, TASC makes two specific arguments criticizing the cost-of-service studies that the Commission approved: 1) that "the studies erroneously assumed that [NEM] customers cause the utility to pay additional costs..." (TASC Mem. at 29); and 2) that because "rooftop solar systems decrease the amount of energy that the utility delivers to [NEM] customers[,]... the studies should have based its [sic] cost analysis on the actual energy delivered to rooftop solar customers," rather than "the maximum potential burden on the distribution system if the [NEM] ratepayer were to lose their own generation." (TASC Mem. at 30-1.) TASC also states in conclusory fashion that the studies are flawed, concentrating on the fact that the Regulatory Operations Staff criticized them. (*Id.* at 28-9.)

With regard to customer-generators being relatively more expensive to serve than other customers, the cost-of-service studies showed that there are increased customer costs due to the meter-related expenses associated with programming meters to measure bi-directional flow. (CR at 377; CR at 12214-12217, 12158; CR at 11888-11890, 11928.) Other increased customer costs are the product of accounting and service expenses related to fully-dedicated employees and the Renewable Energy Department. (CR at 378; CR at 12076, 12111-12113, 12116-12120, 12122; CR at 11853, 11887-11889,11893; CR at 12385-12386; CR at 12387-12388.) Finally, the cost-of-service studies did, in

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fact, show that customer-generators cause additional use of the distribution system to facilitate sending electricity to the utility. The additional costs, however, are insignificant at just 0.1 percent of the NEM increase in marginal distribution costs. (CR at 379; Ex 2A at 23, 40-41, 75, 78; 5A at 23, 37-40, 72.).

Between the two issues raised by TASC, the larger driver of costs is by far the finding that NEM systems do not reduce distribution demand-related costs. In arguing against the cost-of-service studies' use of customer-generators' total load for determining distribution demand-related costs, TASC states that the Commission should not have "assumed that the utility must at all times stand ready to satisfy all of the electrical needs of [NEM] customers." (TASC Mem. at 30.) In doing so, TASC misrepresents the Commission's analysis. The Commission does not expect that the utility will be forced to satisfy all of the electrical needs of NEM customers "at all times;" rather, the Commission quite reasonably expects that the utility should be capable of serving the full electrical needs of all NEM customers when the sun is not shining (either due to cloud cover or nightfall). TASC appears to suggest that the Commission should abandon its duty to provide for the reliable operation and service of public utilities pursuant to NRS 704.001(3). NEM customers are still entitled to receive electric service on demand, so the utility must make the infrastructure investments necessary to fully serve them. TASC ignores that there is a cost associated with having electricity available when you need it.

TASC also ignores the fact that peak demand for electricity is shifting into the early evening hours, meaning that rooftop solar energy systems "will have little to no impact on NV Energy's actual peak demand." (CR at 389; CR at 9487.) It would therefore be unreasonable to downsize distribution facilities/standards, even if reliability concerns did not exist, because customer-generators will be relying on NV Energy for electricity when the system's load is at its peak. Because the utility's distribution system is sized to accommodate maximum use, the "cost savings" that TASC describes do not exist. Regardless of whether a customer-generator uses a relatively low total amount of utility-delivered electricity over a billing cycle, that customer-generator is still expensive to serve if he uses a lot of electricity during periods of peak demand. TASC seems unable to grasp the concept that a reduction in a customer's utility-delivered electricity does not necessarily equate to a reduction in the distribution-related costs of serving that customer.

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Moreover, TASC omits the fact that NV Energy's distribution facilities have service lives that are much longer than the service lives of NEM systems. (CR at 389; CR at 9489-9490.) Thus, any downsizing of distribution facilities to account for the installation of NEM systems would have to assume replacement of the NEM systems at the end of their useful lives. No evidence was presented to support such an assumption, so it would be unreasonable for the Commission to allow NV Energy to downsize its facilities at this time or to downwardly adjust the costs of serving customer-generators.

In sum, TASC seeks a departure from the normal distribution planning practice, which is applicable to all other partial-requirements customers and considers the true burden on the distribution system, while protecting against disruptions in service and stress on distribution equipment due to overloading. (CR at 9849-9854; CR at 9948-9956.) In denying TASC's recommendation that customer-generators receive special treatment in allocating costs, the Modified Final Order finds the following:

> NV Energy is required to provide [reliable] service at the times and place and in the volumes required by any ratepayer, including a NEM ratepayer. This requires that the utility adhere to industry standards for the design and operation of its electric system including system reserves and redundancies... In contrast, NEM ratepayers have no legal requirement to provide any volumes to the grid at any time. NEM ratepayers provide these volumes solely at the discretion of each individual NEM ratepayer and are not scheduled in advance and can be withdrawn at any time by the NEM ratepayer. Further, the volumes flow to the grid without consideration for overall grid demand or system reliability, which remains the legal responsibility of NV Energy.

(CR at 514.)

TASC's reference to the Regulatory Operations Staff having concerns about the cost-of-service studies is another attempt to mislead this Court. TASC neglects to explain that the Regulatory Operations Staff's primary criticism of the cost-of-service studies was limited to expressing a preference for allocating costs in a general rate case and using the allocations approved in the most recent general rate cases. The criticism was directed at the process, not the actual calculations, and the Regulatory Operations Staff even acknowledged that the studies were performed consistent with SB 374. (CR at 387; CR at 11631-11634.) The Regulatory Operations Staff's concerns hardly constitute an "agree[ment] that the utility's marginal cost studies failed to accurately reflect the marginal cost of providing service to [NEM] customers..." (TASC Mem. at 28.) To the contrary, the Regulatory Operations Staff endorsed the part of the cost-of-service studies with which TASC takes greatest issue:

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the use of a load profile for customer-generators that reflects total electricity consumption. The Regulatory Operations Staff stated, "If the NEM ratepayer's generation is off-line for any reason, NV Energy will then have to serve the load" (CR at 11635), adding that "sizing capacity distribution facilities on the maximum peak demand is most appropriate to ensure reliable service to all ratepayers, including NEM ratepayers." (CR at 9489.)

The cost-of-service studies did not find significant additional costs associated with serving customer-generators compared to serving other customers. The studies did, however, expose the fact that the installation of NEM systems was reducing NV Energy's billing determinants, while not reducing costs, leading to the need to shift to non-NEM customers the unrecovered costs of serving NEM customer generators.

b. The adopted compensation rate for net excess electricity reflects the evidence presented regarding the value of such electricity.

When it established the rate of compensation for the net excess electricity produced by rooftop solar energy systems, the Commission considered all of the available evidence regarding the value of the excess electricity. Given that the utilities and, indirectly, their ratepayers are being forced to purchase this electricity, the Commission focused on appropriately pricing it to avoid further unreasonable shifting of costs from customer-generators to other customers.

The Rooftop Solar Advocates focus on the Commission's identification of 11 different factors that are relevant in determining the value of the net excess electricity fed to the grid by rooftop solar energy systems.[23] The Rooftop Solar Advocates inaccurately assert that the Commission considered only two of the 11 factors and that the resulting value determination is therefore arbitrary. (TASC Mem. at 4, 24; Vote Solar Mem. at 2-4, 17-18.) In reality, the Commission considered all 11 factors; however, no useful, quantitative evidence was presented regarding 9 of the factors. The Commission based its decision on the evidentiary record, and there was no reliable evidence demonstrating the

[23] Specifically, the Modified Final Order recognizes the following variables as affecting (positively or negatively) the value of rooftop solar generation: 1) avoided energy; 2) energy losses/line losses; 3) avoided capacity; 4) ancillary services; 5) transmission and distribution capacity; 6) avoided criteria pollutant costs; 7) avoided carbon dioxide emission cost; 8) fuel hedging; 9) utility integration and interconnection costs; 10) utility administration costs; and 11) environmental costs. (CR at 515.)

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value/benefits of excess rooftop solar generation with regard to 9 of the 11 factors. Ironically, the Rooftop Solar Advocates are claiming that the Commission's decision is arbitrary because it does not presume the existence of facts not in evidence.

The Commission's methodology in determining the value of the net excess electricity is simple. Beginning with the long-term avoided cost of energy,[24] which establishes the "avoided energy" value of the electricity, the Commission adjusts the rate based on the additional ten possible positive/negative effects to the value of the electricity to NV Energy and its ratepayers. In Docket Nos. 15-07041 and 15-07042, only the Regulatory Operations Staff presented any evidence supporting an upward adjustment to the value of net excess electricity derived from rooftop solar energy systems. Specifically, the Regulatory Operations Staff presented evidence regarding benefits of capacity and reduced line losses. (CR at 490.) Having seen no evidence suggesting that rooftop solar energy provides unique benefits beyond those identified by the Regulatory Operations Staff, the Commission was forced to proceed as though no additional benefits exist. The burden is on the parties to demonstrate that rooftop solar energy provides benefits not reflected in the avoided cost rate. The Rooftop Solar Advocates present to this Court the ridiculous proposition that the Commission's decision should be set aside because it did not rely on evidence that was never presented.

The factors identified by the Commission are not an adopted rule subject to the same enforcement as a regulation adopted pursuant to the Administrative Procedure Act. TASC suggests that the valuation process described in the Modified Final Order amounts to a regulation "obligat[ing the Commission] to fully consider and apply the 11 factors." (TASC Mem. at 26.) But the factors are not part of a regulation; the Commission identified the 11 factors, as recommended by the Regulatory Operations Staff, in an effort to elicit meaningful participation in the future from the Rooftop Solar Advocates, who had failed to provide a single piece of quantitative data to support an upward adjustment to the rate at which customer-generators receive compensation for net excess electricity. The Rooftop Solar Advocates made broad generalizations regarding the benefits of rooftop solar

[24] NAC 704.9111 defines "long-term avoided cost" as "the incremental costs of electric energy or capacity, or both, to a utility which, but for the purchase of electric energy or capacity from one or more qualifying facilities, the utility would generate itself or purchase from another source over a period exceeding 1 year."

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energy systems, but they failed to actually quantify those benefits or to explain how the benefits attributable to rooftop solar energy are not also attributable to other, less expensive forms of renewable energy, such as large-scale solar or geothermal energy.

The Rooftop Solar Advocates propose that the Commission should have relied upon a cost-benefit study of NEM conducted by Energy + Environmental Economics ("E3") at the request of the 2013 Legislature. (TASC Mem. at 6, 27.) Though the study is outdated and therefore not suitable for use in setting new NEM rates, the study does not, as the Rooftop Solar Advocates claim, conclude that "utility customers who do not participate in [NEM] would experience no appreciable increase in their own utility bills as a result of [NEM]." (*Id.* at 6.) It actually reaches the opposite conclusion: that NEM service under the prior framework had a significant negative impact on the rates of non-NEM customers. (CR at 391, 408.) The E3 study initially concluded that NEM produced a net benefit to all ratepayers; however, the study included a sensitivity analysis to address potential changes in the price of large-scale solar energy, a resource that shares most of the beneficial attributes of rooftop solar and can therefore be treated as a substitute. At the time of the study, the price of large-scale solar energy was approximately $100 per megawatt-hour ("MWh"). The sensitivity analysis found that merely reducing the price of large-scale solar energy to $80 per MWh resulted in a $222 million cost-shift to non-NEM customers. Current prices for large-scale solar energy are approaching $35 per MWh, which suggests that the cost-shift to non-NEM customers would appear much larger if E3 were to update its study using current data.

The Rooftop Solar Advocates now suggest that the Commission should have gathered more evidence before making its decision. (TASC Mem. at 26-7; Vote Solar Mem. at 18.) The Commission has no reason, and certainly no obligation, to provide another opportunity for the Rooftop Solar Advocates to present new evidence. More often than not, a party's failure to produce evidence supporting its position is an indication that supporting evidence does not exist. The Rooftop Solar Advocates' failure or inability to provide useful evidence does not require the Commission to hold additional proceedings to collect more information. Moreover, this argument by the Rooftop Solar Advocates is curious because they did not request the opportunity to present new evidence when they had the chance. The Rooftop Solar Advocates could have asked for a rehearing, pursuant to NAC

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703.801(2), to present additional evidence regarding the value of net excess electricity. Yet they chose not to. Hopefully, they will take advantage of upcoming opportunities to present their evidence in NV Energy's general rate cases, where all rates, including NEM rates, will be subject to change.

Finally, the Rooftop Solar advocates argue that, in lieu of setting new NEM rates as directed by the Legislature, the Commission should have simply declined to act, letting the clock run out and allowing the old NEM rates to remain in effect. (Vote Solar Mem. at 18.) Again, the Rooftop Solar advocates want the Commission to abandon its duty under SB 374. Failing to implement new NEM rates by January 1, 2016, would have resulted in a violation of the law, as the Commission would have allowed an unreasonable cost-shift to persist. The Rooftop Solar Advocates suggest that the Commission should have "refrained from acting" on this matter, just as it refrained from making certain proposed changes to the Basic Service Charges. (Vote Solar Mem. at 18.) But the Basic Service Charge is a rate component that has previously been scrutinized and determined to be just and reasonable. The compensation rate for net excess electricity, however, has never been fully evaluated through the contested case process because, until the passage of SB 374, the compensation rate was statutorily set at the retail rate. Therefore, the prior rate of compensation for NEM could neither be presumed to be just and reasonable nor used as a baseline for determining the appropriate rate of compensation moving forward.

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C. No Parties or Customers Were Deprived of Due Process.

a. The Commission provided adequate notice of the scope of Docket Nos. 15-07041 and 15-07042.

The Petitioners claim that the Commission's decision to apply new NEM rates to all NEM customers violates the due process rights of existing customer-generators because the Commission's notices did not explicitly state that existing customer-generators could be affected by the outcome of the proceedings. (TASC Mem. at 32-34; Vote Solar Mem. at 19; NCARE Mem. at 14; SEIA Mem. at 16-17.) The Petitioners' desperate and disingenuous arguments regarding insufficient notice rely on repealed legal authority and an interpretation of the law that would render the Commission incapable of conducting business. Moreover, the Petitioners failed to raise any concerns when the Commission specifically asked if any parties had concerns regarding the notice. The truth is that the notices issued by the Commission in Docket Nos. 15-07041 and 15-07042 complied with all applicable requirements and sufficiently informed the public of the nature and scope of the proceedings. In the first sentence of each of the notices, the Commission identified the subject matter being addressed: NV Energy's "net metering tariffs." Any NV Energy customer who was receiving electric service under a net metering tariff was put on notice that he could be affected by the proceeding. No one was deprived of due process or the opportunity to be heard regarding the issues addressed in the Modified Final Order, and the interests of existing customer-generators were thoroughly represented.

The transcript of the proceedings in this case illuminates that the Petitioners' arguments regarding notice are not grounded in sincere concerns but, rather, are a tactic employed only after the Commission issued a decision that the Petitioners did not like. Had they been genuinely concerned about the level of participation or the opportunity for existing customer-generators to intervene, they would have spoken up when asked by the Commission on several occasions whether anyone had any concerns regarding notice. The following excerpts from the August 19, 2015, prehearing conference and February 8, 2016, rehearing specifically address the published notices at issue. The Petitioners were present at each of these proceedings.

> **Commissioner Noble:**
> Is there anyone present [who] has any questions on the notice for these proceedings today?
>
> (No Response.)
>
> **Commissioner Noble:**
> The record will reflect that no one expressed any questions or concerns on the notice.

(CR at 18168.)

> **Commissioner Noble:**
> [I]s there anyone present [who] has any questions on the notice issued by the Commission?
>
> (No Response.)
>
> **Commissioner Noble:**
> All right. Hearing none, the Commission deems this matter has been duly and properly noticed for a hearing at this time and place.

(CR at 565.)

With regard to whether it was appropriate to change existing customer-generators' NEM rates in Docket Nos. 15-07041 and 15-07042, Commissioner Noble made it clear to the Petitioners during

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the August 19, 2016, prehearing conference that he envisioned the proceedings addressing the transition from old, existing NEM rates to new NEM rates.

> **Commissioner Noble:**
> Let's start with what to do with the existing [NEM] rate. Under SB 374 Section 2.3 Subsection (3), the Commission shall review those rates and determine whether or not they should be revised. NV Energy has, in [its] filing, not recommended any changes. I strongly encourage the parties to look at [existing NEM rates], what, if any, changes need to be made, and over what, if any time frame those changes should be made to ultimately bring them in alignment with whatever [new NEM rates] will be.

(CR at 18223-24.)

Commissioner Noble asked the parties, including each Petitioner, to raise any concerns as to whether Docket Nos. 15-07041 and 15-07042 were the appropriate forums for addressing existing NEM customers.

> **Commissioner Noble:**
> If people do not feel that th[ese are] the docket[s in which] to do it, please explain what docket it should be done in.

(CR at 18224.) None of the Petitioners raised any concerns or provided any explanation as to why existing NEM rates should not be addressed as contemplated by SB 374. Thus, they either had no concerns, or they were strategically withholding their concerns to potentially raise them as an issue on appeal. In either event, their silence when asked about these issues should preclude them from raising these issues now. The doctrines of estoppel and laches require the forfeiture of any right to raise these issues.

Even if this Court does not find that the Petitioners lack standing to allege insufficient notice, the Petitioners' arguments should still be disregarded because they rely on inapplicable or outdated authorities and fail to demonstrate that interested persons were not notified of the scope of the proceedings in Docket Nos. 15-07041 and 15-07042. The Petitioners focus on NAC 703.160, the regulation governing the Commission's public notices. The linchpin of the Petitioners' argument is that the Commission's notices issued in Docket Nos. 15-07041 and 15-07042 did not comply with NAC 703.160 because they failed "to provide notice of 'the effect of the relief or proceeding upon consumers.'" (TASC Mem. at 32; Vote Solar Mem. at 19; NCARE Mem. at 13; SEIA Mem. at 13; BCP Mem. at 7; GBSC Joinder at 4.) The Petitioners appear to be referring to a requirement that was recently repealed and is no longer applicable to Commission notices due to the difficulty of speculating

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potential effects upon consumers.[25] The Commission's notices fully comply with the revised and effective version of the regulation.

The applicable portion of the revised version of NAC 703.160 appears at subsection 5(a), which provides that "[a] public notice must include, *as appropriate*, a brief description of the purpose of the filing or proceeding, including, without limitation, a clear and concise introductory statement that summarizes the relief requested or the type of proceeding scheduled." (emphasis added.) In the initial Notices of Application, issued on August 3, 2015, the Commission clearly and concisely summarizes "the relief requested" in NV Energy's Applications. On the same date that it issued the Notices of Applications, the Commission also issued a separate Notice of Prehearing Conference and Notice of Hearing in each Docket. On January 25, 2016, the Commission issued a Notice of Hearing addressing the rehearing on issues related to "grandfathering." Each of the notices of prehearing conferences and hearings accurately summarizes "the type of proceedings scheduled." The Petitioners fail to demonstrate that the Commission did not fully comply with the current version of NAC 703.160.

The Petitioners mostly ignore NRS 233B.121 and NRS 703.320, which provide the statutory guidelines for the contents of the Commission's notices. NRS 233B.121(2) addresses the notice provided in contested administrative cases, such as the instant case, and requires that the notice of hearing include: (a) a statement of the time, place, and nature of the hearing; (b) a statement of the legal authority and jurisdiction under which the hearing is to be held; (c) a reference to the particular sections of the statutes and regulations involved, and (d) a short and plain statement of the matters asserted. NRS 703.320 requires the Commission to give notice of the pendency of a matter, as specified by regulations adopted by the Commission; here, the applicable regulation is NAC 703.160. Each of the notices issued by the Commission in Docket Nos. 15-07041 and 15-07042 indisputably complied with these statutory requirements.

Instead of applying the relevant statutory and regulatory standards, the Petitioners seek to expand the Commission's noticing requirements beyond the provisions of NRS 233B.121, NRS

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[25] *See* LCB File No. R011-15, effective October 27, 2015. (Initially adopted as a temporary regulation on February 13, 2015.)

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703.320, and NAC 703.160 to apparently require the Commission to provide notice of all potential outcomes of a filing. Specifically, they contend that the Commission's notices were insufficient because they referred readers to NV Energy's Applications, which did not propose changes to the rates of existing NEM customers. The Petitioners argue that the Commission was obligated to explicitly state in its notices that existing customer-generators' rates could change and that net excess electricity rates could be reduced below the level proposed by NV Energy in its Applications. (TASC Mem. at 32-34; NCARE Mem. at 15; Vote Solar Mem. at 20; SEIA Mem. at 16-17; BCP Mem. at 8.) The Petitioners' argument is erroneous for several reasons.

First, the Commission's notices each refer to Section 4.5 of SB 374, which expressly states that "[t]he Commission may make modifications to the tariff [filed by the utility], including modifications to the rate design and the terms and conditions of [NEM] services to customer-generators."[26] Given that the Commission's notices directed readers to the section of SB 374 that outlines the Commission's ability to modify the proposals contained within NV Energy's Applications, readers were on notice that the proceedings stemming from the Applications could result in an outcome not proposed by NV Energy. The Petitioners' argument that the notice is insufficient assumes that customers read through Nevada Power's and Sierra's Applications, totaling 473 and 443 pages, respectively, to conclude that there was no proposed change to NEM rates for existing customer-generators. Yet, the Petitioners argue that it is unreasonable to expect those same customers to read the precise section of the law to which the notices refer readers. (TASC Mem. at 34; Vote Solar Mem. at 19-21; NCARE Mem. at 16; BCP Mem. at 8-9; SEIA Mem. at 15-18.)

Second, the Commission's notices did not state that the Commission's decision would be limited to granting or denying NV Energy's Applications. The Petitioners suggest that the Commission's Notices of Application stated that the scope of the proceedings "would be limited to" the contents of NV Energy's Applications because the Commission included in its notices boilerplate language stating, "The Commission will make a determination at an open meeting regarding whether to grant the relief requested, which may have an impact on consumers." (BCP Mem. at 9.) However,

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[26] SB 374, Sec. 4.5(4).

this language does not limit a decision to either granting or denying the exact relief requested; rather it notifies consumers that they could be affected by the requested relief and informs them of their ability to attend the meeting where the Commission will make a determination on the matter. The requested relief is the specific potential outcome referenced by the notice because it is the only proposal before the Commission at the time the initial notice is issued.

Third, the two cases cited as support for the Petitioners' arguments contain facts that are easily distinguishable from the facts in this case. In *Nevada Power Co. v. Pub. Serv. Comm'n,* 91 Nev. 816, 544 P.2d. 428 (1975), the insufficient notice related to the introduction by an applicant of entirely new evidence that formed the basis for the applicant's requested relief. Here, the evidence at the heart of the matter remains the cost-of-service studies filed with NV Energy's Applications. There has been no change to the purpose of the proceedings, which was to determine whether an unreasonable cost-shift exists and, if so, how to address it. The facts of *Pub. Serv. Comm'n of Nevada v. Sw. Gas Corp.*, 99 Nev. 268, 271, 662 P.2d 624, 626 (1983) are also completely unrelated to this instant case. There, the *nature* of proceeding changed, while, here, the proceedings have always involved rate design. In Docket Nos. 15-07041 and 15-07042, each notice identified the type of proceeding and the subject matter of the proceeding, neither of which has changed.

The notices in this case specifically addressed changes to tariffs for NEM customers. Therefore, NEM customers should have read the law that precipitated the Applications and to which the Commission directed readers of its notices. Given the substantial investment that a rooftop solar energy system represents, it is not unreasonable to expect that owners/lessees of such systems would inform themselves regarding recent legislative developments directly affecting their financial interests. It is unreasonable to require notice so specific that it must describe in detail the laws outlining the scope of a proceeding. The noticing requirements must not become so burdensome that they inhibit the timely functioning of government. In the case of Commission proceedings, there are rigid statutory deadlines that require the immediate issuance of notices to afford parties time to meaningfully participate and the Commission time to consider relevant issues. The Commission routinely receives filings that are hundreds, if not thousands, of pages in length. Given the applicable time constraints, it

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would be impossible for the Commission to accurately describe such filings with a high degree of specificity.

Fourth, even if interested persons, upon reading the Commission's notices, failed to read Section 4.5 of SB 374 and were unaware that Docket Nos. 15-07041 and 15-07042 could result in outcomes not proposed by NV Energy, those interested persons were still able to intervene in the proceedings once they became aware of the Commission's intent to follow the law and consider making the new NEM rates applicable to existing NEM customers. Certainly, existing NEM customers were aware of the potential effects of the proceedings by the time that the Commission was reconsidering and rehearing "grandfathering" issues.[27] NAC 703.590, which governs the timelines for intervening in Commission proceedings, provides that an interested person may intervene after the intervention deadline if she "state[s] a substantial reason for the delay" that is not due to "neglect or unreasonable inaction." Here, an interested person could have sought intervention after the intervention deadline based on the "substantial reason" that she was unaware of the potential effect on her interests. As the Court can see from the many parties who were allowed to intervene in this case despite having duplicative and overlapping interests, the Commission is generally quite lenient in granting intervention.

Fifth, and most importantly, the Petitioners' proposed standard for adequate notice is impractical and, if adopted by this Court, would lead to absurd and unintended consequences. It is impossible for the Commission to contemplate every recommendation that intervening parties could make in a given case. Therefore, requiring the Commission to provide specific notice of any departure from an applicant's requested relief would severely diminish the role of intervening parties in Commission proceedings because the Commission would be unable to consider recommendations that were not initially proposed by the applicant. Throughout its existence, the Commission has entertained alternative proposals from intervening parties. The Commission's ability to rely on the information presented by parties with different interests, and to exercise its broad authority to substitute just and reasonable rates, regulations, practices, or services pursuant to NRS 704.120, has been crucial to

[27] *See* Notice of Hearing, issued on January 25, 2016 ("The purpose of the hearing is to rehear issues on grandfathering of existing net metering customers...") (CR at 5565.)

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reaching decisions that best serve the public interest. In fact, the Petitioners themselves, as interveners in this proceeding, made several recommendations as alternatives to the proposals contained within NV Energy's Applications. NCARE and BCP regularly propose alternatives to applicants' requested relief in other dockets before the Commission.

What the Petitioners are proposing would turn the utility regulatory framework on its head and result in extreme inefficiencies due to the take-it-or-leave-it scenarios in which the Commission would be forced to deny an application that it would have been willing to approve with minor modifications. It would also grant utilities greater leverage by allowing them to anchor the scope of a proceeding. The Petitioners jumped onboard the "insufficient notice" argument without fully exploring its broader application and the ways in which it proposes to unreasonably limit the effectiveness of interveners in Commission proceedings. In the instant case, the Petitioners happen to support maintaining the status quo, so they would not mind having their participation limited to supporting or opposing the specific contents of the Applications. But in most cases, such limited options would frustrate the regulatory process and undermine the interests of nearly all interested parties.

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b. The interests of existing customer-generators were represented in Docket Nos. 15-07041 and 15-07042.

Noticing requirements exist "so that those interested may have an opportunity to be heard and the rudiments of fair play be observed." *Checker, Inc. v. Pub. Serv. Comm'n of Nev.*, 84 Nev. 623, 446 P.2d 981, 988 (1968). In Docket Nos. 15-07041 and 15-07042, all interested persons had an opportunity to be heard, and the rudiments of fair play were observed, at least by the Commission. The Petitioners state that existing NEM customers "were deprived of an opportunity to be heard" (Vote Solar Mem. at 23), but they fail to identify any argument than an aggrieved existing NEM customer would have made if only the Commission had specifically stated in its notices that existing NEM rates were subject to change.

In actuality, the interests of existing NEM customers were thoroughly represented. TASC's intervention in the Dockets was premised on a direct and substantial interest originating with the customers of TASC's members. During the prehearing conference held on August 19, 2015, the Regulatory Operations Staff argued that TASC should not be allowed to participate in the proceedings because its interests were indirect: "TASC states that NV Energy's NEM application threatens to result in a new financial burden for customer-generators, not TASC members." (CR at 18213.) TASC responded as follows:

> Regarding burden to customer-generators not being an interest to TASC... These are their customers, and if their customers are impacted, the ability of them to exercise their business plan and conduct business in the State of Nevada is impacted.

(CR at 18215.)

In addition to TASC officially intervening on behalf of existing NEM customers, BCP also purported to represent the interests of existing NEM customers. When asked by Commissioner Noble whether BCP, in representing the "public interest," was representing "the interests of both [NEM] customers as well as non-[NEM] customers," BCP answered, "Correct." (CR at 5990-91.)

While TASC's and BCP's declarations make it obvious that they represented the interests of existing NEM customers, the positions argued by other parties made it just as clear that they, too, were representing the interests of existing NEM customers. The Rooftop Solar Advocates' interests were so aligned with the interests of existing NEM customers that there is no conceivable argument from existing NEM customers that was not made on their behalf. There are no unrepresented/injured parties claiming that their arguments were not heard; there are only sore losers who, after fully-participating in all stages of the proceedings, are grasping at straws to overturn a decision that afforded generous due process to everyone involved. This situation is surreal. The Petitioners are actually arguing that there was insufficient notice to make the arguments that they themselves made.

NAC 703.600 contemplates a scenario where persons have overlapping interests. It provides that "[w]hen two or more interveners have substantially the same interest[s] and positions, the Commission will, or the presiding officer shall, limit the number of interveners who will be permitted to cross-examine, make and argue motions or make objections during the course of the hearing when such a limitation is appropriate to expedite the hearing." The regulation recognizes that the *interests and positions*, rather than the persons arguing them, are what matters. Here, the interests and positions of existing NEM customers were represented, regardless of whether individual NEM customers represented their interests themselves.

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c. Even if the Commission's notices were insufficient, the Petitioners' substantial rights were not prejudiced.

NRS 703.373(11), which establishes the standard of review for a final decision of the Commission, only allows a court to set aside the decision "*if the substantial rights of the petitioner have been prejudiced* because the final decision of the Commission is: (a) In violation of constitutional or statutory provisions; (b) In excess of the statutory authority of the Commission; (c) Made upon unlawful procedure; (d) Affected by other error of law; (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) Arbitrary or capricious or characterized by abuse of discretion." (emphasis added.)

The Petitioners want this Court to skip over the requirement that their substantial rights "have been prejudiced" and look only at whether the Commission's decision was made upon unlawful procedure. The Petitioners fail to even allege that their substantial rights have been prejudiced because of inadequate notice. Instead, they focus on the substantial rights of existing customer-generators who were supposedly deprived of an opportunity to be heard during the proceedings. The Petitioners' advocacy for the interests of the existing customer-generators presents a paradox: if the Petitioners' substantial interests have been prejudiced as a result of existing customer-generators receiving inadequate notice (and therefore not participating), then the Petitioners' substantial interests are sufficiently aligned with existing customer-generators such that existing customer-generators' interests were adequately represented by the Petitioners during the Commission proceedings. Basically, any claim by the Petitioners that they did not represent the interests of existing customer-generators is irreconcilable with the notion that the Petitioners' substantial interests would be prejudiced by customer-generators' positions not being heard.

d. The parties in Docket Nos. 15-07041 and 15-07042 had sufficient time to prepare arguments and recommendations regarding "grandfathering" proposals.

There was more than sufficient time for the parties to prepare arguments and recommendations regarding "grandfathering" proposals for existing customer-generators. Nearly *six months* passed between August 19, 2015, the date on which the Petitioners were asked to address grandfathering issues, and February 8, 2016, the date of the rehearing addressing grandfathering. At the prehearing conference held on August 19, 2015, Commissioner Noble not only informed the Petitioners that the

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proceedings would address the rates applicable to existing customer-generators, he specifically identified questions that needed to be addressed:

> **Commissioner Noble:**
> With regard to the existing [NEM] customers, questions that come to my mind are: Does that rate structure stay with the account? Does it stay with the premise? Does it stay with the customer? What if the system fails? What if the system has more panels added to it? Those are some of the issues, in my mind, that need to be addressed.

(CR at 18224.) Despite Commissioner Noble's comments, the Petitioners refused to address any of these issues in their pre-filed direct testimony or in their testimony presented to the Commission during the initial hearing on this matter. For them to now suggest that they had insufficient time to prepare for the rehearing on these very issues is contemptible.

TASC states that the Petitioners were deprived of "a reasonably sufficient opportunity to be prepared for [the rehearing]"[28] and "did not have a meaningful opportunity to present evidence and argument on the question of grandfathering because of the unreasonably expedited schedule." (TASC Mem. at 36.) BCP echoes TASC, stating that "[t]he Commission's unreasonable rehearing procedural schedule denied ...parties adequate opportunity to prepare for the rehearing." (CR at 6354.) TASC recommends that "at a minimum, the Commission's [Modified Final] Order as to existing [NEM] customers must be vacated and remanded." (TASC at 36.) The Petitioners' arguments amount to a proposal that the Commission be punished for providing an additional opportunity for the Petitioners to present evidence after they failed to do so during the initial hearing.

As the Commission notes in its Order reopening the proceedings in Docket Nos. 15-07041 and 15-07042, "[a]ll parties except for [the Regulatory Operations Staff] either entirely ignored the directive to answer these questions in testimony or dismissed it as unimportant ('...all of those [issues] can be worked out...fairly easily...' See Tr. at 310:13-17.)" (CR at 560.) Due to the failure of the proponents of grandfathering to address the issues that had been raised in August, "[t]he Commission believe[d that] there [was] inadequate evidence upon which to base a decision to implement a grandfathering program, especially in light of the substantial subsidy [of over $300 million] that such a

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[28] TASC Mem. at 36, quoting *Farnow v. Dep't1 of Eighth Judicial District Court in & for Clark Cnty.*, 64 Nev. 109, 178 P.2d 371 (1947).

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program would preserve. To consider grandfathering [existing customer-generators], the Commission [requested that it] be provided with the additional information that was conspicuously absent from the testimony of the parties who supported the concept of grandfathering in this case."(CR at 5459-5460.) The Commission reiterated that the purpose of the rehearing was "to allow the Parties one more opportunity to address [the unanswered questions] in full." (*Id.*)

The extensive pre-filed testimony and lengthy rehearing suggest that parties were able to adequately prepare. And, far from "just ramrodding the proceeding through" (BCP Mem. at 13.), the Commission took advantage of the opportunity to finally receive the information that it had requested in August 2015. The result of the rehearing was a significant modification to the original Order and the addition of $100 million in benefits to customer-generators. (CR at 522-26.)

e. There were no procedural irregularities in Docket Nos. 15-07041 and 15-07042 that deprived the Petitioners of due process.

i. TASC's allegations of procedural irregularities and insinuations of bias are unfounded.

TASC states that it reserves the "right to take discovery" regarding irregularities in procedure before the Commission. Specifically, TASC alleges that "there are indications that the Commission may have entered the rehearing with a closed mind: it may have already decided to rule against Petitioners..." (TASC Mem. at 36.) TASC overlooks the fact that the Commission *had already ruled against Petitioners*, which is why they were seeking reconsideration. TASC takes issue with a statement provided by the Commission's Public Information Officer in response to a reporter's request for a response to TASC's public allegations that the Commission broke the law. The Public Information Officer's response, which addressed the legislative declarations discussed throughout this Memorandum, merely reiterated the Commission's findings from the initial Order and did not represent new insight into the Commission's views on the matter.

Though the Nevada Code of Judicial Conduct expressly does not apply to the Commission,[29] Rule 2.10 allows a judge to respond directly or through a third party to allegations in the media or

[29] "Administrative law judges and hearing officers of state agencies are not judges within the meaning of this Code." NCJC I(B).

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elsewhere concerning the judge's conduct in a matter. Here, the Public Information Officer, not the Commission, issued a statement responding to allegations in the media concerning the Commission's conduct. The statement addressed an issue of public importance, as the Commission's initial Order was still in effect during the reconsideration phase of these proceedings. It was necessary for the Commission's representative to address statements intended to undermine public acceptance of and adherence to the Order. Moreover, the statement repeated the earlier findings of the Commission nearly verbatim with regard to the issue of the Order's compliance with the law. Also, any legal conclusions or statements made by the Public Information Officer were arrived at through observation of the prior hearing and review of the record. His statements were not the result of favoritism or bias. Finally, to the extent that his comments addressed a pending matter, the comments were purely legal in nature.[30]

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Additional persuasive authority regarding appropriate ethical standards exists in the form of the Nevada Rules of Professional Conduct, which at Rule 3.6(c) provide that a lawyer may make an extrajudicial statement that the lawyer knows will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter *if a reasonable lawyer would believe that the statement is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client*. The Public Information Officer is not a lawyer, but he was protecting a client from the substantial undue prejudicial effect of recent publicity that neither he nor his client initiated.

The real "irregularities in procedure" in this matter have been the efforts of TASC to undermine the due process rights of other intervening parties. Since the initiation of the NEM proceedings, TASC has engaged in an aggressive public and private campaign to improperly influence the Commission's decision-making process. Some of TASC's tactics have included interviews attacking the Commission and alleging bias and/or "regulatory capture" in print, on television, and on

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[30] "A judge's views on legal issues may not serve as the basis for motions to disqualify." *United States v. Conforte*, 624 F.2d 869, 882 (9th Cir. 1980) (citing *United States v. Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979); *United States v. Haldeman*, supra, 559 F.2d at 136). Also, "[a] judge cannot be disqualified merely because he believes in upholding the law, even though he says so with vehemence." *Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 380, 427-28, 873 P.2d 946, 975-76 (1994).

radio; funding a "government watchdog group" whose sole function is to harass utility commissioners and utility commissions; urging the Governor to intervene in the Commission's decision; bombarding the Commission with public comments and public records requests; and circulating petitions seeking the removal of sitting Commissioners, all while TASC has been a party to a pending proceeding. At the very least, TASC's conduct violates NAC 703.481, which places restrictions on parties engaging in direct *or indirect* communications with the Commission regarding substantive issues related to pending cases.

ii. There is no "right to take discovery" regarding alleged procedural irregularities when seeking judicial review of Commission decisions.

Presumably, TASC addresses the issue of irregularities in procedure pursuant to NRS 703.373(8), despite the reference in its memorandum to NRS 703.373(11), which does not address irregularities in procedure. However, neither statute provides a "right to take discovery." Rather, NRS 703.373(8) provides that "[i]n cases concerning alleged irregularities in procedure before the Commission that are not shown in the record, *the court may receive* evidence concerning the irregularities." Even if TASC's allegations actually warranted further review, only the Court, and not TASC, has the right to receive additional evidence.

D. The Modified Final Order does not violate the Contract Clause of the United States Constitution.

SEIA fails to identify any vested contractual rights that are affected by the Modified Final Order to support a Contract Clause challenge, and its arguments on the matter should be disregarded as meritless. SEIA fails to identify any of the terms or conditions in the solar installation/financing contracts in the record that were allegedly affected by the Modified Final Order. Those contracts on the record do not include specific utility rates or a NEM paradigm as binding terms, and they do not include the NEM rates and structure provided by NV Energy as terms. The Commission's decision to remove an unreasonable subsidy pursuant to SB 374 does not impair vested contractual rights in violation of the Contract Clause.

Public Utilities Commission of Nevada
1150 E. William Street
Carson City, NV 89701-3109

VI. CONCLUSION

Based on the foregoing discussion, the Commission respectfully requests that this Court deny the Petitioners' requested relief and affirm the Commission's Modified Final Order in Docket Nos. 15-07041 and 15-07042.

DATED this 11th day of July, 2016.

Respectfully submitted,

THE PUBLIC UTILITIES COMMISSION OF NEVADA

By: ______________________________

GARRETT WEIR, ESQ.
Nevada Bar No. 12300
1150 East William Street
Carson City, NV 89701
Tel: 775-684-6185
Fax: 775-684-6186
gweir@puc.nv.gov
Attorney for Respondent

Public Utilities Commission of Nevada
1150 E. William Street
Carson City, NV 89701-3109

Public Utilities Commission of Nevada
1150 E. William Street
Carson City, NV 89701-3109

Affirmation
Pursuant to NRS 239B.030/603.040A

The undersigned does hereby affirm that upon the filing of additional documents in the above matter, an Affirmation will be provided **ONLY** if the document contains a social security number (NRS 239B.030) or "personal information" (NRS 603A.040), which means a natural person's first name or first initial and last name in combination with any one or more of the following data elements:

1. Social Security number.

2. Driver's license number or identification card number.

3. Account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account.

The term does not include publicly available information that is lawfully made available to the general public.

Dated the 11th day of July, 2016.

by: ________________________

GARRETT WEIR, ESQ.
Nevada Bar No. 12300
HAYLEY WILLIAMSON, ESQ.
Nevada Bar No. 13619
1150 East William Street
Carson City, NV 89701
Tel: 775-684-6185
Fax: 775-684-6186
gweir@puc.nv.gov
hwilliamson@puc.nv.gov
Attorneys for the Public Utilities Commission of Nevada

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Public Utilities Commission of Nevada, and that, on this date, I have served the foregoing **RESPONDENT PUBLIC UTILITIES COMMISSION OF NEVADA'S REPONDING BRIEF**, in Case No. 16 OC 00521 B delivering to the Nevada Department of General Services true and correct copies thereof, in properly addressed envelopes, for mailing in Carson City, Nevada, to the following:

Christopher W. Mixson, Esq. Wolf, Rifkin, Shapiro, Schulman &: Rabkin, Llp 5594-B Longley Lane Reno NV 89511 Jill Tauber, Esq. 1625 Massachusetts Avenue, NW, Suite 702 Washington, DC 20036 Sara Gersen, Esq. 800 Wilshire Boulevard Suite 1000 Los Angeles, CA 90017 *Attorneys for Vote Solar*	Elizabeth Elliot, Esq. NV Energy 6100 Neil Road Reno, NV 89511 Leif Reid, Esq. Lewis Roca Rothberger Christie LLP 50 W. Liberty Street, Suite 410 Reno, NV 89501 *Attorneys for* *Sierra Pacific Power Company d/b/a NV Energy* *Nevada Power Company d/b/a NV Energy*
Bureau of Consumer Protection Eric Witkoski, Esq. Michael Saunders, Esq. 10791 West Twain Ave., Suite 100 Las Vegas, NV 89135-3022	Jerry Snyder, Esq. Law Offices of Jerry M. Snyder 429 Plumb Lane Reno, NV 89509 *Attorney for Great Basin Solar Coalition*
Robert G. Johnston, Esq. 550 W. Musser Street, Suite H Carson City, NV 89703 *Attorney for Nevadans for Clean Affordable Reliable Energy*	Luca Foletta, Esq. McDonald Carano Wilson LLP 100 W. Liberty Street, 10th Floor Reno, NV 89501 *Attorney for Solar Energy Industries Association*
Kathleen Drakulich, Esq. Adam Hosmer-Henner, Esq. McDonald Carano Wilson LLP 100 W. Liberty Street, 10th Floor Reno, NV 89501 *Attorneys for The Alliance for Solar Choice*	With courtesy copies to: Arturo J. Gonzalez, Esq. Christopher J. Carr, Esq. Navi S. Dhillon, Esq. Morrison & Foerster LLP 425 Market Street San Francisco, CA 94105-2482 Joseph R. Palmore, Esq. Morrison & Foerster LLP 2000 Pennsylvania Avenue NW Washington, DC 20006

DATED this _____ day of July, 2016.

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ELIZABETH AVRAM

Public Utilities Commission of Nevada
1150 E. William Street
Carson City, NV 89701-3109