

*Nevada Power Co. v. Eighth Judicial District Court of Nevada,*  
120 Nev. Adv. Op. 97, 102 P.3d 578 (Dec. 2004)<sup>1</sup>

**PUBLIC UTILITIES—MANDAMUS, ADMINISTRATIVE  
LAW AND PROCEDURE**

**Summary**

Petitioner Nevada Power Company (NPC) filed a writ petition challenging the district court’s jurisdiction over a class action complaint against NPC that alleged deceptive and unfair trade practices, breach of the covenant of good faith and fair dealing, and breach of contract. The two issues facing the Nevada Supreme Court were (1) whether the district court had subject-matter jurisdiction to entertain a complaint against a public utility for the above causes of action; and (2) if the district court did have jurisdiction over those claims, did the Public Utilities Commission of Nevada (PUC) have primary jurisdiction such that the district court should have deferred to the PUC?

**Disposition/Outcome**<sup>2</sup>

The Nevada Supreme Court concluded that the district court had subject-matter jurisdiction over the claims against NPC and properly chose to exercise that jurisdiction; the court denied the petition.

**Factual and Procedural History**

**Facts**

Petitioner Nevada Power Company (NPC) is a regulated electric company that serves customers in Southern Nevada. The real parties in interest are Bonneville Square Associates (BSA) and Union Plaza Operating Company (UP).

NPC classifies its customers by the voltage level at which electric service is taken, and charges rates as approved by the Public Utilities Commission (PUC). NPC classified BSA and UP as LGS-S customers, and charged them at the LGS-S rate.

LGS-S customers receive service at a secondary distribution voltage; in this case, 480 volts. NPC’s primary distribution voltage of 12,000 volts is stepped down to the secondary voltage of 480 volts through a NPC-owned transformer located on the customer’s property. NPC is responsible for the cost of supplying and maintaining the transformer, so the LGS-S customer’s rate reflects NPC’s costs of providing that service—including transformer “losses” that occur during the voltage transformation. This is in contrast to a different type of service, LGS-P, where those customers take service at the primary service of 12,000 volts and own the transformer that steps the voltage to the secondary 480 volt level. LGS-P customers pay a lower rate than LGS-S customers, because, as NPC does not provide the transformer, NPC does not

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<sup>1</sup> By Sally L. Galati

<sup>2</sup> Before the court en banc; Justice Douglas did not participate in this decision, and Judge Janet Berry was designated by the Governor to sit in place of Justice Leavitt.

pass along any costs related to either transformer capital or maintenance costs, or transformer losses.

Meters for LGS-S customers are placed on the 480 volt (secondary) side of the transformer; meters for LGS-P customers are placed on the 12,000 volt (primary) side of the transformer.

When UP built its towers in 1971 and 1983, NPC designed the placement of the transformers and the meters. On those occasions, NPC represented that it was in UP's interest for the meters to be placed on the primary, or 12,000 volt side of the transformer, because NPC would then pay for the meters and installation costs. NPC did not disclose that because UP was a LGS-S customer, metering on the primary side would result in it being charged twice for the transformer losses.

When BSA expanded its office building in 1990, NPC designed the placement of the transformer and the meter. Although BSA was charged at the LGS-S rate, NPC represented that it was in BSA's best interest for the meter to be placed on the primary, or 12,000 volt side of the transformer, because NPC would pay for the meter and installation costs. NPC did not disclose that because BSA was a LGS-S customer, metering on the primary side would result in it being charged twice for the transformer losses.

## **Procedure**

BSA and UP filed a class action complaint against NPC in district court. In their amended complaint, BSA and UP based their three claims on the general allegation that NPC deliberately and knowingly engaged in a pattern and practice of misleading or failing to disclose material facts that caused some of its LGS-S customers to be metered on the primary side while being charged the higher LGS-S rate.

NPC filed a motion to dismiss for lack of subject-matter jurisdiction and lack of primary jurisdiction, arguing that BSA and UP's claims essentially challenged the tariff rate and the placement of its meters. NPC claimed those issues were within the PUC's exclusive jurisdiction and therefore the district court lacked subject-matter jurisdiction. NPC argued alternatively that the PUC had primary jurisdiction over the claims and that the district court should defer to the PUC and dismiss the complaint. After hearing arguments, the district court summarily denied the motion, and NPC then filed a petition for writ relief.

## **Discussion**

### **Writ Relief**

NPC argued that the district court lacked subject-matter jurisdiction to entertain the complaint filed by BSA and UP, because the PUC had either original or primary jurisdiction over the allegations in the complaint. The Nevada Supreme Court determined it would entertain the petition for the writ of prohibition because a petition for a writ of prohibition is an appropriate means of challenging the district court's exercise of jurisdiction.<sup>3</sup>

### **Jurisdiction**

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<sup>3</sup> South Fork Band, Te-Moak Tribe v. Dist. Ct., 116 Nev. 805, 811, 7 P.3d 455, 459 (2000).

The Nevada Supreme Court identified the jurisdiction of the PUC and the district court over the causes of action as the overarching issue in the case. BSA and UP alleged three causes of action against NPC: unfair and deceptive trade practices, breach of the covenant of good faith and fair dealing, and breach of contract. BSA and UP alleged that NPC represented to them that placement of the meter on the primary side of the transformer was in their best interest. BSA and UP further alleged that NPC never disclosed material facts that their status as LGS-S customers entitled them to metering on the secondary side of the transformer and that NPC failed to disclose that metering on the primary side for LGS-S customers would result in excessive billing. These allegations formed the basis for the three causes of action in the amended complaint. Additionally, the cause of action for deceptive trade practices alleged that the rate charged to LGS-S customers was in violation of NRS 704.040, because the service furnished under the LGS-S rate schedule was not just and reasonable in that it treated some LGS-S customers differently than others.

The court stated that the PUC has authority to regulate utility rates under NRS 704.100 to 704.130 and NRS 704.210. The PUC also has authority to regulate the service standards and practices of public utilities in accordance with various provisions in NRS Chapter 704. The statutory scheme also authorizes the PUC to entertain customer complaints against a public utility related to the reasonableness of a rate, regulation, measurement, practice or act.

The statutory scheme supports the conclusion that the PUC has original jurisdiction over the regulation of utility rates and service. A challenge to the reasonableness of a rate or regulation fixed by the PUC must be presented first to the PUC before it may be presented to the courts for judicial review. This is essentially the doctrine of exhaustion of administrative remedies.

While the PUC has original jurisdiction over utility rates and service, NRS 41.600 permits a victim of consumer fraud, including a deceptive trade practice, to bring an action in court. And the Nevada Constitution states that the district courts have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts.<sup>4</sup> The court also pointed to courts in other jurisdictions that have taken the position that the courts have jurisdiction over contract and common-law tort claims against a public utility.<sup>5</sup> The question for the court thus became whether the claims alleged in the complaint were within the PUC's exclusive original jurisdiction or were within the district court's original jurisdiction. To answer that question, the court looked at the substance of the claims, not the labels used in the amended complaint.

NPC (and the PUC, as *amicus curiae*) argued that the amended complaint challenged the reasonableness of the LGS-S rate and a tariff that permits NPC to place meters on the primary side of the transformer. NPC thus asserted that the PUC had exclusive original jurisdiction and that BSA and UP must challenge the rate and tariff through the administrative proceedings provided by NRS 703.310-.370. The court disagreed with NPC's characterization of the claims.

The court stated that BSA and UP were not asking the district court to determine the reasonableness of the meter tariff or the LGS-S rate. Rather, the causes of action focus on NPC's misrepresentations and failures to disclose information to certain of its customers, resulting in overbilling. The court held that these claims fell within the district court's original jurisdiction over claims sounding in tort, contract, and consumer fraud.

The court additionally was concerned because it appeared the PUC did not have authority to award the compensatory, special, and punitive damages that BSA and UP sought. The PUC's

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<sup>4</sup> NEV. CONST. art. 6, § 6(1).

<sup>5</sup> *Gayheart v. Dayton Power & Light Co.*, 98 Ohio App.3d 220, 648 N.E.2d 72, 76 (1994).

lack of power to grant the relief BSA and UP sought in their suit further supported the court's conclusion that that PUC lacked exclusive original jurisdiction over the amended complaint. The court concluded that the PUC did not have exclusive original jurisdiction over the causes of action alleged in the amended complaint and that the district court had original jurisdiction to entertain the amended complaint.

Based on the doctrine of primary jurisdiction, NPC alternatively argued that the district court should have deferred jurisdiction to the PUC and dismissed the amended complaint. As the court explained in an earlier case, the "doctrine of primary jurisdiction requires that courts should sometimes refrain from exercising jurisdiction so that technical issues can first be determined by an administrative agency."<sup>6</sup> Application of the doctrine is discretionary with the court.<sup>7</sup>

Based on its review of the amended complaint, the court concluded that the district court could have deferred action under the primary jurisdiction doctrine for the PUC to address one issue implicated in the amended complaint: the percentage of electricity used by the transformers in the transformation process. This technical issue was within the specialized knowledge of the PUC and its trained staff. However, after the original writ petition was filed with the court, the PUC determined the appropriate transformer loss factor and directed NPC to file a revised tariff. Thus, the PUC had spoken on the issue and applied its expertise to determine the percentage of electricity used in the transformation of voltages, and because the PUC had addressed the transformer loss factor issue, the court concluded that the issued did not warrant application of the primary jurisdiction doctrine.

## **Conclusion**

The court held that the causes of action alleged in BSA and UP's amended complaint were within the original jurisdiction of the district court. The court determined that the district court properly exercised its discretion in refusing to defer primary jurisdiction to the PUC, and thus did not exceed its jurisdiction. The court therefore denied NPC's petition.

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<sup>6</sup> Sports Form v. Leroy's Horse & Sports, 108 Nev. 37, 41, 823 P.2d 901, 903 (1992).

<sup>7</sup> Rabon v. City of Seattle, 34 P.3d 821, 824, 107 Wash.App. 734 (2001).