

BEFORE THE PUBLIC UTILITIES COMMISSION OF NEVADA

Amended Application of MSG Las Vegas, LLC to)
purchase energy, capacity, and/or ancillary services) Docket No. 18-10034
from a provider of new electric resources.)
_____)

At a general session of the Public Utilities
Commission of Nevada, held at its offices
on May 23, 2019.

PRESENT: Chairwoman Ann Pongracz
Commissioner C.J. Manthe
Commissioner Hayley Williamson
Assistant Commission Secretary Trisha Osborne

ORDER

The Public Utilities Commission of Nevada (“Commission”) makes the following
findings of fact and conclusions of law:

I. INTRODUCTION

On October 31, 2018, MSG Las Vegas, LLC (“MSG”) filed with the Commission an Application, designated as Docket No. 18-10034, to purchase energy, capacity, and/or ancillary services from a provider of new electric resources (“Application”). On November 21, 2018, MSG filed an Amended Application (“Amended Application”).

On April 15, 2019, the Commission issued an Order granting MSG’s Amended Application assessing MSG a zero-dollar impact fee, subject to the satisfaction of the compliances and directives delineated in the Commission’s April 15, 2019 Order (“the Order”).

On April 29, 2019, Nevada Power Company d/b/a NV Energy (“NPC”) filed a Petition for Reconsideration (“the Petition”).

II. SUMMARY

The Commission grants the Petition and reaffirms the Commission’s April 15, 2019, Order.

III. PROCEDURAL HISTORY

- On October 31, 2018, MSG filed the Application.

- MSG filed the Application pursuant to the Nevada Revised Statutes (“NRS”) and the Nevada Administrative Code (“NAC”) Chapters 703, 704, and 704B, including, but not limited to, NRS 704B.310, NAC 704B.310 and NAC 704B.340. Pursuant to NAC 704B.340(2) and NAC 703.5274, MSG requested confidential treatment of certain information contained in its Application.
- The Regulatory Operations Staff (“Staff”) of the Commission participates as a matter of right pursuant to NRS 703.301.
- On November 14, 2018, the Attorney General’s Bureau of Consumer Protection (“BCP”) filed a Notice of Intent to Intervene pursuant to NRS Chapter 228.
- On November 21, 2018, MSG filed an Amended Application which included a Draft Notice. Pursuant to NAC 704B.340(2) and NAC 703.5274, MSG requested confidential treatment of certain information contained in its Amended Application.
- On November 28, 2018, the Commission issued a Notice of Amended Application.
- On November 28, 2018, the Commission issued a Notice of Prehearing Conference.
- On December 18, 2018, NPC filed a letter with the Commission indicating that it intended to fully participate as a party in this Docket.
- On December 20, 2018, the Commission held a prehearing conference. MSG, NPC, BCP, and Staff (collectively “the Parties”) made appearances.
- On January 4, 2019, the Presiding Officer issued a Procedural Order.
- On January 25, 2019, Staff filed its Final Impact Analysis.
- On February 11, 2019, MSG filed a letter advising the Commission that it would not be filing an Alternative Analysis.
- On February 11, 2019, NPC filed an Alternative Analysis.
- On February 14, 2019, the Commission issued a Notice of Hearing.
- On February 14, 2019, MSG filed Direct Testimony.
- On February 28, 2019, NPC, BCP, and Staff each filed Direct Testimony.
- On March 7, 2019, MSG filed Rebuttal Testimony.
- On March 14, 2019, the Presiding Officer held a hearing. The Parties made appearances. At the conclusion of the hearing, the Presiding Officer admitted Exhibits 1 through 15 and Confidential Exhibits C-1 through C-6 into the record.

- On April 15, 2019, the Commission issued the Order.
- On April 29, 2019, NPC filed its Petition.
- On May 13, 2019, BCP filed an Answer to the Petition (“BCP’s Answer”), Staff filed an Answer to the Petition (“Staff’s Answer”), and MSG filed an Answer to the Petition (“MSG’s Answer”).

IV. NPC’s PETITION FOR RECONSIDERATION

NPC’ Position

1. NPC requests that the Commission reconsider paragraphs 49, 90, 91, 92, 93, 94, 106, and ordering paragraph 2 (the “Challenged Paragraphs”) of the Order and argues that those paragraphs are unlawful, unreasonable, or based on erroneous conclusions of law or mistaken facts. (*See* Petition at 1-4.)

2. Referencing NRS 704B.310(5), NPC states that the Commission must determine that an NRS 704B applicant’s proposed transaction is not contrary to the public interest in order to grant the application. (*Id.* at 2.) NPC explains that, in making the public interest determination, NRS 704B.310(6)(a) requires the Commission to consider whether the electric utility providing service to the eligible customer will be burdened by increased costs as a result of the proposed transaction or whether any remaining customer of the electric utility will pay increased costs for electric service as a result of the proposed transaction. (*Id.*)

3. NPC states that, in the Challenged Paragraphs, the Commission dismisses NPC’s substantial evidence that it has incurred costs to serve future load growth, similar to MSG’s load, and that by not assessing an impact fee, NPC and the remaining customers will be burdened by increased costs as a result of the proposed transaction. (*Id.*) NPC asserts that the Commission is incorrect that NPC “provided no testimony indicating that it had made investments to support customer growth, including MSG’s, beyond the three-year action plan period.” (Order at para.

93.) NPC asserts that it provided detailed evidence showing it has invested billions of dollars to support long-term load growth and that NPC's assertions were affirmed by Staff. (*Id.* at 2- 3; Exhibit 7 at 13; and Tr. at 77.) NPC argues that the Order conflicts with NRS 704B.310(5), by incorrectly concluding that NPC did not spend more than billions of dollars in long-term investments to serve future load growth similar to MSG's load and that NPC and its remaining customers will not be burdened with increased costs. (*Id.* at 3.) NPC states that the Order is, thus, based on mistaken facts which result in an erroneous conclusion of law. (*Id.*)

4. Referencing NRS 704B.310(6)(c), NPC states that, in determining whether the proposed transaction will be contrary to the public interest, the Commission shall consider whether the proposed transaction will add energy, capacity or ancillary services to the supply in the State. (*Id.*) NPC asserts that it provided detailed evidence as to why MSG's proposed transaction with its provider of new electric resources does not add energy, capacity or ancillary services to the supply in the State. (Ex. 7 at 5.) NPC notes that the Commission nevertheless reaches a contrary finding in paragraph 106, without any discussions or evidence to support its conclusion. (*Id.*)

5. NPC also argues that the Commission's Order at paragraph 94 constitutes impermissible *ad hoc* rulemaking. (*Id.* at 3-4.) Citing generally to Breyer and Steward, Administrative Law and Regulatory Policy, 375 (2Ed. 1985), NPC posits that NRS 233B provides that the formulation and amendment of a rule should take place outside of and before its application in a particular adjudication. (*Id.* at 3.) NPC states that the Nevada Supreme Court has determined that when a rule of general applicability effectuates commission policy, selective application or enforcement constitutes *ad hoc* rulemaking and is prohibited. (*Id.*) NPC cites to

Coury v. Whittlesea-Bell, 102 Nev. 302, 721 P.2d 375 (1986) and *Las Vegas Transit v. Las Vegas Strip Trolley*, 105 Nev. 575, 780 P.2d 1145 (1989). (*Id.* at 3-4.)

6. NPC notes that, in paragraph 94, the Commission applies the similar “standard” for MSG that it applied to the LV Stadium and Fulcrum NRS 704B dockets.¹ (*Id.*) NPC argues that the “standard” the Commission references is that if NPC cannot specifically identify MSG’s load or a cost incurred to serve that load, then MSG is not required to pay an impact fee. (*Id.* at 4.) NPC asserts that this “standard” is contrary to the Commission’s regulations adopted for NPC’s resource planning and thus constitutes impermissible *ad hoc* rulemaking and should be reconsidered. (*Id.*)

7. NPC concludes that that Commission should reconsider the Challenged Paragraphs to ensure that neither NPC nor remaining customers are burdened with increased costs. (*Id.*)

BCP’s Position

8. BCP states that, although it believes that the Challenged Paragraphs of the Commission’s April 15, 2019, Order are reasonable and rest on substantial evidence, BCP is not opposed to the Commission granting the Petition and reconsidering the issues NPC raises. (BCP’s Answer at 1.)

Staff’s Position

9. Staff states that NPC fails to support its allegations that the Order’s finding that NPC will not be burdened with increased costs is based on mistaken facts which result in an erroneous conclusion of law. (Staff’s Answer at 1.) Staff argues that NPC is simply asking the Commission to re-weigh the evidence it already weighed. (*Id.* at 2.) According to Staff, the

¹ Docket Nos. 18-09003 and 18-06009, respectively.

Commission considered NPC's argument regarding its investments and found it lacking. (*Id.*) Staff states that the Commission is given broad discretion in determining whether a NRS 704B application is in the public interest and that the Commission's finding that NPC and remaining customers will not be burdened with increased costs as a result of the proposed transaction was reasonable and based on the evidence in the record. (*Id.*)

10. Staff further argues that NPC fails to support its allegations that the Order is unlawful, unreasonable, or based on erroneous conclusions of law or mistaken facts in finding that the proposed transaction will add energy, capacity, or ancillary services to the supply in Nevada. (*Id.*) Contrary to NPC's assertions, the Order properly discusses the evidence in the record, as the Commission cites to portions of the record pertaining to the Parties positions and recommendations. (*Id.*) Therefore, Staff reasons that the Commission considered the Parties' positions and that the testimony of the witnesses appears to have provided the Commission with the evidence necessary to provide the basis for its decision. (*Id.*) Staff asserts that mere disagreement with a Commission's legally and factually supported Order does not justify reconsideration and petitions for reconsideration should not be used merely to regurgitate positions already considered and rejected by the Commission. (*Id.*)

11. Staff also argues that NPC fails to support its allegations that the Order constitutes impermissible *ad hoc* rulemaking. (*Id.* at 3.) Citing NRS 704B.310, Staff states that the Commission is given broad discretion to determine whether a NRS 704 application is in the public interest and must order such terms, conditions, and payments "as the Commission deems necessary and appropriate" to ensure an applicant's departure from bundled service will not be contrary to the public interest. (*Id.* at 3.) (Emphasis in original.) Staff argues that, contrary to NPC's assertions, nothing in the plain language of NRS 704B.310 or NAC 704B.410 prohibits

the Commission from considering whether NPC has planned for the applicant and whether the utility made investments to support the applicant's load when the Commission makes its determinations under NRS 704B.310. (*Id.*)

12. Staff further argues that simply because NPC disagrees with the Commission's decision does not mean that the Commission engaged in *ad hoc* rulemaking. (*Id.*) Staff opines that the Commission took all of the relevant information into mind when applying and enforcing current statutes and regulations, and the determination that MSG not pay an impact fee is reasonable, based on the reasons that the Commission articulated. (*Id.*) Staff states that the Commission did not create any new requirements, rules, or obligations and it did not make a statement of general applicability to all NRS 704B proceedings going forward. (*Id.*) Rather, the Commission enforced valid, existing regulations and, for all of these reasons, has not engaged in improper *ad hoc* rulemaking. (*Id.*)

13. Based on the foregoing, Staff recommends that the Commission deny the Petition or, in the alternative, reaffirm Paragraphs 49, 90, 91, 92, 93, 94, 106, and ordering paragraph 2 of the April 15, 2019, Order. (*Id.* at 4.)

MSG's Position

14. MSG argues that the Petition does not satisfy the standards for reconsideration under NAC 703.801 because it merely discusses points that have previously been raised and considered by the Commission and should be denied. (MSG's Answer at 1.)

15. MSG states that NPC's first point argues that the Commission made a mistake of fact because it did not recognize that NPC's billions of dollars in long-term investments were made specifically for the benefit of MSG one day becoming a NPC customer. (*Id.*) MSG notes that NRS 704B.310(5) requires the Commission to approve a NRS 704B application unless it is

contrary to the public interest. (*Id.* at 2.) MSG argues that NPC failed to show during these proceedings how granting MSG's Amended Application would be contrary to the public interest. (*Id.*) MSG states that, while NPC references a spreadsheet of power purchase agreements and generation assets on page 13 of Exhibit 7, NPC does not specifically state how any of those investments were specifically intended for MSG, or set aside for MSG, rather than for general consumer growth. (*Id.* at 2-3.) MSG asserts that the Commission did not make a mistake of fact. (*Id.* at 3.) MSG further asserts that the facts are clear that NPC did not specifically plan for or incur costs because of MSG's load despite NPC's ability to do so in the most recent Integrated Resource Plan docket,² and that these points are explained in MSG's, Staff's, and BCP's testimonies. (*Id.* at 3; *see also*, Ex. 2 at 22-25; Ex. 14 at 3-4, 6-9; and Ex. 8 at 2.)

16. MSG argues that NPC's only evidentiary support for its first argument is the table of NPC's long-term commitments contained on page 13 of Exhibit 7 and a reading of Staff's testimony that is belied by the context in which it was cited. (*Id.* at 5.) MSG asserts that NPC's list demonstrates only that NPC obtained power purchase agreements and generation assets; it does not demonstrate that MSG was actually planned for or that NPC incurred any expenses on MSG's behalf. (*Id.*) Furthermore, it is clear from the context of Staff's testimony that NPC was planning for system-wide projected growth based on historical information, not specific projects based on present-day realities. (*Id.*) Staff was not saying that MSG's sphere was specifically planned for two decades ago, but instead, was attempting to explain that NPC plans decades into the future for general growth. (*Id.*)

17. MSG posits that there is substantial evidence presented by MSG, BCP, and Staff supporting the position that granting MSG's Application would not be contrary to the public

² Docket No. 18-06003.

interest. (*Id.* at 6) The Commission relied on both the quantity and quality of evidence to draw its conclusions and those conclusions do not warrant reconsideration. (*Id.*)

18. Regarding NPC's argument pertaining to new electric resources, MSG notes that an agency's interpretation of a statute that it is authorized to execute is entitled to deference "unless it conflicts with the constitution or other statutes, exceeds the agency's powers, or is otherwise arbitrary and capricious." *Cable v. State ex rel. Emp'rs Ins. Co. of Nev.*, 122 Nev. 120, 126, 127 P.3d 1256, 1271 (2010). (*Id.* at 7.) MSG also notes that where a statute is clear and unambiguous, a plain and ordinary meaning should be applied. *Nev. Attorney for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1256, 1271 (2010).

19. MSG argues that NPC misconstrues the critical provision of NRS 704B.310(6)(c), namely the requirement that energy, capacity or ancillary services be added "to the supply in this State." (*Id.*) A plain reading of NRS 704B.110, which defines "new electric resource," indicates that energy merely must not be under contract with the utility for it to be eligible and that NPC's interpretation goes beyond the plain meaning of NRS 704B.310(6)(c) and NRS 704B.110. (*Id.*) MSG asserts that it addressed this issue in direct testimony, which was not challenged through cross-examination. (*Id.*)

20. MSG further argues that NPC's argument that the Commission engaged in *ad hoc* rulemaking is misplaced and dismisses long-standing precedent for procedure in regulatory matters. (*Id.* at 8.) MSG states that the Commission's reference to (not reliance upon) the Fulcrum and LV Stadium dockets merely demonstrates the propriety of thoroughness in creating a complete Order, which takes into account prior decisions where factual circumstances are identical. (*Id.* at 9.) The Commission did not cite to those cases as authority or state its requirement to be bound by those cases due to either case creating a rule. (*Id.*) Rather, no rule

has been created at all, which is required for the Commission to engage in *ad hoc* rulemaking.

(*Id.*) MSG asserts that NPC's argument takes the premise of paragraph 94 out of context. (*Id.*)

MSG also asserts that, while the Commission cannot arbitrarily rule that an impact to either NPC or ratepayers exists absent any credible, material evidence, it can reference prior cases where identical facts exist to simply explain at least one rationale behind its decision-making.

(*Id.*)

21. For these reasons, MSG requests that the Commission deny the Petition.

Commission Discussion and Findings

22. Pursuant to NAC 703.801(1):

1. A petition for reconsideration must specifically:

- (a) Identify each portion of the challenged order which the petitioner deems to be unlawful, unreasonable, or based on erroneous conclusions of law or mistaken facts; and
- (b) Cite those portions of the record, the law or the rules of the Commission which support the allegations in the petition. The petition may not contain additional evidentiary matter or require the submission or taking of evidence.

...

7. If the Commission grants a petition for reconsideration, it will reexamine the record and order with regard to the issues on which reconsideration was granted and issue a modified final order or reaffirm its original order.

...

9. A modified final order of the Commission issued upon reconsideration . . . will incorporate those portions of the original order which are not changed or modified by the modified final order. A modified final order is the final decision of the Commission.

23. The Commission finds that NPC satisfied NAC 703.801(1)(a) because NPC specifically identifies the Challenged Paragraphs—paragraphs 49, 90, 91, 92, 93, 94, 106, and ordering paragraph 2—of the Order and argues that the Order is based upon mistaken facts which result in an erroneous conclusion of law, that the Order reaches a finding without

discussions or evidence to support its conclusion, and that it constitutes impermissible *ad hoc* rulemaking. (Petition at 1-4.) The Commission finds that NPC satisfies NAC 703.801(1)(b) because NPC cites to witness testimony that is part of the record and Nevada case law in support of its allegations. (*Id.*) Accordingly, NPC has met the procedural threshold standard for reconsideration. Therefore, the Commission grants the Petition.

24. The Commission finds that, while NPC satisfies the procedural requirements of NAC 703.801(1), NPC simply reargues a position that the Commission already heard and puts forth evidence that the Commission already weighed. NPC asserts that the Commission dismisses NPC's "substantial" evidence that it has incurred costs to serve future load growth, similar to MSG's load. The "substantial" evidence NPC refers to is Table 1 on page 13 of Exhibit 7. The Order's specific references to Exhibit 7 throughout the Order demonstrate that the Commission is cognizant of this evidence and considered it when the Commission was reaching its conclusions. The Order also makes clear that the Commission is cognizant of, and considered, the evidence presented by MSG, BCP, and Staff that refutes the notion that NPC incurred any additional costs to serve MSG's load. Considering the fact that NPC's Petition merely repeats the same arguments that it put forth in its testimony, the Commission finds that NPC has presented no basis for altering the determinations contained in the Order, which are clearly delineated therein and which are clearly supported by the evidence presented by three out of the Parties to this Docket.

25. NPC also asserts that the Commission's finding in paragraph 106 that MSG's proposed transaction will add energy and capacity to the supply in Nevada was reached without evidence to support such a conclusion. However, as Staff highlights, this assertion is refuted by the provisions of the Commission's Order citing to evidence of record submitted by the Parties.

(Staff's Answer at 2; *see* the Order at para. 101-105.) The Commission based its conclusion in paragraph 106 on the positions and recommendations articulated by the Parties and submitted into the record in the form of witness testimony. Accordingly, contrary to NPC's assertion, the Commission's finding in paragraph 106 is based on the evidentiary record.

26. Lastly, NPC asserts that the Commission engaged in *ad hoc* rulemaking when, in paragraph 94, it compared the instant docket to the LV Stadium and Fulcrum NRS 704B dockets and ultimately reached a conclusion similar to the conclusions reached in those dockets regarding an impact fee. "An agency engages in rulemaking when it promulgates, amends, or repeals '[a]n agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency.'" *Labor Com'r of State of Nevada v. Littlefield*, 123 Nev. 35, 39-40, 153 P.3d 26, 29 (2007) (*quoting* NRS 233B.038(1)(a)).

27. The Commission did not engage in *ad hoc* rulemaking here because the Commission does not promulgate, amend, or repeal a rule or "standard" in its Order. The Commission's reference to the LV Stadium and Fulcrum dockets in paragraph 94 is just that: a reference to—not reliance upon—prior cases that, as MSG notes, helps explain the rationale behind the Commission's decision-making. (*See* MSG's Answer at 9.) The Commission's discussions and findings in paragraphs 89 through 94 do not rely on prior Commission decisions, but rather they rely on the same statutes and regulations that have guided the Commission's analysis in all prior NRS 704B dockets. Indeed, the first paragraph under the Commission's discussion and findings in this section of the Order sets the foundation for the subsequent analysis by stating explicitly that the Commission has considered the factors outlined in NRS


704B.310(6)(a). (See the Order at para. 89.) Accordingly, the Commission did not engage in *ad hoc* rulemaking.

28. For the above reasons, the Commission finds that paragraphs 49, 90, 91, 92, 93, 94, 106, and ordering paragraph 2 are lawful, reasonable, and based on valid conclusions of law and fact.

THEREFORE, it is ORDERED:

1. Nevada Power Company d/b/a NV Energy's Petition for Reconsideration is GRANTED.
2. The Commission's April 15, 2019, Order is REAFFIRMED.
3. All arguments of the Parties raised in these proceedings not expressly addressed herein have been considered and either rejected or found to be non-essential for further discussion in this Order.

By the Commission,




 ANN PONGRACZ, Chairwoman and Presiding Officer



 C.J. MANTHE, Commissioner



 HAYLEY WILLIAMSON, Commissioner

Attest: 
 TRISHA OSBORNE,
 Assistant Commission Secretary

Dated: Carson City, Nevada
 5/30/19

 (SEAL)

