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March 20, 2003

Re: NRS 233B, NRS 703 - comparison of provisions for judicial review

NRS 233B.039(3)(c) provides: The **special** provisions of Chapter 703 of NRS for the judicial review of decisions of the Public Utilities Commission of Nevada prevail over the **general** provisions of this chapter.

The judicial review provisions of the APA are NRS 233B.130 to 233B.150, inclusive (attached). The provisions for judicial review in NRS 703 are NRS 703.373 to 703.377, inclusive (attached).

The differences between the two are shown in the following table. Where there is no entry under NRS 703, there is no language in NRS 703 which corresponds to the language in NRS 233B (and vice versa).

NRS 233B	NRS 703
233B.130(1) preliminary, procedural or intermediate act or ruling reviewable if review of final decision would not provide adequate remedy	703.373(1) jud. review only of final decision
233B.130(2) agency and all parties of record must be named as respondents	
233B.130(2) petition for jud. review to be filed within 30 days after service of final decision of agency	703.373(2) Filed within 90 days after service of final decision. If rehearing held, then within 30 days after decision on rehearing. Copies of petition must be served on PUCN and all parties of record. Silent on when service must be accomplished, might be same day as when filed with court.
233B.130(2) cross-petitions for jud. review to be filed within 10 days after service of petition for jud. review	no reference to cross-petitions
233B.130(3) agency and parties desiring to participate in jud. review to file and serve statement of intent to participate within 20 days after service of petition	703.373(3) Answers to be filed within 30 days after service of petition for jud. review. Action then at issue. Parties must be ready for hearing on 20 days' notice.
233B.130(5) petition and cross-petition to be served on agency and parties within 45 days after filing petition, unless court extends time	
233B.131(1) agency to transmit record to court within 30 days after service of petition for jud. review. Record may be shortened by stip.	703.330(2) PUCN to file certified copy of all proceedings and testimony "before action is reached for trial."
233B.131(2) additional and rebuttal evidence may be taken before agency upon application to court	
233B.131(3) agency may modify findings and	

decisions after receipt of add'l evidence and file same with court	
233B.133(1) petitioner/cross-petitioner to serve and file memo of points and authorities within 40 days after agency notifies parties the record filed with court	
233B.133(2) respondent/cross-petitioner to serve and file reply memo of pts and auths within 30 days after service of memo of pts and auths	
233B.133(3) petitioner/cross-petitioner may serve and file reply memo of pts and auths within 30 days after service of reply memo	
233B.133(4) any party may request hearing within 7 days after expiration of time for reply. Unless request for hearing filed, matter deemed submitted.	
233B.133(5) memos of pts and auths must be in form for appellate briefs, NRAP 28	
233B.133(6) court may extend times for filing memos for good cause	
233B.135(1) jud. review must be conducted without jury, confined to record	703.373(4) same
233B.135(1) court may receive evidence concerning alleged irregularities in procedure before agency	703.373(4) if irregularities in procedure before PUCN alleged, which not shown in record, proof may be taken in court. On request, court shall hear oral argument and receive briefs.
233B.135(2) agency decision deemed reasonable and lawful until reversed/set aside in whole/in part by court. Burden of proof on party attacking/resisting decision to show final decision invalid.	703.374(2) PUCN decision deemed reasonable and just until set aside by court. In actions for injunction or any other relief, burden of proof on party attacking or resisting order of PUCN to show by clear and satisfactory evidence that order unlawful/unreasonable. If injunction granted, and order concerns rate case for which utility did not receive full relief, utility may place proposed changes in rates in effect pending final determination by court, by filing bond conditioned on refund.
233B.135(3) Court may not substitute its judgment for agency's as to weight of evidence on ? of fact. Court may remand/affirm final decision or set it aside in whole/in part if substantial rights of petitioner have been prejudiced because agency decision is: (a) in violation of constitutional/statutory provisions, (b) in excess of agency's statutory authority,	703.373(6) Court may not substitute its judgment for agency's as to weight of evidence on ? of fact. Court may affirm final decision or set it aside in whole/in part if substantial rights of petitioner have been prejudiced because administrative findings, inferences, conclusions or decisions are : (a) in violation of constitutional/statutory provisions, (b) in

(c) made upon unlawful procedure, (d) affected by other error of law, (e) clearly erroneous in view of reliable, probative and substantial evidence on whole record, or (f) arbitrary or capricious or characterized by abuse of discretion.	excess of agency's statutory authority, (c) made upon unlawful procedure, (d) affected by other error of law, (e) clearly erroneous in view of reliable, probative and substantial evidence on whole record, or (f) arbitrary or capricious or characterized by abuse of discretion. <i>Note: 703 deletes "remand" and changes "decision" to "administrative findings, inferences, conclusions or decisions."</i>
233B.140(1) for stay of final decision - file and service written motion for stay on agency and all parties at time of filing petition for jud. review	703.374(1) Court may issue injunction suspending or staying final order, after hearing, if (a) applicant files motion for prelim. injunction, (b) applicant has served motion on PUCN and other parties within 20 days after order rendered, (c) court finds reasonable likelihood that applicant will prevail on merits and will suffer irreparable injury if injunctive relief not granted, and (d) applicant files bond or other undertaking to secure adverse parties.
233B.140(2) for stay, court to consider same factors as are considered for preliminary injunction under NRCP 65. Court to give deference to trier of fact and consider risk to public of staying decision. Petitioner must provide security for court to issue stay.	
233B.150 Judgment of district court may be appealed to supreme court.	703.376 Judgment of district court may be appealed to supreme court, within 60 days after service of order or judgment.
	703.375 If court finds rates excessive, and utility has collected such rates, utility shall refund excess within 60 days of court's judgment. Procedure included for persons to whom refund cannot be made.
	703.373(5) actions have precedence over any civil action of a different nature pending in court

NRS 233B.130 Judicial review; requirements for petition; statement of intent to participate; petition for rehearing.

1. Any party who is:

(a) Identified as a party of record by an agency in an administrative proceeding; and

(b) Aggrieved by a final decision in a contested case,

is entitled to judicial review of the decision. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute. Any preliminary, procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy.

2. Petitions for judicial review must:

(a) Name as respondents the agency and all parties of record to the administrative proceeding;

(b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred; and

(c) Be filed within 30 days after service of the final decision of the agency.

Cross-petitions for judicial review must be filed within 10 days after service of a petition for judicial review.

3. The agency and any party desiring to participate in the judicial review must file a statement of intent to participate in the petition for judicial review and serve the statement upon the agency and every party within 20 days after service of the petition.

4. A petition for rehearing or reconsideration must be filed within 15 days after the date of service of the final decision. An order granting or denying the petition must be served on all parties at least 5 days before the expiration of the time for filing the petition for judicial review. If the petition is granted, the subsequent order shall be deemed the final order for the purpose of judicial review.

5. The petition for judicial review and any cross-petitions for judicial review must be served upon the agency and every party within 45 days after the filing of the petition, unless, upon a showing of good cause, the court extends the time for such service.

6. The provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning a final decision in a contested case involving an agency to which this chapter applies.

(Added to NRS by 1965, 966; A 1969, 318; 1975, 495; 1977, 57; 1981, 80; 1989, 1651; 1991, 465)

NRS 233B.131 Transmittal of record of proceedings to reviewing court by agency; additional evidence; modification of findings by agency.

1. Within 30 days after the service of the petition for judicial review or such time as is allowed by the court, the agency that rendered the decision which is the subject of the petition shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review, including a transcript of the evidence resulting in the final decision of the agency. The record may be shortened by stipulation of the parties to the proceedings. A party unreasonably refusing to stipulate to limit the record, as determined by the court, may be assessed by the court any additional costs. The court may require or permit subsequent corrections or additions to the record.

2. If, before submission to the court, an application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence and any rebuttal evidence be taken before the agency upon such conditions as the court determines.

3. After receipt of any additional evidence, the agency:

(a) May modify its findings and decision; and

(b) Shall file the evidence and any modifications, new findings or decisions with the reviewing court.

(Added to NRS by 1989, 1649)

NRS 233B.133 Memoranda of points and authorities: Time for filing memorandum and reply; request for hearing; required form.

1. A petitioner or cross-petitioner who is seeking judicial review must serve and file a memorandum of points and authorities within 40 days after the agency gives written notice to the parties that the record of the proceeding under review has been filed with the court.

2. The respondent or cross-petitioner shall serve and file a reply memorandum of points and authorities within 30 days after service of the memorandum of points and authorities.

3. The petitioner or cross-petitioner may serve and file reply memoranda of points and authorities within 30 days after service of the reply memorandum.

4. Within 7 days after the expiration of the time within which the petitioner is required to reply, any party may request a hearing. Unless a request for hearing has been filed, the matter shall be deemed submitted.

5. All memoranda of points and authorities filed in proceedings involving petitions for judicial review must be in the form provided for appellate briefs in Rule 28 of the Nevada Rules of Appellate Procedure.

6. The court, for good cause, may extend the times allowed in this section for filing memoranda.

(Added to NRS by 1989, 1649)

NRS 233B.135 Judicial review: Manner of conducting; burden of proof; standard for review.

1. Judicial review of a final decision of an agency must be:

(a) Conducted by the court without a jury; and

(b) Confined to the record.

In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may

receive evidence concerning the irregularities.

2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.

3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

- (a) In violation of constitutional or statutory provisions;
 - (b) In excess of the statutory authority of the agency;
 - (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.
- (Added to NRS by 1989, 1650)

NRS 233B.140 Procedure for stay of final decision; ruling by court.

1. A petitioner who applies for a stay of the final decision in a contested case shall file and serve a written motion for the stay on the agency and all parties of record to the proceeding at the time of filing the petition for judicial review.

2. In determining whether to grant a stay, the court shall consider the same factors as are considered for a preliminary injunction under Rule 65 of the Nevada Rules of Civil Procedure.

3. In making a ruling, the court shall:

- (a) Give deference to the trier of fact; and
- (b) Consider the risk to the public, if any, of staying the administrative decision.

The petitioner must provide security before the court may issue a stay.

(Added to NRS by 1967, 810; A 1977, 58; 1989, 1652)

NRS 233B.150 Appeal from final judgment of district court. An aggrieved party may obtain a review of any final judgment of the district court by appeal to the supreme court. The appeal shall be taken as in other civil cases.

(Added to NRS by 1967, 811)

NRS 703.373 Judicial review: Petition; answer; scope of review; grounds for setting aside decision of commission.

1. Any party of record to a proceeding before the commission is entitled to judicial review of the final decision.
2. Proceedings for review may be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the party resides, or in and for the county where the act on which the proceeding is based occurred. A petition must be filed within 90 days after the service of the final decision of the commission or, if a rehearing is held, within 30 days after the decision thereon. Copies of the petition must be served upon the commission and all other parties of record.
3. The commission and other defendants shall file their answers to the petition within 30 days after the service thereof, whereupon the action is at issue and they must be ready for a hearing upon 20 days' notice to either party.
4. The review must be conducted by the court without a jury and be confined to the record. In cases of alleged irregularities in procedure before the commission, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
5. All actions brought under this section have precedence over any civil action of a different nature pending in the court.
6. The court shall not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact. The court may affirm the decision of the commission or set it aside in whole or in part if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
 - (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.

(Added to NRS by 1983; 965)

NRS 703.374 Judicial review: Requirements for injunction; burden of proof; filing bond to place into effect proposed changes in schedule of rates.

1. A court of competent jurisdiction, after hearing, may issue an injunction suspending or staying any final order of the commission if:
 - (a) The applicant has filed a motion for a preliminary injunction;
 - (b) The applicant has served the motion on the commission and other interested parties within 20 days after the rendition of the order on which the complaint is based;
 - (c) The court finds there is a reasonable likelihood that the applicant will prevail on the merits of the matter and will suffer irreparable injury if injunctive relief is not granted; and
 - (d) The applicant files a bond or other undertaking to secure the adverse parties in such manner as the court finds sufficient.
2. The decision of the commission on each matter considered shall be deemed reasonable and just until set aside by the court. In all actions for an injunction or for any other relief, the burden of proof is upon the party attacking or resisting the order of the commission to show by clear and satisfactory evidence that the order is unlawful or unreasonable.
3. If an injunction is granted by the court and the order complained of is one which:
 - (a) Disapproves a public utility's proposed changes in a schedule of rates, or any part thereof, pursuant to NRS 704.061 to 704.110, inclusive; or
 - (b) Otherwise prevents the proposed changes in the schedule, or any part thereof, from taking effect,
 the public utility complaining may place into effect the proposed changes in the schedule, or any part thereof, pending final determination by the court having jurisdiction, by filing a bond with the court in such an amount as the court may fix, conditioned upon the refund to persons entitled to the excess amount if the proposed changes in the schedule, or any part thereof, are finally determined by the court to be excessive.

(Added to NRS by 1983, 965; A 1995, 2607; 1997, 1887, 2666; 1999, 492; 2001, 3241)

NRS 703.375 Judicial review: Refund of excess payment; report of refund; claims for refunds.

1. If a court determines that the rate or rates considered by the commission are excessive, and that the public utility has collected those excessive rates, the public utility shall compute and refund the excess or overpayment of the rate or rates pursuant to a plan approved by the commission within 60 days after the entry of the final judgment of the court.
 2. The public utility shall prepare and file with the commission a statement and report in affidavit form stating that all money has been refunded according to the approved plan, and if there are persons to whom payment has not or cannot be made, the names, addresses and individual amounts of the refund must be listed in the report. The statement and report must be filed with the commission within 90 days after the entry of final judgment. The public utility shall pay the aggregate amount of the unpaid refunds to the commission.
 3. The commission shall:
 - (a) Retain the aggregate refunds in the public utilities commission regulatory fund subject to the claim of each person entitled thereto for his share in the refund; and
 - (b) Pay all valid claims which are presented for payment within 2 years after the date of the entry of final judgment of the court.
- All claimants must identify themselves to the satisfaction of the commission before payment may be made.
4. Any person has a right of action against the commission in the event of a refusal of the commission to pay his claim if the person's name appears in the report filed by the public utility. This action against the commission must be brought within 6 months after the refusal to pay the claim.
 5. The commission shall investigate every case in which a claim is presented to it by a person claiming a refund under a plan submitted by a public utility which was approved by the commission. If the investigation results in a refusal by the

public utility to pay a valid claim, then the claimant has a right of action against the public utility.

6. Any unclaimed money which remains in the custody of the commission at the expiration of the 2year period escheats to this state.

(Added to NRS by 1983, 966; A 1995, 2607; 1997, 1888, 2667; 1999, 492)

NRS 703.376 Judicial review: Appeal to supreme court. Any party to the action, within 60 days after the service of a copy of the order or judgment of the district court, may appeal to the supreme court as in other civil cases.

(Added to NRS by 1983, 967; A 1997, 1889)

NRS 703.377 Revocation of certificate, permit or license: Hearing; conditions; judicial review.

1. Any certificate of public convenience and necessity, permit or license issued or transferred in accordance with the provisions of NRS 704.001 to 704.751, inclusive, is not a franchise or irrevocable.

2. Upon receipt of a written complaint or on its own motion, the commission may, after investigation and hearing, revoke any certificate, permit or license, except that the commission may not revoke the certificate of a public utility unless the commission has arranged for another public utility to provide the service for which the certificate was granted.

3. If the commission revokes any certificate, permit or license, the person who held the certificate, permit or license may seek judicial review pursuant to the provisions of NRS 703.373 to 703.376, inclusive.

(Added to NRS by 1983, 967; A 1985, 316; 1989, 726; 1997, 1889; 2001, 3242)

Rule 2.15

EIGHTH DISTRICT COURT RULES

(c) Orders under subsections (a) and (b) must fix the time within which the restraining order, if any, and all pleadings, affidavits and briefs in support of the restraining order and the motion for preliminary injunction must be served upon the adverse party, and the time for filing of opposition, counter-affidavits and briefs.

WEST PUBLISHING CO.
Injunction ⇌ 132.

WESTLAW Topic No. 212.
C.J.S. Injunctions §§ 4, 5, 17, 166.

Rule 2.15. Petitions for judicial review other than pursuant to the Nevada Administrative Procedure Act.

(a) A petitioner seeking judicial review under authority other than NRS 233B must serve and file a memorandum of points and authorities in support thereof within 21 days after the record of the proceeding under review has been filed with the court.

(b) The respondent must serve and file a memorandum of points and authorities in opposition thereto within 21 days after service of petitioner's points and authorities.

(c) Petitioner may serve and file reply points and authorities not later than 7 days after service of respondent's opposition.

(d) After petitioner's time to reply has expired, either party may serve and file a notice of hearing setting the petition for hearing on a day when the judge to whom the case is assigned is hearing civil motions, and which is not less than 7 days from the date the notice is served and filed.

(e) All memoranda of points and authorities filed in proceedings involving petitions for judicial review must be in the form provided for appellate briefs in Rule 28 of the Nevada Rules of Appellate Procedure.

(f) Rules 2.22 through 2.28 apply to the hearing of petitions for judicial review.

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Appeal and Error ⇌ 755.

WESTLAW Topic No. 30.
C.J.S. Appeal and Error §§ 1312, 1314.

Rule 2.16. Petitions for judicial review pursuant to the Nevada Administrative Procedure Act. A request for hearing pursuant to NRS 233B.133(4) must be in the form of a notice setting the petition for hearing on a day when the judge to whom the case is assigned is hearing civil motions, and which is not less than 7 days from the date the notice is served and filed.

WEST PUBLISHING CO.
Administrative Law and Procedure ⇌ 721.
WESTLAW Topic No. 15A.

C.J.S. Public Administrative Law and Procedure § 208.

Rule 2.17. First Amendment extraordinary writs.

(a) A petitioner seeking review of a claim of prior restraint under the First Amendment to the United States Constitution must label the extraordinary writ and points and authorities "First Amendment Writ." Points and authorities in support of the writ must be served and filed concurrently with the writ, and petitioner must immediately deliver a courtesy copy of the writ and points and authorities to the assigned department.

(b) The respondent must serve and file a memorandum of points and authorities in opposition thereto within 15 days after service of petitioner's points and authorities.

(c) Petitioner may serve and file reply points and authorities not later than 3 days after service of respondent's opposition.