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ambiguous situations, and even if it is equally probable that the vehicle or its occupants are innocent of any wrongdoing, police must be permitted to act *before* their reasonable belief is verified by escape or fruition of the harm it is their duty to prevent. In determining whether the government's intrusion into a motorist's Fourth Amendment interests was reasonable, the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation. *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010). Rather, an officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred. *Id.* Because the deputy observed an apparent traffic violation when Morrissey was driving on a road which was clearly marked as being closed, the deputy had probable cause to believe that a violation had occurred and his stop of the vehicle was objectively reasonable.

CONCLUSION

We conclude that Morrissey committed a misdemeanor and a traffic violation by driving on a road which was clearly marked with a road closed barricade and sign. Because the deputy observed this violation, his stop of the vehicle was objectively reasonable. We affirm the district court's order which affirmed the county court's denial of Morrissey's motion to suppress and the conviction and sentence.

AFFIRMED.

NEBRASKA PUBLIC ADVOCATE, APPELLANT, V. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, BLACK HILLS/NEBRASKA GAS UTILITY COMPANY, LLC, DOING BUSINESS AS BLACK HILLS ENERGY, APPELLEE, AND CONSTELLATION NEW ENERGY—GAS DIV., LLC, ET AL., INTERVENORS-APPELLEES.

815 N.W.2d 192

Filed March 20, 2012. No. A-11-341.

1. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

2. **Administrative Law: Judgments: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.
3. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
4. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
5. **Courts: Appeal and Error.** Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.
6. **Public Utilities: Rates.** In determining whether expenses are prudently incurred, the test is whether they are costs which a reasonable utility or jurisdictional entity would have made in good faith under the same circumstances at the relevant point in time.
7. **Administrative Law: Judgments: Appeal and Error.** An appellate court, in reviewing a district court judgment for errors appearing on the record, under the Administrative Procedure Act, will not substitute its factual findings for those of the district court when competent evidence supports those findings.
8. **Evidence: Words and Phrases.** Competent evidence means evidence that tends to establish the fact in issue.
9. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Roger P. Cox and Jack L. Schultz, of Harding & Schultz, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

Trenten P. Bausch and Megan S. Wright, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and Douglas J. Law, of Black Hills Energy, for appellee Black Hills/Nebraska Gas Utility Company, LLC.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The Nebraska Public Service Commission (Commission) granted in part an application filed by Black Hills/Nebraska Gas Utility Company, LLC, doing business as Black Hills Energy (Black Hills Energy), for a natural gas general rate increase, a large amount of which was attributable to transactions between Black Hills Energy and its affiliates. The district court affirmed. The Nebraska Public Advocate (Public Advocate) appeals, arguing that Black Hills Energy did not meet its burden to show that each payment to an affiliate was prudently incurred and that the costs charged by affiliates reasonably approximated the market value. Because we find no errors appearing on the record, we affirm.

BACKGROUND

In 2007, Black Hills Corporation (BHC) entered into an agreement to acquire the regulated gas utilities of Aquila, Inc., in several states, including Nebraska. Aquila, BHC, and Black Hills Energy submitted to the Commission application No. NG-0044, which sought approval of the proposed transfer of Aquila's Nebraska certificate of public convenience and the changed control of Aquila's Nebraska jurisdictional utility assets. The Commission entered an order approving the transfer, and the acquisition was completed in July 2008.

BHC established Black Hills Energy as a separate legal entity for the natural gas assets formerly of Aquila which were located in Nebraska. Black Hills Utility Holdings, Inc., is a subsidiary of BHC which was formed to hold and separate the regulated utility holdings that BHC acquired from Aquila from the nonregulated holdings of BHC. Black Hills Energy obtains services from Black Hills Utility Holdings which are primarily related to customer service, billing, and information technology. Black Hills Service Company, LLC, is a subsidiary of BHC which provides administrative and management services—including functions such as payroll, administering benefits, risk management, and executive management—to all of BHC's subsidiaries.

On December 1, 2009, Black Hills Energy filed an application with the Commission for a general rate increase. The Public Advocate, along with several other entities, filed petitions for formal intervention, which were granted.

The Commission received extensive live, prefiled, and rebuttal testimony and exhibits regarding the rate application. Because the issue on appeal is narrow, we omit discussion of the evidence not pertinent to this appeal. In particular, affiliate costs are at issue. Michael Arndt, a public utility rate consultant, testified that an affiliate transaction is one for goods or services between two companies which share common ownership through a holding company structure. According to Arndt, 57.04 percent of Black Hills Energy's test year operation and maintenance expenses related to charges from affiliate companies. He cautioned that because affiliated companies share common ownership, the transactions between them lack arm's-length bargaining.

Black Hills Energy obtains support services from Black Hills Service Company and from Black Hills Utility Holdings through written service agreements. According to BHC's executive vice president and chief financial officer, doing so avoids the duplication of these business functions by each of the regulated and nonregulated business units of BHC and creates efficiencies by having the support services provided on a centralized basis. Jeffrey Thomas, a senior regulatory analyst for Black Hills Utility Holdings, similarly testified that having centralized department functions necessary for operations through Black Hills Service Company and Black Hills Utility Holdings helps reduce costs. He explained that costs would increase if each state was required to have its own accounting departments and computer systems, because there would be an increase in the number of employees and systems due to the duplication of many functions that are shared by the affiliates. Both Black Hills Service Company and Black Hills Utility Holdings have a cost allocation manual (CAM), and both companies provide their services at cost to Black Hills Energy and other BHC affiliates through direct and indirect charges. The service agreements specifically state that Black Hills Service

Company and Black Hills Utility Holdings will provide Black Hills Energy with

> various services as provided herein at cost, and pursuant to [the respective company's CAM], with cost determined in accordance with applicable rules and regulations under the [Energy Policy Act of 2005], which require [the company] to fairly and equitably allocate costs among all associate companies to which it renders services.

A return is not built into the costs charged by the parent or service company or other affiliate; the allocations are based on actual costs. In response to Commission staff questions, Black Hills Energy stated that it evaluates whether a cost from an affiliate is less than or equal to the cost of obtaining a good or service from an unregulated third party.

Thomas explained the allocation of common expenses. He testified that BHC had taken measures to segregate the costs of its regulated affiliates, such as Black Hills Energy; its nonregulated affiliates, such as Enserco Energy Inc.; and its regulated utility affiliates, such as Black Hills Energy and Cheyenne Light, Fuel & Power. It then applies cost allocation methods to those common costs. BHC also accounts for regulated and nonregulated private enterprise activity conducted within its regulated utilities by using Commission-approved cost allocation methodologies. Thomas stated that the majority of expense allocations in the rate application consisted of "either costs directly assigned or prudently incurred common expenses derived by dividing up the common functional support costs that are centralized. Those costs include information technology, billing, collection, accounting, treasury, human resources, and other corporate functions." According to Thomas, BHC directly assigns a cost to a business unit when those costs can be identified; when a cost cannot be directly assigned, BHC determines "the cost 'drivers'" and adopts a reasonable allocation method to divide those common expenses. If a cost driver is not readily apparent, then a general allocation methodology is used. Thomas explained that in allocating costs to Black Hills Energy, BHC used the cost allocation methods under the CAM that BHC filed with its application for approval to

transfer Aquila's assets to BHC, as directed to do so by the Commission. With regard to nonregulated activity conducted within the regulated utility, Thomas stated that the change from Aquila to Black Hills Energy provided for the same type of allocation methods used by Aquila and approved by the Commission for Aquila. Thomas stated that in Aquila's last rate case, the Public Advocate did not challenge the allocations under that CAM and the Commission accepted the allocation methodologies. According to Thomas, there were no significant differences in the cost assignment methodology between the Aquila and BHC CAM's. Thomas explained that there was a similarity in business support structures between Aquila and BHC, that both companies adopted and applied the same cost allocation methodology, that BHC segregates its nonregulated and sister utility affiliates from cost allocations in the Nebraska affiliate, and that BHC has adopted an allocation methodology and organization structure from Aquila that had been approved by several commissions in order for Black Hills Energy to comply with and conform to the cost allocation methodologies. Thomas prepared a summary of affiliate charges to the Nebraska gas operations for three time periods ("Black Hills base year costs," 2007 calendar year cost under Aquila, and Aquila's base year cost), and the summary "show[ed] a consistency in the make-up of costs charged to the Black Hills gas operations."

Richard Petersen, the director of gas regulatory accounting, opined that the affiliate transaction costs were reasonable. He noted that BHC operates in a number of states, that it has to ensure that costs as assigned between states are reasonable, that BHC is "privy to a lot of other company data where you compare costs from your company to their company," and that the costs "seem reasonable based on those comparisons." But Petersen agreed that none of that information had been provided to the Commission in this case.

Laura Patterson is the director of compensation, benefits, and human resources information systems for BHC. She testified that pay ranges within the pay grades are competitive with what is paid by other companies for similar positions. She explained that where data exists, all jobs are compared to

the market and placed in the grade where the midpoint of the range is closest to the average market rate for that job. She further testified, "Towers Watson conducted a market review of the [Black Hills Energy] positions in early 2009 and benchmarked each position to a BHC salary grade based midpoints [sic], which were designed to closely reflect the market median values." She further testified that market rates are determined by using data from compensation surveys where companies report actual compensation paid to employees by position. She testified that the BHC compensation department annually reviews the pay structure to see how it and pay practices reflect the market. According to Patterson, "As of May 1, 2010, the average base pay for employees in Nebraska was 98% of the market median, indicating BHC employees' base pay rates were slightly below but within acceptable range of the market median."

According to Arndt, Black Hills Energy had not supported its affiliate charges in its prefiled direct testimony; however, Arndt was not recommending any adjustments to disallow Black Hills Energy's affiliate charges for ratemaking purposes. He iterated that affiliate charges must be justified by Black Hills Energy before it would be appropriately allowed in the cost of service in this case. He further iterated his position that affiliate charges "are naturally suspect, since the goal of corporations is profit maximization." He cautioned that regulated companies could subsidize nonregulated companies through affiliated transactions "by overallocating costs to regulated utility companies through common allocators such as the general allocator in this case, which uses factors such as net plant, payroll and gross margins."

The Commission entered a lengthy final order granting the application in part. The Commission observed that Black Hills Energy had the burden of proof to demonstrate the proposed rates were just and reasonable and that "[m]ere conclusory statements are insufficient." The Commission found that Black Hills Energy was entitled to a base rate jurisdictional revenue requirement of $193,031,728, which amounted to a rate increase but was less than the increase sought by Black Hills Energy.

The Public Advocate subsequently filed a "Motion for Clarification and/or Reconsideration and Request for Oral Argument." Following a hearing, the Commission entered an order granting the motion in part with respect to the allowance of rate case expenses. It denied all other aspects of the motion, including that regarding affiliate transactions.

The Public Advocate then filed in the district court a petition for review of the administrative decision. The Public Advocate claimed that the evidence presented at the hearing showed Black Hills Energy did not comply with or meet the burden of proof imposed by 291 Neb. Admin. Code, ch. 9, § 005.07 (2009), and that the inclusion of affiliate transaction costs in rates charged to jurisdictional ratepayers was contrary to § 005.07.

The district court entered a comprehensive and well-reasoned order. In conducting its de novo review, it attached a rebuttable presumption of validity to the actions of the Commission and stated that the burden of proof rested with the Public Advocate as the party challenging the Commission's action. The court rejected the Public Advocate's claim that affiliate transaction costs should have been disallowed because Black Hills Energy failed to present sufficient evidence to demonstrate the prudence and value of those costs as required by § 005.07. The court reasoned that the Public Advocate's claim failed to acknowledge that Black Hills Energy's allocations of costs from affiliated service companies were made pursuant to a cost allocation methodology required by the Commission and failed to recognize the substantial evidence presented by Black Hills Energy which supported the reasonableness and value of the cost allocations from the affiliated service companies to Black Hills Energy. The district court found that the Commission properly allowed Black Hills Energy's affiliate costs.

The Public Advocate timely appeals.

ASSIGNMENTS OF ERROR

The Public Advocate assigns, restated and reordered, that the district court and the Commission erred in (1) considering the testimony and evidence of Thomas and (2) determining that the challenged affiliate transaction costs could be included

in rates to be charged to jurisdictional ratepayers, when Black Hills Energy did not satisfy the burden of proof imposed upon utilities by § 005.07.

[1] The Public Advocate also assigns that the district court erred in determining that a rebuttable presumption of validity applied to the actions of the Commission and in holding that the burden of proof with respect to affiliate transaction costs rested with the Public Advocate. However, we decline to consider this assignment of error because it is not argued in the Public Advocate's brief. See *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011) (in order to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief of party asserting error).

STANDARD OF REVIEW

[2,3] In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record. *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Liddell-Toney v. Department of Health & Human Servs.*, 281 Neb. 532, 797 N.W.2d 28 (2011).

[4] An appellate court reviews questions of law independently of the lower court's conclusion. *Tymar v. Two Men and a Truck, supra*.

ANALYSIS

Thomas' Evidence.

[5] The Public Advocate assigns that the court and the Commission erred in considering the testimony and evidence of Thomas, a witness for Black Hills Energy. Although the Public Advocate objected to Thomas' evidence before the Commission, the Public Advocate did not raise or discuss the issue in its petition for review filed with the district court. See

Neb. Rev. Stat. § 84-917(2)(b)(vi) (Cum. Supp. 2010) (petition for review shall set forth petitioner's reasons for believing that relief should be granted). Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition. *In re Petition of Navrkal*, 270 Neb. 391, 703 N.W.2d 247 (2005). Because the issue was not presented to or passed upon by the district court and because we find no plain error, we decline to further address this assignment of error.

Burden of Proof.

The crux of the Public Advocate's appeal is that Black Hills Energy did not meet its burden of proof with respect to affiliate transactions and that such transactions should not be included in the rates charged to jurisdictional ratepayers. Thus, the Public Advocate argues that "the $7,443,996 of affiliate costs that constitute direct charges and the $19,609,402 of affiliate costs that constitute allocated charges cannot be included in rates and such amounts must not be included in [Black Hills Energy's] annual revenue requirement." Brief for appellant at 19. Black Hills Energy argues that the costs the Public Advocate complains about are technically from an affiliate but would be intercorporate common expenses. Thus, Black Hills Energy asserts that it is a cost allocation issue rather than an affiliate transaction.

[6] The Public Advocate argues that Black Hills Energy did not satisfy the burden of proof imposed by § 005.07. Section 005.07, concerning payments to affiliates, states:

> The jurisdictional utility has the burden to demonstrate that any cost[s] paid to an affiliate for any goods or services are prudent. The jurisdictional utility has the burden to demonstrate all of the following before any amount paid to an affiliate either, as a capital cost or an expense, is included in rates . . . :

> 005.07A Each payment is prudently incurred for each item or class of items at the time incurred.
>
> 005.07B The costs charged by an affiliate reasonably approximate the market value of service to it.

In determining whether expenses are prudently incurred, the test is whether they are costs which a reasonable utility or jurisdictional entity would have made in good faith under the same circumstances at the relevant point in time. See *K N Energy v. Cities of Alliance & Oshkosh*, 266 Neb. 882, 670 N.W.2d 319 (2003).

[7-9] Our inquiry under the operative standard of review is whether competent evidence supports the district court's decision. An appellate court, in reviewing a district court judgment for errors appearing on the record, under the Administrative Procedure Act, will not substitute its factual findings for those of the district court when competent evidence supports those findings. *Intralot, Inc. v. Nebraska Dept. of Rev.*, 276 Neb. 708, 757 N.W.2d 182 (2008). Competent evidence means evidence that tends to establish the fact in issue. *Shepherd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011). The Public Advocate asserted during oral argument that whether Black Hills Energy's evidence met the burden of proof under § 005.07 presented a question of law, which we would review de novo. But the evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it. *Banks v. Housing Auth. of City of Omaha*, 281 Neb. 67, 795 N.W.2d 632 (2011).

Black Hills Energy's evidence, taken as a whole, sufficiently showed that payments made to affiliates were prudently incurred and that the costs charged by affiliates reasonably approximated the market value. The evidence established that when the Commission approved the transfer of Aquila's assets to Black Hills Energy, it directed BHC to keep Black Hills Energy as a separate subsidiary. Because Black Hills Energy is a separate entity, Black Hills Service Company and Black Hills Utility Holdings are its affiliates. These companies provide support services to Black Hills Energy and other affiliates, and

the centralization of such support services saves money and avoids duplication of employees and systems.

The Commission directed Black Hills Service Company and Black Hills Utility Holdings to allocate costs to Black Hills Energy in accordance with the CAM's on file. And the allocation of costs under Aquila's corporate structure—which had been approved by the Commission—was similar to the allocation of costs to Black Hills Energy. The service agreements that Black Hills Energy had with Black Hills Service Company and Black Hills Utility Holdings require that the support services be provided to Black Hills Energy "at cost." Black Hills Energy's evidence established that a return is not built into the costs charged, that the allocations are based on actual costs, and that Black Hills Energy evaluates whether costs from an affiliate are less than or equal to the costs of obtaining goods or services from an unregulated third party. Further, there was a consistency in costs charged under both Aquila and Black Hills Energy. In addition, Petersen provided general testimony that the costs incurred from affiliate transactions seemed reasonable based on comparisons to data of other companies. And Patterson testified that BHC conducts compensation surveys and market reviews to try to approximate the average market rate for jobs. We find that the record contains substantial evidence to support the decision of the district court.

CONCLUSION

We conclude that the district court's order conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. In other words, we find no error appearing on the record. Accordingly, we affirm.

AFFIRMED.