2017 OK 107

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

HONORABLE SODY CLEMENTS, an Individual and Oklahoma Resident on behalf of herself and others similarly situated; LT. GENERAL (Ret.) RICHARD A. BURPEE, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; JAMES PROCTOR, an Individual and Kansas Resident on behalf of himself and others similarly situated; RODD A. MOESEL, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; RAY H. POTTS, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; BOB A. RICKS, an Individual and Oklahoma resident on behalf of himself and others similarly situated, Appellants/Applicants vs. SOUTHWESTERN BELL TELEPHONE d/b/a AT&T OKLAHOMA; STATE ex rel. OKLAHOMA CORPORATION COMMISSION, Appellees.	No. 115,334 **FOR OFFICIAL PUBLICATION**

APPEAL FROM THE OKLAHOMA CORPORATION COMMISSION

(Rec'd Dec. 19, 2017)

¶0 Appellants appeal from the Oklahoma Corporation Commission's summary dismissal of their Application to reopen an Order entered in 1989 by the Oklahoma Corporation Commission.

AFFIRMED

Russell J. Walker, Oklahoma City, Oklahoma, For Appellant.

Andrew J. Waldron, Oklahoma City, Oklahoma, For Appellant.

Curtis M. Long, Tulsa, Oklahoma, For Southwestern Bell Telephone Company d/b/a AT&T Oklahoma, Appellee.

Clyde A. Muchmore, Oklahoma City, Oklahoma, For Southwestern Bell Telephone Company d/b/a AT&T Oklahoma, Appellee.

Richard C. Ford, Oklahoma City, Oklahoma, For Southwestern Bell Telephone Company d/b/a AT&T Oklahoma, Appellee.

Melanie Wilson Rughani, Oklahoma City, Oklahoma, For Southwestern Bell Telephone Company d/b/a AT&T Oklahoma, Appellee.

Robert J. Campbell, Jr., Oklahoma City, Oklahoma, For State ex rel. Oklahoma Corporation Commission, Appellee.

Michael J. Hunter, Attorney General, Oklahoma City, Oklahoma, for State ex rel. Oklahoma Corporation Commission, Appellee.

Abby Dillsaver, Assistant Attorney General, Oklahoma City, Oklahoma, For Southwestern Bell Telephone Company d/b/a AT&T Oklahoma, Appellee [sic].

Dara M. Derryberry, Assistant Attorney General, Oklahoma City, Oklahoma, For Southwestern Bell Telephone Company d/b/a AT&T Oklahoma, Appellee [sic].

OPINION

WATT, J.:

¶1 Appellants[1] ("Customers") request this Court to reverse the Oklahoma Corporation Commission's

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[1] Application to Vacate or Modify Order 341630 and Redetermine Issues, Cause PUD [sic] No. 201500344, filed September 14, 2015, Corporation Commission of the State of Oklahoma, by Applicants, Honorable Sody Clements, an Individual and Oklahoma Resident on behalf of herself and others similarly situated; Lt. General (Ret.) Richard a. [sic] Burpee, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; James Proctor, an Individual and Kansas Resident on behalf of himself and others similarly situated; Rodd A. Moesel, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; Ray H. Potts, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; Bob A. Ricks, an Individual and Oklahoma Resident on behalf of himself and others similarly situated.

("Commission") Order Dismissing Cause[2] and to remand the underlying application to the Commission for a full hearing. Appellants are a group of six different individuals who were customers of the Defendant, Southwestern Bell Telephone d/b/a AT&T Oklahoma ("SWBT") during the periods of time relevant to the underlying proceeding.[3]

¶2 Customers appeal from the Commission's dismissal of their "Application to Vacate or Modify Order 341630 and Redetermine Issues."[4]. In their Application, Customers requested the Commission vacate or modify Order No. 341630 entered September 20, 1989 in Cause No. PUD 260, ("1989 Order") ***over 28 years ago*** and reconsider certain issues raised therein. Customers urged the subject Order was tainted when entered because one Oklahoma Corporation Commissioner, Robert E. Hopkins ("Hopkins") accepted a bribe in exchange for his vote to approve the 1989 Order.

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[2] Order Dismissing Cause, September 7, 2016, Before the Corporation Commission of Oklahoma, Cause No. PUD 201500344, Order No. 655899.

[3] Various motions have been filed by parties and interested parties to this litigation as follows: Appellants' Motion for Evidentiary Hearing and Discovery Pursuant to Oklahoma Constitution, Article 9, Section 22, Appellee Southwestern Bell Telephone Company d/b/s [sic] AT&T Oklahoma's Motion to Strike Extraneous Items from Appellate Record, and Application of Commissioner Bob Anthony, Pro se, to File Amicus Curiae Brief. These motions will not be issued a separate Order as all issues are resolved by this Opinion.

[4] Application to Vacate or Modify Order 341630 and Redetermine Issues, September 14, 2015, Before the Corporation Commission of Oklahoma, Cause No. PUD 201500344.

¶3 SWBT filed a Motion to Dismiss asking the Commission to summarily dismiss Customers' application. SWBT argued that Customers lacked any legal basis for the requested relief as this matter had been reconsidered and reaffirmed by the Commission on at least two separate times and presented multiple times to this Court.

¶4 The two issues before this Court with respect to the Commission's Order Dismissing Cause are simply: (1) whether the Commission acted within its authority, and (2) whether the findings and conclusions reflected in this Order are supported by the law and substantial evidence? We answer both questions affirmatively and uphold the decision by the Commission.

STANDARD OF REVIEW

¶5 Any person aggrieved by any action or order by the Commission "affecting the rates, charges, services, practices, rules or regulations of public utilities," may appeal the decision. Any such appeal ***shall be*** to the Oklahoma Supreme Court only. Okla. Const. art. IX, § 20. Under the state Constitution, Customers are entitled to a limited the decision. Any such appeal ***shall be*** to the Oklahoma Supreme Court only. [sic] Okla. Const. art. IX, § 20. [sic] Under the state Constitution, Customers are entitled to a limited *judicial* review to determine "whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence." *Id.*

FACTS AND PROCEDURAL HISTORY

¶6 Customers filed their Application on September 14, 2015, asking the Commission to vacate or modify PUD 260 ***entered in 1989*** in order "to redress the proven bribery and corruption perpetrated by Southwestern Bell Telephone Company [SWBT] that occurred in 1989 in relation to Oklahoma Corporation Commission's . . . Cause No. PUD (Public Utility Docket) 860000260 ("PUD 260")."[6] More than twenty-six (26) years ago, the then acting public utility division director for the Commission, [sic] initiated PUD 260 to determine how SWBT should distribute or utilize SWBT's surplus cash created by federal corporate tax reforms. Two of the three Commissioners approved the 1989 Order wherein it was determined that SWBT surplus revenue should not be refunded to its ratepayers. The 1989 Order outlined how SWBT was to use these funds which included converting multi-party lines to single-party service, updating a number of the SWBT's central offices as well as other provisions. Commissioner Anthony ("Anthony") did not vote in favor of the 1989 Order.

¶7 The 1989 Order was appealed to this Court urging that the Commission's Order was not supported by sufficient evidence and urged the surplus created by the tax changes should be treated as an overcharge under 17 O.S. 1981, § 121 and therefore required a refund

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[6] Application to Vacate or Modify Order 341630 and Redetermine Issues, before the Corporation Commission of Oklahoma, Cause No. PUD 201500344. This Application related to the issuance of the 1989 Order in Cause PUD 260 matters arising from Cause PUD 260, culminating in the 1989 Order.

to ratepayers. *Henry v. Southwestern Bell Telephone Co.*, 1991 OK 134, 825 P.2d 1305. We held that the surplus funds were solely created by federal tax changes and not as a result of an overcharge by SWBT and thus "§ 121 affords no authority for requiring the refund sought by AARP and the State." *Id.* ¶11, 825 P.2d at 1311. Although portions of the 1989 Order were remanded back to the Commission for further proceedings, we affirmed the order in part as discussed herein.

¶8 Commissioner Hopkins ("Hopkins"), [sic] was one of the two commissioners who voted in favor of the 1989 Order. Several years after the adoption of this Order, the public learned that Hopkins had accepted a bribe in exchange for assuring his favorable vote to the 1989 Order. Hopkins was indicted in 1993 and then later convicted for his criminal act.[7] Anthony announced in 1992 that he had been secretly acting as an investigator and informant in an ongoing FBI investigation concerning the conduct of his fellow commissioners and of SWBT. *Southwestern Bell Telephone Co. v. Oklahoma Corp. Comm.*, 1994 OK 38, ¶2, 873 P.2d 1001, 1003.

¶9 Following Hopkins' conviction, in March 1997, Anthony, *pro se*, filed a document titled "Suggestion to

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[7] See, *United States v. Hopkins*, 77 F.3d (1996), unpublished decision; Robert E. "Bob" Hopkins was convicted for accepting a bribe while serving as a commissioner on the Oklahoma Corporation Commission. Hopkins was tried jointly with co-defendant William Anderson, an attorney who represented Southwestern Bell in Corporation Commission matters. Mr. Anderson was charged with paying the bribe.

the Court," advising this Court of the criminal misconduct of Hopkins and asked this Court to recall its mandate issued in *Henry v. Southwestern Bell Telephone Co.*, 1991 OK 134, 825 P.2d 1305. This Court issued an Order wherein we concluded that the document filed by Anthony "[did] not invoke either the appellate or original jurisdiction of the Supreme Court."[8]

¶10 After this Court's Order, this matter was next considered on remand to the Commission in light of Hopkins accepting a bribe. On remand in 1997, the Commission issued an Order, ("Cause 260 Remand Order") and held that "rehearing of the entire cause [by the Commission] is neither warranted nor in the public interest. . . . [and t]here is no benefit to reopening a ten-year old case."[9] The Commission also noted that this Court had already finally determined that the surplus monies were not overcharges under 17 O.S. 1981 § 121, thus, ratepayers were not entitled to a refund as a matter of law. The Commission also noted that the evidence contained in PUD 260 reflected that the 1989 Order reflected "a position originally proposed by Staff and there was no showing of wrongdoing on behalf of Staff."[10] The Commission concluded that the matter

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[8] Order, May 19, 1997, *State of Oklahoma ex rel., Robert Henry, Attorney General, and the American Association of Retired Persons, Appellants v. Southwestern Bell Telephone Company, Appellees/Cross-Appellant, and The Oklahoma Corporation Commission*, In the Supreme Court of Oklahoma, No. 74,194.

[9] Record on Appeal, pps. 2229-2230, Cause 260 Remand Order at 8-9, ¶ 7.

[10] Record on Appeal, pps. 22229 [sic]-2230, Cause 260 Remand Order at 8-9, ¶ 7.

should be closed in its entirety. ***The Cause 260 Remand Order was not appealed.***

¶11 In January 2010, Anthony again filed a "Suggestion for *Sua Sponte* Recall of Mandate, Vacation of Opinion, and Remand of Cause to the Oklahoma Corporation Commission for Want of Appellate Jurisdiction with Brief in Support of Suggested Actions."[11] This Court noted that Anthony's "Suggestion for *Sua Sponte* Recall" was "substantially similar to the 'Suggestion' filed by Commissioner Anthony on March 27, 1997."[12] We noted in this Order that Anthony had "failed to advance any new factual or legal argument which would require a different result."[13] We also found that the 2010 "Suggestion" was barred by issue and claim preclusion.

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[11] *State of Oklahoma ex rel., Robert Henry, Attorney General, and the American Association of Retired Persons, Appellants v. Southwestern Bell Telephone Company, Appellees/Cross-Appellant, and The Oklahoma Corporation Commission*, In the Supreme Court of Oklahoma, No. 74,194.

[12] *State of Oklahoma ex rel., Robert Henry, Attorney General, and the American Association of Retired Persons, Appellants v. Southwestern Bell Telephone Company, Appellees/Cross-Appellant, and The Oklahoma Corporation Commission*, In the Supreme Court of Oklahoma, No. 74,194.

[13] *State of Oklahoma ex rel., Robert Henry, Attorney General, and the American Association of Retired Persons, Appellants v. Southwestern Bell Telephone Company, Appellees/Cross-Appellant, and The Oklahoma Corporation Commission*, In the Supreme Court of Oklahoma, No. 74,194.

LEGAL ANALYSIS

¶12 The Commission's Order granting SWBT's Motion to Dismiss the Customers' application must be upheld if: (1) the Commission has "regularly pursued its authority,"[14] and (2) the findings and conclusions of the Commission are sustained by the law and substantial evidence.[15] We find that the Commission acted within its authority in hearing and granting this Motion to Dismiss.[16] We also find the Commission's Order is supported by overwhelming evidence and law.

¶13 The Order from which Customers appeal contains ***nineteen pages*** meticulously outlining the long and protracted history of PUD 260, the 1989 Order and the crime committed by Hopkins. Anthony's tireless dissent to the 1989 Order is also well documented as are his repeated efforts to overturn it. The Commission carefully noted that prior to the adoption of the 1989 Order, the issues in PUD 260 were heard by a Hearing Officer based on testimony from Commission Staff and other evidence. The Hearing Officer issued a report that with few exceptions, was then incorporated into and became the 1989 Order.[17] Although Hopkins was found to have accepted a bribe in connection with the 1989 Order, there was no finding at anytime that the

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[14] Okla. Const. art. IX, §20

[15] Okla. Const. art. IX, §20

[16] Okla. Const. art. IX, §20

[17] Record on Appeal, pps. 1507-1525, Cause No. PUD 2015000344 [sic], Order No. 655899, Order Dismissing Cause, September 7, 2016, p. 1509.

Hearing Officer or Commission staff ever engaged in any wrongdoing.

¶14 The Order Dismissing Cause also discussed in detail the Cause 260 Remand Order from 1997, noting that in 1997, the Commission found it had no jurisdiction over the Cause 260 Order and that rehearing was unwarranted and not in the public interest. The Commission also determined that it had no jurisdiction to modify or amend the issues that had already been affirmed by the Oklahoma Supreme Court, ie. that the surplus funds held by SWBT were not an overcharge within the meaning of 17 O.S. §121 and therefore ratepayers were not entitled to a mandatory refund.[18] In reviewing this 1997 history, the Commission stated in its Order Dismissing Cause:

> 28. The Cause 260 Remand Order, entered in 1997, provided closure to the 260 Cause, ordering "that the entire cause should not be reopened and that no further hearings, proceedings or orders are necessary with respect to this Cause." (citation omitted) This order was approved ***almost five years after the revelation of the bribery – and by two new Commissioners***.[19]

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[18] Record on Appeal, pps. 1507-1525, Cause No. PUD 2015000344 [sic], Order No. 655899, Order Dismissing Cause, September 7, 2016, p. 1516.

[19] Record on Appeal, pps. 1507-1525, Cause No. PUD 2015000344 [sic], Order No. 655899, Order Dismissing Cause, September 7, 2016, p. 1516.

¶15 Customers urged that the dismissal of their application to reopen and vacate the 1989 Order involves a *constitutional* violation and thus requires a higher standard of review requiring this Court to "exercise its own independent judgment as to both the law and the facts." Okla. Const. art. IX, §20. We find Customers' assertion without merit. But even so, a full review and consideration of all facts in this matter and the law leads us to the same result.

¶16 The Commission is created by Article IX of our state Constitution and consists of three members elected by the people at a general election. A concurrence by a majority is required to exercise the authority of the state to "supervise, regulate and control public service corporations, and to that end it has been clothed with legislative, executive and judicial powers." *Southwestern Bell Telephone Co. v. Corp. Comm.*, 1994 OK 38, ¶5, 873 P.2d 1001, 1004.

¶17 The issues raised by Customers have already been considered on two separate occasions and ***the majority of the Commissioners*** concluded each time that it had no [sic] the 1989 matter. The Oklahoma Constitution granted the authority to the ***concurrence*** of Commissioners. Such decision shall stand if supported by the law and substantial evidence, both of which we find are satisfied in the matter before us.

¶18 Furthermore, issue preclusion bars this Court from reconsidering matters already litigated. We previously determined in *Henry*, *supra.* that ratepayers were not entitled as a matter of law to a mandatory

refund of the surplus money held by SWBT created from federal tax changes. Customers sought a refund in its Application, the same relief previously denied by the Commission and this Court. This issue has long ago been decided and as such is barred for redetermination as a matter of law. *State of Okla. ex rel. Dep't of Transp. v. Little*, 2004 OK 74, 100 P.3d 707, *Nealis v. Baird*, 1999 OK 98, 996 P.2d 458.

¶19 By our state Constitutional directive, this Court is bound to uphold the findings and conclusion of the Commission where they are "sustained by the law and substantial evidence." Okla. Const. art. IX. §20. We find the Commission's Order Dismissing Cause contains overwhelming evidence and legal authority supporting its Order. The Order Dismissing Cause, Order No. 655899 is hereby affirmed.

**AFFIRMED: ORDER 655899,
BEFORE THE CORPORATION
COMMISSION OF OKLAHOMA**

Kauger, Watt, Winchester, Edmondson, Colbert, Reif, Wyrick, JJ. – Concur
Gurich, V.C.J. – Concur by reason of *stare decisis*
Combs, C.J. – Dissent.

2017 OK 107

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

HONORABLE SODY CLEMENTS, an Individual and Oklahoma Resident on behalf of herself and others similarly situated; LT. GENERAL (Ret.) RICHARD A. BURPEE, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; JAMES PROCTOR, an Individual and Kansas Resident on behalf of himself and others similarly situated; RODD A. MOESEL, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; RAY H. POTTS, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; BOB A. RICKS, an Individual and Oklahoma resident on behalf of himself and others similarly situated, Appellants/Applicants vs. SOUTHWESTERN BELL TELEPHONE d/b/a AT&T OKLAHOMA; STATE ex rel. OKLAHOMA CORPORATION COMMISSION, Appellees.	)	No. 115,334

ORDER REVISING OPINION

(Filed Dec. 20, 2017)

The Court's opinion, filed herein on December 19, 2017 is **revised** to correct the numbering of footnotes beginning at page 5 to read as follows:

> Footnote 6 should be renumbered to footnote 5, and the numbering of all sequential footnotes that follow are likewise renumbered accordingly.
>
> In all other respects, the December 19, 2017 opinion shall remain unchanged.

DONE BY ORDER OF THE SUPREME COURT THIS 20TH DAY OF DECEMBER, 2017.

/s/ Douglas Combs
CHIEF JUSTICE

2017 OK 107

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

HONORABLE SODY CLEMENTS, an Individual and Oklahoma Resident on behalf of herself and others similarly situated; LT. GENERAL (Ret.) RICHARD A. BURPEE, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; JAMES PROCTOR, an Individual and Kansas Resident on behalf of himself and others similarly situated; RODD A. MOESEL, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; RAY H. POTTS, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; BOB A. RICKS, an Individual and Oklahoma resident on behalf of himself and others similarly situated, Appellants/Applicants vs. SOUTHWESTERN BELL TELEPHONE d/b/a AT&T OKLAHOMA; STATE ex rel. OKLAHOMA CORPORATION COMMISSION, Appellees.	No. 115,334

ORDER REVISING OPINION

(Filed Dec. 20, 2017)

The Court's opinion, filed herein on December 19, 2017 is **revised** to correct computer formatting errors as follows:

> (1) the following text at the top of Page 5 is to be **deleted** as duplicate text from the preceding page – "*the decision. Any such appeal **shall** be to the Oklahoma Supreme Court only. Okla. Const. art. IX, §20. Under the state Constitution, Customers are entitled to a limited*"
>
> (2) the following sentence is to be **inserted** on page 11, to become the last line on page 11 - "*authority to grant the requested relief and it was not in the public's interest to reopen*". With corrections the full sentence will read as follows: "The issues raised by Customers have already been considered on two separate occasions and ***the majority of the Commissioners*** concluded each time that it had no authority to grant the requested relief and it was not in the public's interest to reopen the 1989 matter".

Another "Order Revising Opinion" has been filed correcting a footnote numbering issue. In all other respects, the December 19, 2017 opinion shall remain unchanged.

DONE BY ORDER OF THE SUPREME COURT THIS 20TH DAY OF DECEMBER, 2017.

/s/ Douglas Combs
CHIEF JUSTICE

2017 OK 107

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

HONORABLE SODY CLEMENTS, an Individual and Oklahoma Resident on behalf of herself and others similarly situated; LT. GENERAL (Ret.) RICHARD A. BURPEE, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; JAMES PROCTOR, an Individual and Kansas Resident on behalf of himself and others similarly situated; RODD A. MOESEL, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; RAY H. POTTS, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; BOB A. RICKS, an Individual and Oklahoma resident on behalf of himself and others similarly situated,

Appellants/Applicants

vs.

SOUTHWESTERN BELL TELEPHONE d/b/a AT&T OKLAHOMA; STATE ex rel. OKLAHOMA CORPORATION COMMISSION,

Appellees.

No. 115,334

ORDER REVISING OPINION

(Filed Jan. 4, 2018)

The Court's opinion, filed herein on December 19, 2017 is **revised** to correct the following entries of appearances listed on page 2 as follows:

The listing of Michael J. Hunter, Attorney General, Oklahoma City, Oklahoma is to be omitted;

The listing for Abby Dillsaver is corrected to read - Abby Dillsaver, General Counsel for the Attorney General of the State of Oklahoma, Mike Hunter;

The listing for Dara M. Derryberry is corrected to read - Dara M. Derryberry, Deputy Attorney General for the Attorney General of the State of Oklahoma, Mike Hunter;

The following name is added - Jared B. Haines, Assistant Attorney General for the Attorney General of the State of Oklahoma, Mike Hunter.

Two previous orders have been filed with revisions, in all other respects, the December 19, 2017 opinion shall remain unchanged.

DONE BY ORDER OF THE SUPREME COURT THIS 4TH DAY OF JANUARY, 2018.

/s/ Norma Gurich
VICE CHIEF JUSTICE

BEFORE THE CORPORATION
COMMISSION OF OKLAHOMA

<table>
<tr><td>APPLICANTS: HONORABLE SODY CLEMENTS, an Individual and Oklahoma Resident on behalf of herself and others similarly situated; LT. GENERAL (Ret.) RICHARD A. BURPEE, an individual and Oklahoma Resident on behalf of himself and others similarly situated; JAMES PROCTOR, an Individual and Kansas Resident on behalf of himself and others similarly situated; RODD A. MOESEL, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; RAY H. POTTS, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; BOB A. RICKS, an Individual and Oklahoma Resident on behalf of himself and others similarly situated.

RELIEF SOUGHT: VACATE OR MODIFY OKLAHOMA CORPORATION COMMISSION ORDER NO. 341630 CAUSE NO. PUD 260; AND REDETERMINE ISSUES FOLLOWING INTRINSIC FRAUD</td><td>)</td><td>CAUSE NO. PUD 201500344

ORDER NO. 655899</td></tr>
</table>

HEARING:

November 3, 2015, in Courtroom 301
2101 North Lincoln Boulevard, Oklahoma City, Oklahoma 73105

Before the Oklahoma Corporation Commission *en banc*

APPEARANCES:

Curtis M. Long and John W. Gray, Jr., Attorneys *representing* Southwestern Bell Telephone Company d/b/a AT&T Oklahoma

Russell J. Walker and Andrew J. Waldron, Attorneys *representing* Applicants

Michael L. Velez, Assistant General Counsel, *representing* the Public Utility Division, Oklahoma Corporation Commission

Abby Dillsaver and Dara M. Derryberry Assistant Attorneys General *representing* the Office of Attorney General, State of Oklahoma

ORDER DISMISSING CAUSE

The Corporation Commission of Oklahoma ("**Commission**") being regularly in session and the undersigned Commissioners being present and participating, there comes on for consideration and action the *Motion to Dismiss of Southwestern Bell Telephone Company d/b/a AT&T Oklahoma* and the *Attorney General's Motion to Dismiss*, both filed October 2, 2015, in this Cause ("**Motions**"). The Motions seek to dismiss Applicants' *Application to Vacate or Modify Oklahoma Commission Order No. 341630 Cause No. PUD 260; and Redetermine Issues following Intrinsic Fraud*, filed September 14, 2015 ("**Application**").

On November 3, 2015, the Commission *en banc* heard the Motions. After hearing arguments by counsel

to the Motions, the Commission took the matter under advisement.[1]

BACKGROUND

As set forth in both the Application and the Motions, this Cause relates to matters arising from Cause No. PUD 860000260, *In the Matter of the Application of Howard W. Motley, Jr., for an Inquiry into the Effect of the 1986 Tax Reform Act on Oklahoma Utilities*, filed on October 23, 1986 ("**Cause 260**"). Specifically, the instant Application seeks to vacate or modify Order No. 341630, *Order Regarding Rates of Southwestern Bell Telephone Company*, entered on September 20, 1989 ("**Cause 260 Order**"). As a result of the extensive history surrounding these matters and the applicability to the arguments set forth in the Motions, a summary of pertinent actions is discussed below:[2]

1. Cause 260 was filed by the public utility division director ("**Staff**") to determine the effect of a reduction in the federal corporate income tax on Oklahoma utilities, including Southwestern Bell Telephone Company ("**SWBT**").

2. Recognizing that time constraints would prevent Staff from completing its investigation and audit

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[1] Also on this date, hearings were set before the Commission *en banc* on SWBT's and the AG's *Motions for Initial Screening Conference*. The Commission took no action on these matters.

[2] The Commission does not attempt to address the entirety of the procedural histories of this and related actions, and takes administrative notice of the referenced documents.

in Cause 260 due to the number of utilities being investigated, Staff and SWBT entered into a Stipulation on June 23, 1987 to establish the applicable effective date of a rate reduction in the event the Commission ultimately determined a rate reduction was warranted. Also on this date, the Commission entered Order No. 313853 in Cause 260, wherein the Commission adopted the Stipulation ("**Cause 260 Stipulation**").[3] *See* Cause 260 Stipulation, attached as Ex. 10 to Application.

3. The Cause 260 Stipulation provided, *inter alia*, that:

> In order to allow the full benefits of the 1986 Tax Reform Act to accrue to the benefit of [SWBT]'s customers, [SWBT] and Staff agree that if the Commission, after hearing, ultimately determines a rate reduction is appropriate for [SWBT], taking into account all ***known and measurable changes*** in [SWBT]'s business, that said reduction will be effective as of July 1, 1987.[4]
>
> *   *   *
>
> It is further agreed that in any further negotiation or proceeding, other than any proceeding involving the honoring, enforcement, or construction of this Stipulation, the parties

[3] As corrected by Order No. 314277, *Order Nunc Pro Tunc*, entered July 7, 1987.

[4] The effective date of the Tax Reform Act of 1986.

> shall not be bound or prejudiced by this Stipulation.

Id. at Att. A, ¶¶ 4 and 6. (emphasis added)

4. On January 25, 1989, Staff filed Cause No. PUD 890000662, *In the Matter of the Application of Howard W. Motley, Jr., for an Inquiry into the Rates and Charges of SWBT* ("**Cause 662**"). Cause 662 was filed to review the rates and charges of SWBT. In filing this rate case, Staff recognized the need to address certain issues the Commission had previously indicated in General Cause No. 29321 ("**Cause 29321**") needed to be reviewed, in addition to other issues the parties were not prepared to address in Cause 260.

5. With respect to SWBT, the hearing in Cause 260 was remanded to a Hearing Officer. Although originally set for hearing on December 7, 1987, the hearing did not occur until over two years later. Ultimately, the matter was heard before the Hearing Officer on January 26, 27, 30 and February 3, 1989, and the *Report of Hearing Officer* was issued on June 2, 1989.

6. On September 20, 1989, the Commission entered the Cause 260 Order that, with few exceptions, generally agreed with the recommendation of the Hearing Officer adopting Staff's recommendations.[5]

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[5] As corrected by Order No. 341820, *Order Nunc Pro Tunc Concerning SWBT Rate Order 341630*, entered September 27, 1989. Commissioners Hopkins and Townsend voted in favor of the Cause 260 Order. A *Dissenting Opinion of Chairman Bob Anthony to Order No. 341630* was also filed on September 27, 1989 ("**Cause 260 Order Dissent**") – stating that "on principal, I

7. The Cause 260 Order found the Tax Reform Act of 1986 reduced the federal corporate income tax rate from 46% to 34% and caused SWBT to accumulate approximately $31 million in surplus cash between January 1, 1987 and September 30, 1989.[6] *See State ex rel. Henry v. Southwestern Bell Telephone Co.*, 1991 OK 134, ¶ 5, 825 P.2d 1035, 1309. The Commission also determined that ***SWBT's excess revenues stemming from the 1986 tax reforms should not be refunded to ratepayers, but instead be used for upgrading service***, specifically to convert multi-party line areas to single-party service and to modernize SWBT's central offices. *See id.* at ¶ 6, 825 P.2d at 1309.

8. The Commission further found, *inter alia*, that:

> *Staff appropriately considered* ***known and measurable changes*** *in [SWBT]'s business operations in Oklahoma.* This Cause was established to determine the effects of the lowering of the corporate income tax rate on the respondents, including [SWBT]. Corporate income tax rates are calculated after revenues and expenses are taken into account. Since revenues and expenses do not remain static, ***Staff appropriately considered known***

believe some or all of the overcharge should be refunded to the broad base of telephone customers. Also, I feel a larger total amount could have been determined." Cause 260 Order Dissent, included in Ex. 9 attached to Application.

[6] The effective date was prior to the issuance of the Cause 260 Order under the terms of the Cause 260 Stipulation.

and measurable changes pursuant to the [Cause 260 Stipulation].

Cause 260 Order at 4, attached as Ex. 9 to Application. (emphasis added)

9. In response to the Cause 260 Order, the AG filed a *Motion for Modification of Order Number 341630* and the American Association of Retired Persons ("**AARP**") filed a *Motion for Reconsideration and to Stay and Abate Effect of Order* ("**Cause 260 Motions**"). Among other issues raised in these motions was the assertion that the Commission erred by ordering SWBT to make central office upgrades and party-line elimination instead of ordering cash refunds.

10. On October 19, 1989, the Commission entered Order No. 342343, *Order Regarding Motions for Modification, Reconsideration and to Stay and Abate Order Number 341630* ("**Cause 260 Order on Motions**"), which denied the Cause 260 Motions.[7] Specifically addressing the rate design in the form of service

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[7] However, the Cause 260 Order on Motions did amend the Cause 260 Order specific to interest rate. This order amended the rate of interest applied to the revenue excess from July 1, 1987 to October 1, 1989 from 8.21% to 11.589%. Commissioner Anthony concurred with the decision of the majority to increase the interest rate, but dissented from the remainder of the order based on his prior dissent in the Cause 260 Order, stating he believed "some or all of the excess revenues should be refunded to the broad base of telephone customers." *Separate Opinion of Chairman Bob Anthony*, attached to Cause 260 Order, attached as Ex. 6 to Application.

and central office improvements, the Commission found:

> The record is replete with evidence of the impossibility of identifying the customers to whom any revenue excess would be owed, as well as establishing on any equitable basis the amounts owed.
>
> More importantly, as a matter of policy, this Cause presents a unique opportunity to accomplish service and central office upgrades ***in a manner which eliminates any adverse impact on basic exchange rates and any burden on ratepayers***. When the upgrade required by this Commission is completed, the state of Oklahoma will have one of the most modern, up-to-date telephone systems in the Southwest. Modern forms of communication will be available to residences, and large and small businesses in the exchanges which are upgraded.

Cause 260 Order on Motions at 4-5, attached as Ex. 6 to Application. (emphasis added)

11. Further, in the Cause 260 Order on Motions, the Commission noted the unrebutted evidence of the Staff supported its ordering of the service improvement program. *See id.* at 5.

12. On April 19, 1991, the Commission entered Order No. 356271, *Interim Order*, in Cause 662 ("**Cause 662 Interim Order**"). The Cause 662 Interim Order was entered in response to the AG's *Motion to Place SWBT's Rates Subject to Refund and to Compel*

Discovery. The AG sought, *inter alia*, SWBT's rates be subject to refund pending completion of Cause 662 based on his assertion SWBT was generating excessive earnings. The Cause 662 Interim Order determined that the rate of return would be the sole manner to ascertain whether SWBT was overearning – and, if SWBT's rate of return exceeded the rate established by the Commission in the amount of 11.41 percent, SWBT's rates would be subject to refund with interest, limited to a date certain.[8] The Commission found the Interim Order shall remain in effect until December 31, 1991, or until the Commission issued a final order, whichever occurred first – unless otherwise extended after notice and hearing.[9] *See* Interim Order at 4-5.

The Commission rejected arguments by SWBT that its actions would result in retroactive ratemaking. Specifically, the Commission found as follows:

> The Commission ***does not propose to actually change any rates, retroactively, at the time of the final hearing on the merits***

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[8] The Cause 662 Interim Order adopted the *Report of the ALJ*, which recognized the impacts the Cause 260 Order would have on SWBT's rates ultimately determined in Cause 662 (*see Interim Order* at Att. A, p. 6). Further, the Commission addressed the impact of Cause 260 concerning the accumulated depreciation reserve imbalance. *See Interim Order* at 4.

[9] The Commission subsequently extended the Cause 662 Interim Order on three occasions. *See* Order Nos. 362281, 364631, and 367460. Order 367460 extended the prior interim orders until the earlier date of September 4, 1992, or the date a final order issued in Cause 662. The Commission entered the Cause 662 Order on August 26, 1992, which superseded the Interim Order(s). *See* Cause 662 Order at 224, Section L.

> ***of [Cause 662]***. Instead, the Commission intends to look only at the earnings level of SWBT and determine whether or not the earnings of SWBT exceed 11.41 percent return on equity ***for the period that the earnings are subject to refund***. The Commission is very aware that if the Commission were to change the rates of SWBT at this time . . . SWBT could suffer a shortfall of revenues. In view of the fact that the Commission could not then allow the shortfall to be made up with future rates because that would be retroactive ratemaking, SWBT would never be able to recover those lost revenues. It seems absurd to suggest that although the Commission could reduce rates on an interim basis, the Commission lacks the authority to take action which will provide protection to SWBT during this interim period.

Id. (emphasis added)

13. In October 1989, the Cause 260 Order was appealed to the Oklahoma Supreme Court by SWBT, the AG, and AARP. *See* Supreme Court Case No. 74,194 ("**Henry Appeal**"). *State ex rel. Henry v. Southwestern Bell Telephone Co.*, 1991 OK 134, 825 P.2d 1305, affirmed the Cause 260 Order in part, reversed in part, and remanded four issues on evidentiary grounds to the Commission for further proceedings.[10] Issues remanded back to the Commission included ratemaking treatment of severance pay expense, cash working

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[10] The *Henry* decision was decided December 24, 1991, modified March 2, 1992, and mandate issued March 26, 1992.

capital and depreciation reserve deficiency, and the identification of the specific central offices that would be upgraded with the reinvestment ordered by the Commission. *See id.* at ¶ 1, 825 P.2d at 1307. ***Not*** reversed or remanded to the Commission was the decision to apply surplus funds to upgrade services. *See id.*

14. The Supreme Court rejected arguments asserted by the AG and AARP that the surplus funds should be refunded to ratepayers pursuant to 17 O.S. 1981 § 121. Recognizing that the rates charged by SWBT during the period in question were authorized by the Commission and that the surplus cash in question did *not* result in charges in excess of the lawful rate, the Court explained:

> Inasmuch as [SWBT]'s accumulation of surplus funds is attributed solely to a decrease in the federal corporate income tax rate, this money was not obtained by overcharging ratepayers. *Neither may the Commission's finding regarding the federal tax law's effect upon [SWBT] be regarded as a declaration* ***that a different rate should have been charged.*** In short, § 121 affords no authority for requiring the refund sought by AARP and the State.

Henry, 1991 OK 134 at ¶ 11, 825 P.2d at 1311. (footnote omitted; emphasis added)

15. In light of its determination that SWBT need not refund its surplus cash to ratepayers, the Supreme Court then found the Commission did *not* err by directing SWBT's use of those funds to upgrade telephone service. The Court stated:

> The record leaves no doubt that the Commission viewed [SWBT]'s accumulation of surplus revenue as presenting a 'unique opportunity to accomplish service and central office upgrades in a manner which eliminates any adverse impact on basic exchange rates and any burden on ratepayers.' ***The Commission's decision in this regard was hence one of 'policy,' and this court is not free to disturb that ruling if it is supported by 'substantial evidence.'***
>
> The Commission's efforts to replace multiparty lines with single-party connections are complemented by the 'impossibility of identifying specific ratepayers' who would be entitled to a refund. Indeed, it would be inequitable to distribute funds based on some artificial formula that lacks a relation to the ratepayers' entitlement. ***In any event, there can be no doubt that the service improvements ordered by the Commission are inherently beneficial and supported by substantial evidence.*** On this record we are not free to block the Commission from pursuing its 'goal of universal service by implementing this [improvement program].'

Id. at ¶¶ 14-15, 825 P.2d at 1311. (footnotes omitted; emphasis added)

16. In evaluating the issues on appeal, the Supreme Court specifically reviewed the Commission's finding that "Staff appropriately considered [other] known and measurable changes in SWB[T]'s business operations in Oklahoma." *Id.* at ¶ 5, 825 P.2d at 1309.

The Supreme Court further acknowledged the Cause 260 Stipulation, wherein the Commission would take into account "all known and measurable changes" in SWBT's business in determining whether a rate reduction would be warranted. *Id.* at ¶ 2, 825 P.2d at 1308. The Court noted the "Commission expressly found the terms of the [Cause 260 Stipulation] to be 'fair, reasonable and equitable.'" *Id.* at n.7. The Court rejected AARP's assertion that the Commission erred by including known and measurable changes in SWBT's business operations, stating that:

> [U]nder the facts in this case it would be inherently unfair of the Commission to consider the surplus income in total separation or isolation of other utility needs. . . . The scope of the Commission's inquiry was sound from legal, accounting and economic points of view. We hence conclude that the Commission did not abuse its discretion by considering evidence of changes in SWB[T]'s business operations in conjunction with its inquiry's original stated purpose.

Id. at ¶¶ 20-21, 825 P.2d at 1314.

17. On August 26, 1992, a new Commission (Commissioners Anthony, Watts and Apple) unanimously entered Order No. 367868, *Order of the Commission*, in Cause 662 ("**Cause 662 Order**"). After issuing the initial Interim Order (*see* discussion, *supra*, n.9), the Commission entered a final rate order – which directed SWBT refund approximately $148 million to its Oklahoma ratepayers and reduce its Oklahoma

rates by approximately $92.7 million annually. The order further directed SWBT to invest $84 million in its statewide network modernization during the next five years.

Among other issues, the Cause 662 Order specifically took into account the 260 Cause and the *Henry* decision.[11] *See* Cause 662 Order at 219, Section I. The Commission found:

> [T]he record should not be reopened in [Cause 662] to consider the issues remanded from [Cause 260], but instead we direct Staff to schedule a hearing concerning the remanded issues as quickly as schedules permit, in order to protect SWBT.
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> * * *
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> The pending [Cause 662] is an entirely different proceeding, . . . the Court's opinion which remanded certain portions of a previous Order on evidentiary grounds, does *not* mandate any specific legal result in the pending Cause.

Cause 662 Order at 220-221. (emphasis added)

18. In clarifying the interplay between the Cause 662 Interim Order and Cause 260, the Commission explained:

> The Commission *has* ***not sought to retroactively adjust SWBT's authorized rates due to any mistake in the [Cause 260***

[11] At the time of the Cause 662 Order, the remanded issues had not yet been addressed by the Commission.

> ***Order]***, or any other previous orders. The [Cause 662 Interim Order], placing SWBT's earnings subject to refund, insures that ***prospectively***, from the date of that Order, SWBT's ratepayers are not deprived of rate reductions due to regulatory lag.

Id. at 231. (emphasis added)

19. Beginning on September 24, 1992, the Cause 662 Order was appealed to the Supreme Court by numerous parties ("**Cause 662 Appeals**").[12]

20. On October 2, 1992, subsequent to the *Henry* mandate, Commissioner Anthony announced that "for four years he had been secretly acting as an investigator and informant in an ongoing FBI investigation concerning the conduct of his fellow commissioners and employees and representatives of [SWBT]." *Southwestern Bell Telephone Co. v. Okla. Corp. Comm'n*, 1994 OK 38, ¶ 2, 873 P.2d 1001, 1003. The investigation uncovered that Bill Anderson, a private outside attorney retained by SWBT, had bribed Commissioner Hopkins to vote for the Cause 260 Order. Both Anderson and Hopkins were indicted, tried, convicted, and sent to prison. *See Judgments in a Criminal Case* and *Superseding Indictment*, attached as Exs. 1-2 to Application.

21. On October 30, 1995, the Commission entered Order No. 396704, *Settlement Order*, in Cause 662 ("**Cause 662 Settlement Order**").[13] This order

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[12] *See* Oklahoma Supreme Court Case Nos. 80,333, 80,334, 80,340, 80,342, and 80,345.

[13] Commissioners Graves and Apple – who were not in office at the time of the Cause 260 Order – voted in favor of the Cause

resulted from the parties reaching a settlement in the Cause 662 Appeals and to fully resolve Cause 662 and the remanded issues in Cause 29321. The Commission adopted the settlement, which superseded certain orders in Cause 662 and vacated all other orders to the extent that any provisions of those orders had not been implemented previously or were not implemented pursuant to the adopted Settlement Agreement.[14] The Cause 662 Settlement Order was approved over three

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662 Settlement Order. A *Concurring Opinion of Commissioner Bob Anthony* was issued, wherein he noted the "basic validity and legal soundness of the Commission's original [Cause 662 Order] is the reason the customers of SWBT will finally receive the economic benefits they deserve." Commissioner Anthony further stated, "the final outcome of this settlement agreement is the best that can be done at this time to be fair and equitable to the utility and its customers. The Commission's original [Cause 662 Order] was fair, just, and reasonable, and basically, so is this settlement." *See* Concurring Opinion, attached to Cause 662 Settlement Order.

[14] The settlement was comprised of numerous benefits, including an $84.4 million annual SWBT revenue reduction; a one-time cash payment in the amount of $170 million to SWBT's customers; vouchers to SWBT's customers in an approximate amount of $268 million; various educational and community and economic development benefits in an approximate amount of $35 million; a commitment by SWBT not to increase its local exchange access line rates before January 1, 1998; the accelerated modernization of SWBT's Oklahoma infrastructure; the enhancement of universal service by implementing a Lifeline service plan; a substantial reduction in SWBT's Touch-Tone rates; the elimination by SWBT of mileage charges associated with local exchange services; a substantial reduction in SWBT's switched intrastate access charges to long distance providers; and *the end of protracted proceedings between the parties concerning Cause 29321 and Cause 662*. *See* Settlement Agreement, attached as Ex. A to Cause 662 Settlement Order.

years after the revelation of the bribery – and by two new Commissioners.

22. On March 27, 1997, Commissioner Anthony, pro se, filed a *Suggestion to the Court* with the Oklahoma Supreme Court in the *Henry* Appeal ("**Suggestion**"). In this filing, he sought the Supreme Court recall its mandate in *Henry* and "address a vitiating infirmity in the [Cause 260 Order]. Suggestion at 1. The Suggestion asserted Okla. Const., art. IX, § 18a required a quorum for issuance of an order, that Hopkins was one of the only two commissioners who signed the Cause 260 Order, that the bribed vote was invalid, and therefore the Cause 260 Order was not constitutionally adopted and therefore judicially defective. *Id.* at 1-2.

23. On May 19, 1997, the Supreme Court entered its *Order* in the *Henry* Appeal concerning the Suggestion, stating it "does not invoke either the appellate or original jurisdiction of the Supreme Court." Order at 2.

24. On May 28, 1997, the Commission entered Order No. 412680, *Order Directing Administrative Law Judge to Conduct Hearing*, in Cause 260 directing the ALJ to immediately conduct such hearing(s) as may be necessary, to examine the record and resolve the issues remanded to the Commission by the Supreme Court in the *Henry* decision.

25. On June 26, 1997, the Commission entered Order No. 413667, *Order on Remand*, in Cause 260 ("**Cause 260 Remand Order**"). The Cause 260 Remand Order addressed the four issues remanded to the Commission by the Supreme Court (severance pay,

cash working capital, central office upgrades, and reserve depreciation deficiency). Based upon additional evidence introduced and the withdrawal by SWBT of its appeal regarding severance pay and cash working capital, it was determined the remanded issues were moot or otherwise resolved, and the entire record should not be reopened and the case closed.

26. In the Cause 260 Remand Order, the Commission – for the first time had an opportunity, **which it took** – to address the issues asserted in the Suggestion.[15] The Commission found it had no jurisdiction over the Cause 260 Order and that rehearing of Cause 260 was unwarranted and not in the public interest. Specifically, the Cause 260 Remand Order found, pursuant to *Turpen v. Oklahoma Corp. Comm'n*, 1988 OK 126, 769 P.2d 1309, that "the Commission has no jurisdiction to modify or amend the issues affirmed by the Supreme Court, because more than 30 days have elapsed since the Commission issued its final order in 1989 and the Commission lacks permission from the Oklahoma Supreme Court to rehear the entire cause." Cause 260 Remand Order at p. 8, ¶ 6. The Commission further found:

> [R]ehearing of the entire cause is neither warranted ***nor in the public interest***. . . . There is no benefit to reopening a ten-year old case.

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[15] Commissioners Graves and Apple – who were not in office at the time of the Cause 260 Order – voted in favor of the Cause 260 Remand Order, with Commissioner Anthony dissenting. *See also Concurring Opinion of Vice-Chairman Bob Anthony* attached to Order No. 412680, with Suggestion attached thereto.

> The upgrades were funded by customer-supplied capital and were excluded from SWBT's rate base. It could be argued that if such amount were now to be refunded, the costs of the upgrades would then become a part of SWBT's rate base, assuming that is possible in light of the [Cause 662 Settlement Order]. In light of the new world of deregulation, none of this probably makes any difference, in any event. In addition, a review of Commissioner Anthony's dissents filed in this cause indicate that his main area of dissent is based upon the very question for which Commission Hopkins was convicted for accepting a bribe. Commissioner Anthony's dissenting opinions to [the Cause 260 Order and Cause 260 Order on Motions] wanted a refund to the telephone customers rather than an upgrade to facilities. The Supreme Court specifically found that these funds were not "over charges" as contemplated by 17 O.S. § 121, but were the result of authorized rates, and, therefore, the ratepayers were not entitled to a refund. The Commission's decision had the effect of supporting the provision of Universal Service, the bribery conviction was for a vote to do something that was in the Commission's discretion and the vote adopted a position originally proposed by Staff and there was no showing of wrongdoing on behalf of Staff. Therefore, this Cause should be closed in its entirety.

Cause 260 Remand Order at 8-9, ¶ 7. (emphasis added)

27. The Cause 260 Remand Order, entered in 1997, provided closure to the 260 Cause, ordering "that

the entire cause should not be reopened and that no further hearings, proceedings or orders are necessary with respect to this Cause." *Id.* at 10. This order was approved almost five years after the revelation of the bribery – and by two new Commissioners.

28. On January 25, 2010, Commissioner Anthony filed a *Suggestion for Sua Sponte Recall of Mandate* in the *Henry* Appeal ("**Suggestion 2**"). The Supreme Court issued an *Order* on February 8, 2010, stating "this [Suggestion 2] is substantially similar to the 'Suggestion' filed by Commissioner Anthony on March 27, 1997. . . . Commissioner Anthony has failed to advance any new factual or legal argument which would require a different result." Order at 1. The Order further noted the [Suggestion 2] did not invoke the appellate or original jurisdiction of the Court and the proceeding was barred by issue and claim preclusion.[16] *Id.* at 2.

29. On June 25, 2014, an *Application to Assume Original Jurisdiction, Bill of Review and Petition for Writ of Mandamus with Brief in Support* was filed with the Oklahoma Supreme Court by two of the applicants in the instant Cause ("**2014 Petition**").[17] *See* Oklahoma Supreme Court Case No. 112,973. The 2014 Petition sought "to redress the proven bribery

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[16] Supreme Court review of appealable Commission orders are *judicial*. *See* Okla. Const., art. IX, § 20.

[17] Applicants Honorable S. Clements and Lt. General (Ret.) R. Burpee filed as petitioners acting on their own behalves and others similarly situated. In the 2014 Petition, these petitioners sought the matter be certified as a class action.

and corruption that occurred in 1989 in relation to [Cause 260]." 2014 Petition at 1. Additionally, petitioners stated they "present the needed evidence and legal basis required to . . . remedy the *intrinsic fraud* utilized by SBTC to obtain ill-begotten orders and judgments from the OCC and also this Court." *Id.* at 3. (emphasis added)

In support of seeking original jurisdiction of the Supreme Court, petitioners asserted:

> [N]o judgment has ever been entered finding that the "bribed" [Cause 260 Order] is unconstitutional for the reason that, excluding the bribed vote of Commissioner Hopkins, the [Cause 260] Order lacks the approval of a majority of the OCC Commissioners as is required by the Oklahoma Constitution. . . . Under Oklahoma law, the simple fact is that no valid and untainted Order has ever been entered ultimately deciding [Cause 260].

Id. at 4 (citing Okla. Const., art. IX, Section 18(a) and *Oklahoma Company v. O'Neil*, 1967 OK 105, 431 P.2d 445, *Marshall v. Amos*, 1968 OK 86, 442 P.2d 500, and *Johnson v. Johnson*, 1967 OK 16, 424 P.2d 414).

Petitioners, recognizing the *Henry* mandate, agreed the Commission *lacked "the authority to 'recall mandate' and 'vacate' the Opinion of the Oklahoma Supreme Court." Id.* at 5. (emphasis added). Accordingly, petitioners sought the Supreme Court grant a Bill of Review to grant its requested relief. Petitioners further asserted that when the Cause 260 Order was appealed,

the *Henry* decision was without any knowledge of the Hopkins bribery. *See id.*

In requesting a Writ of Mandamus, petitioners sought the Court direct the Commission to "vacate its [Cause 260 Order] . . . , and that it reconsider the issues which were determined therein" in addition to awarding attorneys' fees and costs. *Id.* at 6.

30. On September 8, 2014, after affording the parties oral presentation, the Supreme Court denied the 2014 Petition.

31. On September 9, 2015, Applicants filed Cause 344.[18] The Application "seeks to redress the proven bribery and corruption perpetrated by [SBTC] that occurred in 1989 in relation to [Cause 260]." Application at 1.

In support of its Application, Applicants assert:

> [N]o judgment has ever been entered finding that the "bribed" [Cause 260 Order] is unconstitutional for the reason that excluding the bribed vote of Commissioner Hopkins, the [Cause 260] Order lacks the approval of a majority of the OCC Commissioners as is required by the Oklahoma Constitution.
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> * * *
>
> The simple fact is that no valid and untainted Order has ever been entered either ultimately:

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[18] Applicants are comprised of a group of individuals acting on their own behalves and others similarly situated as in the 2014 Petition, however, do not seek certification of a class action.

> (1) deciding [Cause 260] or (2) enforcing the parties' agreed [Cause 260 Stipulation].

Id. at 4 (citing Okla. Const., art. IX, Section 18(a), *O'Neil*, *Amos*, and *Johnson*).

In filing Cause 344, Applicants request the Commission vacate or modify "its ('bribed') [Cause 260 Order], and determine (without bribery) the matters raised by [Cause 260]" and award attorneys' fees and costs. *Id.* at 11.[19]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As demonstrated by the history surrounding this Cause, the Commission is being asked to remedy the actions taken by Corporation Commissioner Hopkins occurring over two decades ago. First and foremost, the Commission emphatically denounces the improper and intolerable actions which ultimately resulted in criminal convictions, and is aware of its Constitutional power and authority to correct abuses by the companies it regulates. *See* Okla. Const., art. IX, § 18. Accordingly, this request is not taken lightly, and takes into

[19] Applicants specifically seek "to vacate or modify Section III, Part K of the [Cause 260 Order] determining the 'Excess Revenues' as being $7,847,172 for 1989, and each year thereafter, and also, Section IV, setting forth the Commission's determination on how the revenue excess should be used." Application at 10, Section IV. Additionally, Applicants argue "the Commission's 'unbribed' determination of the Excess Revenues for 1989 and each year thereafter should be based on the 'complete test year' and 'actual data' used in its [Cause 662 Order]." *Id.* at 10-11.

account its duty to serve the public interest. Upon due consideration of the matters presented in the Application, the Motions, and the arguments of counsel, the Commission finds and concludes as follows:

1. The Oklahoma Supreme Court has unequivocally recognized the difference between judicial and legislative processes as follows:

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or **past facts** and ***under laws supposed to already exist***. That is its purpose and end. Legislation, on the other hand, looks to the ***future*** and changes existing conditions by making a new rule, ***to be applied thereafter*** to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial in kind. . . .
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> Proceedings legislative in nature are not proceedings in a court, . . . no matter what may be the general or dominant character of the body in which they may take place. . . . That question depends not upon the character of the body, but upon the character of the proceedings. . . . And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. ***But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision***

> ***lead up. . . . The nature of the final act determines the nature of the previous inquiry.*** As the judge is bound to declare the law, he must know or discover the facts that establish the law. So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the question considered might be the same that would arise in the trial of a case.

Southwestern Bell Telephone Co. v. Oklahoma Corp. Comm'n, 1994 OK 38, ¶¶ 10-11, 873 P.2d 1005, 1005 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 211 (1908), 29 S.Ct. 67, 53 L.Ed. 150 (1908)).

2. "It is universally recognized that the fixing of rate schedules for public utilities is a legislative process, and that a public service regulatory body acts in a legislative capacity in approving rate schedules. It necessarily follows that a rate order is a legislative enactment and not a judgment of a Court." *Wiley v. Oklahoma Natural Gas Co.*, 1967 OK 152, ¶ 3, 429 P.2d 957. (citations omitted)

3. The Oklahoma Supreme Court determined Cause 260 to be a legislative proceeding. *See Southwestern Bell Telephone Co.*, 1994 OK at ¶ 16, 873 P.2d at 1007 (finding Cause 260 to be "inarguably legislative in nature.") Such treatment dictates the Cause 260 Order to be a legislative enactment rather than a judgment of a Court. *See Wiley*, 1967 OK 152 at ¶ 3, 429 P.2d at 957. Cause 344 is also legislative – as the act being determined results from the underlying

legislative Cause 260 Order. *See id.*, 1994 OK at ¶¶ 10-11, 873 P.2d at 1005.

As a result, the heightened rights argued by Applicants to be applicable to this Cause do not exist. As the Supreme Court recognized in *Cox Oklahoma Telecom, LLC v. Oklahoma Corp. Comm'n*, 2007 OK 55, 164 P.3d 150:

> In *Southwestern Bell Telephone Co.*, the court held that utility companies have no right to an unbiased decision-maker in a ratemaking proceeding. In *Wiley*, we held that the legislative decision-making process in a ratemaking proceeding is not subject to due process attack based on an allegation that the Commission had been wrongfully influenced to approve rate increases by contributions and favors from a lobbyist. The court has on several occasions held that due process notice and hearing requirements are not applicable to a legislative proceeding such as ratemaking.

Id. at n.26. (citations omitted)

4. Because the Commission finds that both Cause 260 and Cause 344 are legislative in nature – and the Oklahoma courts have concluded on several occasions that the res judicata doctrine[20] is inapplicable to a legislative action by this Commission, Applicants are not barred under res judicata from seeking the requested relief in this new Application. *See e.g.*,

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[20] Res judicata refers to the doctrines of issue and claim preclusion.

Chicago, Rock Island & Pacific R.R. Co. v. State et al., 1950 OK 297, ¶ 21, 225 P.2d 363, 368 (the doctrine of res judicata is not recognized in legislative proceedings before the Corporation Commission); *Phillips v. Snug Harbor Water and Gas Co.*, 1979 OK CIV APP 24, ¶ 6, 596 P. 2d 1273, 1275 (questioning applicability of doctrine of res judicata in legislative action of Corporation Commission and citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 4 (1966) for proposition that Corporation Commission rate order was legislative in nature and therefore not res judicata); *Community Natural Gas Co. v. Corporation Commission et al., Lone Star Gas Co. v. Same*, 1938 OK 51, ¶ 15, 76 P. 2d 393, 398 ("Ordinarily, the rule of res judicata applies only to judicial proceedings. As we pointed out in the Prentis Case . . . the findings of fact and rules of law announced in a legislative proceeding cannot be res judicata upon the issue subject to the scrutiny of a court in judicial review.")

5. Similarly, Applicants rely upon intrinsic fraud as the basis to grant their requested relief, which is likewise inapplicable to legislative proceedings. *See e.g.*, *Leck v. Continental Oil Co.*,1989 OK 173, ¶21, 800 P.2d 224, 229 (recognizing the applicability of intrinsic fraud in an "actual adversary trial", thus applicable to a Commission oil and gas *judicial* proceeding). *See also Southwestern Bell Telephone Co.*, 1994 OK at ¶ 17, 873 P.2d at 1007 (holding a writ of mandamus was improper in a legislative proceeding, and further explaining "[n]either is prohibition a proper remedy to reach an act which is legislative in nature. Prohibition will

only lie where an inferior court or officer is acting in a judicial capacity exercising judicial or quasi-judicial power not granted by law or making an unauthorized or excessive application of judicial force."); *id.* at ¶ 7, 873 P.2d at 1004 (recognizing the appropriateness of the Commission entering its orders by order nunc pro tunc when performing in a *judicial* capacity).

Notwithstanding the above, Applicants argue the Cause 260 Order "was obtained by means of *intrinsic fraud*, that being, the *bribery of one of the Commissioners*." Application at 10, Section IV. (emphasis added) The Commission finds that both the Supreme Court and the Commission have been made aware of this very fact and have had opportunities to take into consideration the bribery of Commissioner Hopkins and grant similar relief being requested in this Cause. In each instance, the Supreme Court and the Commission chose not to grant this relief. *See* discussion, *supra*, ¶¶ 22-23 and 26-30.

6. Although Applicants seek to apply judicial processes to a legislative matter, Applicants cannot change the legislative characteristic of this proceeding into a judicial proceeding. As a result, authorities relied upon by Applicants asserting judicial processes (*see e.g.*, *O'Neil*, *Amos*, *Johnson*, [sic]) are inapplicable to this proceeding.[21]

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[21] The Commission is sensitive to Applicants' concerns. In *Southwestern Bell Telephone Co.*, Justice Opala, in his dissenting opinion, clearly addressed the interplay between judicial and legislative proceedings – which this case hinges upon. If adopted by

the majority, arguably this Cause would dictate a different result. *See id.* at Dissent. As pronounced by Justice Opala:

> *The Court is clearly in error when it pronounces today that because the Commission's function of a public utility ratemaking is 'legislative', it goes unshielded by any form of due process*. . . . The court's analysis . . . ignores a near-century of the most recent growth in the body of this Nation's constitutional law. That case law unequivocally teaches that ratemaking for application to a single public utility is clothed *with due process safeguards. Among those safeguards is the right to a neutral decisionmaker*.
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> While the concept of ratemaking as a legislative function has not been disturbed by the American constitutional order, *post-Prentis jurisprudence has superimposed upon its framework a host of due process protections. Participation by a neutral and detached decisionmaker is one of several essential elements of due process which has been applied to individual ratemaking*.
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> * * *
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> The administrative process of American law distinguishes between *rulemaking* and *adjudication*. A "rule" is the product of administrative *legislation*. Rulemaking process is hence the administrative counterpart of legislative lawmaking. In contrast, an "order" is the product of administrative *adjudication*. Adjudicative process is the administrative equivalent of a court's judicature.
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> In sum, rules are agency directives of *general applicability* which are designed to *apply across the board to all regulated entities*. Ratemaking, although historically termed nonadjudicative, generally calls for *particularized applicability and trial-type hearings*. With the post-Prentis march of due process, today's *individual ratemaking – gradually* transformed for conformity to the adjudicative process – no longer fits under the

7. Moreover, even if the Commission could find it should proceed with the merits in this Cause and deny the Motions, Applicants fail to recognize the Commission is still without authority to grant their requested relief.

The Cause 260 Stipulation specifically states parties shall not be bound or prejudiced by the stipulation in future proceedings – except to honor, enforce, or construe the stipulation. *See* discussion, *supra*, ¶ 3. Applicants assert the Cause 260 Stipulation affords the

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> *general rubric of lawmaking* (*or rulemaking*). The present-day acceptance of individual ratemaking as "adjudication" or as "on-the-record rulemaking" is but current recognition – by *both* the federal and state administrative law systems – that ratemaking of particularized applicability has indeed become *sui generis* – *a genre* of legislation that bears procedural characteristics which implicate due process. The essence of business profitability, the extent of capital investment, and the return rate for each utility, are *elements of proof*, all of which call for *a different analysis* and for a different fact finding process (for individual ratemaking) from that of ordinary general ratemaking. *It is for this reason that individual ratemaking inquiry must be surrounded with the full panoply of due process guarantees*.
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> * * *
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> *One of the integral elements of due process is an individual's right to be heard by a neutral and detached decisionmaker. That element is not constitutionally reserved for exclusive application to adjudicative proceedings. The neutrality mandate extends not only to judges but also to agency decisionmakers.*

Id. at ¶¶ 2, 8-9, 12, 873 P.2d at 1010-1016. (emphasis in original; references omitted)

Commission the ability in this new proceeding to grant their requested relief. *See* Application at 4 (arguing no valid and untainted order has ever been entered ultimately enforcing the [Cause 260 Stipulation]) Additionally, Applicants claim it "is because of [the Cause 260 Stipulation] that SBTC owes customers the 'excess revenues' as 'ultimately determined' by the OCC, with interest, from July 1, 1987 *to the present*." *See* Application at n.6. (emphasis added) and discussion, *supra*, ¶ 31.

The terms of the Cause 260 Stipulation did allow SWBT's excess revenues (ultimately determined to be approximately $31 million) to be effective July 1, 1987. *See* discussion, *supra*, ¶¶ 2-3. However, as discussed in *Henry* – and later recognized in the Cause 260 Remand Order voted affirmatively by two subsequent Commissioners, Cause 260 addressed the rates charged by SWBT for a specific period in question. "The rates charged by SWB[T] *during the period in question* (January 1, 1987 to September 20, 1989) clearly were authorized by the Commission." *Henry*, 1991 OK at ¶ 11, 825 P.2d at 1311. (emphasis added)

In order for this Commission to have the ability to consider Applicants' requested relief, the terms of the Cause 260 Stipulation would have to remain unsatisfied. This simply is not the case. This stipulation required the Commission to take into account all known and measurable changes in SWBT's business. *See* discussion, *supra*, ¶ 3. In the Cause 260 Order, the Commission addressed such known and measurable changes, and specifically found that Staff

appropriately considered this information pursuant to the Cause 260 Stipulation. *See id.* at ¶8. Most importantly, the Oklahoma Supreme Court examined – and rejected – assertions by AARP that the Commission erred by including known and measurable changes in SWBT's business operations when it determined a rate reduction was warranted. In examining this issue, the Supreme Court acknowledged the Cause 260 Stipulation and the fact the Commission found its terms to be fair, reasonable, and equitable. *See id.* at ¶ 16.

The *Henry* decision did not disturb the Commission's findings that SWBT had accumulated approximately $31 million in surplus cash stemming from the 1986 Tax Reform Act, or that Staff appropriately considered known and measurable changes to SWBT's business when assessing the appropriateness of a rate reduction. Accordingly, the Commission properly considered the terms of the Cause 260 Stipulation, and no further obligations, duties, and/or rights exist under the stipulation to be enforced. The Cause 260 Remand Order was never appealed, and became final and unappealable by operation of law thirty days after its issuance under *Turpen*. *See Turpen*, 1988 OK 126, ¶ 20, 769 P.2d 1309,1318 (in discussing the difference between motions to modify a Commission order from that of a district court, the Court explained "Commission orders automatically become final after 30 days. Once an order has become final, *its vacation is beyond that agency's power*.") (emphasis added)

Because the Cause 260 Stipulation was fully satisfied, Applicants' efforts to bring a new proceeding to circumvent the legislative nature of these proceedings and turn this action into a judicial proceeding – by addressing past facts under the laws in existence during the Cause 260 Cause, simply cannot stand. *See Southwestern Bell Telephone Co.* 1994 OK 38 at ¶¶ 10-11, 873 P.2d at 1005. To allow such treatment would result in prohibited retroactive ratemaking and inappropriately subject this *legislative* case to continuous review and impermissible collateral attack.

8. Applicants further seek this Commission address *past facts* and now use the "complete test year" and "actual data" used in the Cause 662 Order to modify the Cause 260 Order. *See* discussion, *supra*, n.19. Howe ver [sic], the Commission specifically addressed the interrelation of Cause 260 and the Cause 662 Order. *See* discussion, *supra*, ¶¶ 17-18. The Cause 662 Order unequivocally addressed Cause 260, and the Commission specifically found the matters to be separate proceedings and provided for specific treatment therein. The Cause 662 Order was finally resolved pursuant to the Cause 662 Settlement Order. *See* discussion, *supra*, ¶ 21. Moreover, the Cause 662 Settlement Order was never appealed, and became final and unappealable by operation of law thirty days after its issuance under *Turpen*. *See Turpen*, 1988 OK 126 at ¶ 76, 769 P.2d at 1332 ("The focus of ratemaking is on whether proposed rates are just and reasonable, not on accounting for mistakes in past rate cases."); *see also S.W. Pub. Serv. Co. v. State*, 1981 OK 136, 637 P.2d 92

(where Commission attempted to account for mistakes in past ratemaking in the setting of future rates, it was engaging in prohibited retroactive ratemaking).

The Commission, through both the Remand Order (June 1997) and the Cause 662 Settlement Order (October 1995), made significant ratemaking decisions affecting SWBT after it was aware of the bribery. In both instances, the Commission took into account SWBT's actions in making its decisions. The Commission made decisions it deemed best to serve the public interest and struck a balance in rendering these decisions based upon the public interest and remedies provided by law.

9. Cause 344 is a separate proceeding. Accordingly, the Commission must apply the law in effect at the time *this* cause was commenced. *See* Okla. Const., art. 5, §§ 52 and 54. In light of deregulation by the legislature, as acknowledged by the Commission in the Cause 260 Remand Order, the Commission cannot grant the relief requested by Applicants. *See* discussion, *supra*, ¶ 26.

10. Throughout the entirety of proceedings related to the Cause 260 Order, an overriding issue has been overlooked by Applicants. Consistently, the Commission has found upgrading service and modernizing SWBT's central offices – as opposed to ordering a refund – to be in the public interest. *See* discussion, *supra*, ¶¶ 10-11, 15 and 26. The Supreme Court likewise recognized there was no doubt the service improvements were inherently beneficial. *See Henry*

1991 OK 134 at ¶ 15, 825 P.2d at 1312. Citing the Cause 260 Order, the Supreme Court pointed out the following Commission findings, which were *not* challenged on appeal:

> Upgrading multi-party service to single-party service will directly benefit approximately 54,000 Oklahoma customers who now have multi-party service. The Commission notes that the public comments submitted to this Commission overwhelmingly favored the proposed upgrade programs. All ratepayers will benefit indirectly from these programs. As the Staff explained in its testimony, and as explained in the Report of the Hearing Officer, the capital improvement plan proposed by the Staff avoids the borrowing costs and other costs that would normally be associated with such an upgrade. Such borrowing costs would normally be permissible and recoverable by SWBT as costs of service. By avoiding such costs, rates are kept lower for all Oklahoma ratepayers.

Id. at n.27.

The Court further acknowledged the Cause 260 Order, which explained that:

> One of the most important goals espoused consistently over the years by this Commission has been the goal of universal service. Inherent in this goal is not only bringing affordable telephone service to the greatest number of people, but also providing the highest quality service available. This Commission

> has had a long-standing service improvement program, but due to financial constraints, it has not been possible to implement such a program in a relatively short time frame.

Id. at n.25.

Despite recognizing the *Henry* decision did not legally require a refund of the excess revenues, Applicants ask for the Commission to ignore this fact and nevertheless order a refund because "it is appropriate in this circumstance." Application at 11. *See also*, discussion, *supra*, ¶ 31. Applicants' request completely ignores the fact the Commission, taking into account the facts and circumstances highlighted in this Application – still believed it to be in the public interest to use the excess revenues to modernize the SWBT network in Oklahoma. *See id.* at ¶ 26.

11. In the 2014 Petition, petitioners acknowledged – due to the *Henry* mandate, the Commission *did not have authority to recall its mandate and vacate* the *Henry* decision. *See* discussion, *supra*, ¶ 29. Accordingly, the Supreme Court was asked to grant a Bill of Review, which the Court declined – despite being made aware of the Hopkins bribery. *See id.* at ¶ 30.

Here, Applicants acknowledge the Cause 260 Order was affirmed, however similarly assert that when the Cause 260 Order was appealed – the *Henry* decision was without any knowledge of the Hopkins bribery. *See* Application at 4-5. Applicants argue that although the Commission is *not* required to refund the excess revenues to the ratepayers pursuant to *Henry*, it should nevertheless be ordered to do so. *Id.* at 11.

12. The law requires dismissing this action. Today's decision does not minimize the seriousness of events surrounding Cause 260, but that Cause was finally resolved by prior Commission decisions that addressed those serious events. The Commission is confident it has met its constitutional duty to the best of its ability – given the priority of serving the overall public interest.

ORDER

The Commission, consistent with the Commission's findings and conclusions above, and pursuant to OAC 165:5-9-2(e) orders as follows:

THE COMMISSION ORDERS the Application is dismissed with prejudice.

THE COMMISSION FURTHER ORDERS that all pending motions are denied and this Cause is closed in its entirety.

OKLAHOMA CORPORATION COMMISSION

DISSENTING OPINION ATTACHED
BOB ANTHONY, Chairman

/s/ Dana L. Murphy
DANA L. MURPHY, Vice Chairman

/s/ J. Todd Hiett
J. TODD HIETT, Commissioner

DONE AND PERFORMED this 7th day of September, 2016.

BY ORDER OF THE COMMISSION:

/s/ Peggy Mitchell
PEGGY MITCHELL, Secretary

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICANTS: HONORABLE SODY CLEMENTS, an Individual and Oklahoma Resident on behalf of herself and others similarly situated; LT. GENERAL (Ret.) RICHARD A. BURPEE, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; JAMES PROCTOR, an Individual and Kansas Resident on behalf of himself and others similarly situated; RODD A. MOESEL, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; RAY H. POTTS, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; BOB A. RICKS, an Individual and Oklahoma resident on behalf of himself and others similarly situated,	)	CAUSE NO. PUD 201500344
RELIEF SOUGHT: VACATE OR MODIFY OKLAHOMA CORPORATION COMMISSION ORDER NO. 341630 CAUSE NO. PUD 260; AND REDETERMINE ISSUES FOLLOWING INTRINSIC FRAUD	)	

Dissenting Opinion of
Corporation Commissioner Bob Anthony

(Filed Sep. 7, 2016)

Today's 2-1 dismissal vote prevents the six ratepayer Applicants and the federal government through the Department of Defense and the Federal Executive Agencies (DOD/FEA) from putting on their rate case. By not hearing this case, the Oklahoma Corporation Commission (OCC or Commission) forfeits an opportunity to perform its Constitutional duty "of correcting abuses" and joins AT&T in declaring to the public that "bribery wins" and "bribed votes do count" in Oklahoma. Respectfully, I dissent.

Applicants seek to correct an OCC rate order tainted by intrinsic fraud and to have the OCC exercise its constitutional ratemaking authority to follow its own order in PUD 260 that adopted a June 23, 1987 "stipulation" with Southwestern Bell Telephone Company (SWB or SWBT or Southwestern Bell).

The OCC has exclusive legislative jurisdiction to determine and prescribe public utility rates; however, today's vote denies constitutional due process and ratepayers' rights to be heard. These travesties of justice deserve Oklahoma Supreme Court judicial review. Today's dismissal is certainly not in the public interest.

In my opinion, the present Cause No. PUD 201500344 (PUD 344) is a Corporation Commission "rate case," and the case itself is legislative. In the words of *Cox v. State ex rel. Corporation Commission*, 2007 OK 55. 164

P.3d 150, "Ratemaking has been definitely labeled and treated as legislative."

This case is about money.

This case is about money, ratepayer money – how much it should be and over how many years do the excess revenues apply.

Bribery, neglect of constitutional duty, public corruption and estimates using stale data have projected excess Southwestern Bell revenues of $7.8 million annually starting with 1989. Actual audited data, an official record, and a 3-0 vote under a signed refund agreement with Southwestern Bell indicates $100.5 million annually. For decades Southwestern Bell and others have mislead the public to believe the controversy is about how much of the excess revenue pie should go to refunds or system upgrades and modernization. The real issue is, "How big is the pie?"

This case is also about allowing open, honest government in Oklahoma. Shamefully, no public comment was allowed at the Commission's "noticed" and supposedly "public" hearing on November 3, 2015. After months of delays, now the Majority stops tomorrow's public hearing before the Administrative Law Judge and makes numerous questionable Findings of Fact without ever letting the Applicants and federal government put on their case.

Overview

I join today's Majority when it apparently rejects the vociferous, coordinated "lack of jurisdiction" arguments put forth by Southwestern Bell and the Attorney General in their Motions to Dismiss. In fact, today in seven pages of Findings of Fact and Conclusions of Law by the Majority, not once is the word "jurisdiction" mentioned.

This is no surprise to me, because I received the advice and analysis reported by the law professor recently hired by the Oklahoma Corporation Commission who studied the PUD 344 and PUD 260 matters. I recall being told the position for dismissal put forth by Southwestern Bell and the Attorney General was not a valid basis upon which to dismiss the PUD 344 case.

Interestingly, Assistant Attorney General Abby Dillsaver insisted that the "jurisdiction" question had to be decided before the OCC could even consider any arguments about the merits of the application itself. And yet, having apparently decided the Commission *does* have jurisdiction, the Majority has hauled off and made numerous Findings of Fact about issues raised in the application without allowing the Applicants to argue their case!

Instead the Majority tries to find flexibility in vaguely declaring that the matter is "legislative" and that the "public interest" is somehow upheld by another victory for bribery, public corruption, and intrinsic fraud at the Oklahoma Corporation Commission. Notice the total silence of today's Commission Majority and the Order

to Dismiss on the fundamental legal issue of bribery's "repugnancy" to the Oklahoma Constitution. Numerous court cases say victims of intrinsic fraud that occurred at the Oklahoma Corporation Commission must be brought before the "forum where fraud occurred."

Commission Majority Abdicates Its Constitutional Duty to Correct Abuses

The Commission has both continuing constitutional jurisdiction and "the duty" under Article 9, Section 18 "of correcting abuses" by transmission companies. Oklahoma Supreme Court case law since the 1910s affirms the broad "power and authority" of the Commission to correct abuses. *St. Louis & S.F.R. Co. v. Lewis, et al.*, 1911 OK 113, 114 P. 702.

If bribery of a commissioner by a regulated company isn't an "abuse," I don't know what is. Hiding behind contrived legal prohibitions and proclaiming "public interest" to avoid performing a constitutional duty violates a commissioner's oath of office. In my opinion, the Commission should find that a Southwestern Bell attorney of record in Cause No. PUD 860000260 (PUD 260) bribing Commissioner Hopkins for his vote does constitute an "abuse" that must be corrected by an honest ultimate rate determination.

Ignoring "Repugnancy to the Constitution," Commission Majority injudiciously agrees with AT&T that "Bribed Votes Do Count," despite "irrefutable denial of due process"

About 50 years ago, dealing with the 1960s Corporation Commission scandal where OCC then-General Counsel Bill Anderson was taking money from a regulated utility, in *Wiley v. Oklahoma Natural Gas Company* 1967 OK 152, 429 P.2d 957 the Oklahoma Supreme Court held,

> ¶5 It is equally well settled that the judiciary cannot annul or pronounce void any act of the Legislature on any ground other than that of repugnancy to the constitution. Constitutionality of legislative acts is to be determined solely by reference to the limits imposed by the constitution. The Court may not inquire into the motives of the Legislature, as motives cannot be made a subject of judicial inquiry for the purpose of invalidating an act of the legislature. 16 Am.Jur.2d, Constitution Law, Secs. 158, 163, 169. (Emphasis added.)

In my opinion, such "repugnancy to the constitution" is not only evident when Bill Anderson, a Southwestern Bell attorney of record in PUD 260, bribes Commissioner Hopkins for his vote in the PUD 260 rate case, it is an appalling affront to honest government. Yet the Majority fails even to mention the "repugnancy" exception in *Wiley*, let alone explain why it doesn't apply. This is a fatal oversight of today's Order Dismissing Cause PUD 344 signed by the Majority.

The Oklahoma Constitution explicitly stands against bribery in Article 9, Section 40 when it states,

> No corporation organized or doing business in this State shall be permitted to influence . . . official duty by contributions of money or anything of value.

The Oklahoma Constitution again stands against bribery in Article 15, Section 1 (Oath of Office for all public officers) explicitly stating,

> . . . and that I will not, knowingly, receive, directly or indirectly, any money or other valuable thing, for the performance or nonperformance of any act or duty pertaining to my office . . .

Furthermore, a brief of the Oklahoma Attorney General filed on May 1, 1996 in PUD 260 begins,

> As set forth more fully below, the convictions of Commissioner Hopkins and [Southwestern Bell attorney of record in PUD 260] William Anderson for bribery constitute an irrefutable denial of due process in this cause. (Emphasis added.)

Commission Majority ignores fundamental points of law and denies due process

The Commission Majority appears to be under the impression that reading an application is the same thing as hearing the case. Make no mistake, by today's action the Commission Majority has refused even to hear the Applicants' case, let alone consider the relevance of

any evidence they were prepared to present or the merits of any arguments they were prepared to make.

An unbelievable denial of due process in this PUD 344 case occurs when the Majority issues its Dismissal Order thereby preventing James Proctor, the former Director of the OCC Public Utility Division, from testifying. He has firsthand and direct experience with PUD 260 stipulations and refund agreements involving numerous Oklahoma public utilities. Rather, the Majority seems happy to concoct a new theory of PUD 260 stipulations in an attempt to shut down this case without considering sworn testimony available from its own former Commission Staff. As I have raised before, including at the November 3, 2015 hearing, a fatal flaw in both the SWB and AG Motions to Dismiss is their failure to address whatsoever the PUD 260 Stipulation and its validity. Over twenty times the PUD 260 Stipulation is mentioned in the PUD 344 Application with Exhibits. The Majority Order now tries to remedy the SWB and Attorney General (AG) shortcoming by inventing the legal fiction that the Stipulation does not really mean what it says when it talks about the OCC "ultimately determines a rate reduction is appropriate" for SWB.

The Majority therefore has created its own Dismissal Order. In Section 7 on page 16 of today's order, the Majority correctly states,

> In order for this Commission to have the ability to consider Applicant's requested relief,

> the terms of the Cause 260 Stipulation would have to remain unsatisfied.

However, the Majority, without the benefit of expert testimony from witness James Proctor, goes on incorrectly to assert, "This simply is not the case." In the preceding paragraph the Majority asserted, "The terms of the Cause 260 Stipulation did allow SWBT's excess revenues (ultimately determined to be approximately $31 million) to be effective July 1, 1987." Not only has this never previously been claimed to have been the Commission's "ultimate" determination, but is the Majority really affirming that a determination made by bribery and deceit is "ultimate" and final? Shocking.

Today's order, and the Southwestern Bell and Attorney General motions filed October 2, 2015 that inspired it, seeks to dismiss totally, with prejudice, an entire public utility legislative Cause brought under a long-standing Commission Rule (OAC 165:5-17-2 Post Order Relief). This Rule allows an application " . . . filed by any person, whether or not a party of record in the original cause, [that] shall be treated as a separate cause . . . " The PUD 344 cause seeks to ultimately determine Southwestern Bell rates and protect consumer interests. It raises issues of the Commission's integrity. Because the matter addresses intrinsic fraud and public corruption at a public agency involving a regulated public utility, it deserves a fair and open hearing. Applicants cite *Moore's Federal Practice* indicating <u>motions to dismiss are viewed with disfavor and are infrequently granted</u>.

Applicants also cite *Conley v Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) indicating "dismissal of a claim is only proper if it is beyond a reasonable doubt that plaintiff could prove no set of facts in support of the claims that would entitled [sic] the plaintiff to relief." Yet the Majority fails to explain how it has determined beyond a reasonable doubt that the PUD 344 application cannot prove its claims when new applicants are bringing new facts and evidence previously unknown to the Commission and making arguments the Commission has never before considered. Moreover, PUD 344 has been brought by distinguished applicants represented by counsel that has already won refunds or credits for ratepayers in a similar case in the past.

The PUD 344 cause is a new application with several new Applicants. Collectively, the following descriptions apply: two former Commission staff members, two with law degrees, two with military service, and two Oklahoma businessmen. One is an elected official. One was the FBI Special Agent in Charge for all of Oklahoma when the FBI investigation concluded and guilty verdicts were obtained at the federal trial of Southwestern Bell attorney Bill Anderson and Commissioner Hopkins. One is the former commanding general of Tinker Air Force Base. One is the former Director of the Commission's Public Utility Division (PUD) whose staff once testified about falsified public utility legal billings by utility attorney Bill Anderson. This applicant has also formally testified or made filings for PUD in the PUD 260 and PUD 662 matters, and he finalized refunds from non-SWB companies who were original

parties to PUD 260 and had Refund Orders and/or Stipulations like Southwestern Bell. He has since submitted three sworn affidavits as an expert witness for the Applicants in this cause and is intimately familiar with the details of PUD 260 and the consequences for ratepayers of its ethical shortcomings. In short, these are prominent citizens with distinguished records of service to Oklahoma and the public; that the Majority should refuse to hear their concerns is disturbing and shameful.

By today's action, the Majority also refuses to hear the concerns of the United States Department of Defense and all other Federal Executive Agencies, whose counsel filed an Entry of Appearance just last week, citing "compelling evidence of intrinsic fraud utilized by Southwestern Bell." In his motion to the OCC, counsel says, "DOD/FEA was affirmatively injured through the aforementioned criminal activity. To date, such injury has yet to be remedied." Apparently the Majority lends no more weight to the credibility of the military and federal government than it does to the PUD 344 applicants.

In my opinion, the OCC Court Clerk file for PUD 344 and the OCC transcripts of PUD 344 hearings contain new sworn affidavits, evidence and/or indications related to a commissioner "pay off," intrinsic fraud, perjury and/or fraud on the Commission and fraud on the Oklahoma Supreme Court. There are newly unsealed deposition transcripts of Southwestern Bell officials, documents and filings conveying new information pointing to widespread wrongdoing and/or deceit, and

new (less than two years old) indications multiple Southwestern Bell attorneys or officers were involved in conspiracy and/or fraud related to PUD 260.

Also, as I've said repeatedly, the Commission can and should request an FBI Title III wiretapped conversation between SWB attorneys Bill Anderson and William J. Free recorded March 19, 1991, played as evidence in the 1994 federal bribery trial (Case No. CR-93-137-A), identified as U.S. Government Exhibit No. 211, purportedly referencing Southwestern Bell efforts to "pay off Hopkins" and quoting the SWB Oklahoma then-president as having said, "Do it and don't let me know how you do it."

Again, the preponderance of new evidence means there are new opportunities to "connect the dots" and contemplate the relationship between these new matters and those set forth in the "Government's Notice of Intent to Utilize Evidence of Other Crimes, Wrongs or Acts under Federal Rules of Evidence 404(b) and/or That Are Not 'Extrinsic' to The Crime Charged" as filed by The U. S. Justice Department on March 25, 1994 in its federal criminal case against Hopkins and Anderson (No. CR-93-137-A). These matters include Bill Anderson, as a Southwestern Bell attorney in PUD 260, making arrangements for $15,000 to each of two OCC commissioners before the PUD 260 vote. New matters and their relevancy to telephone rates, as argued by ratepayer Applicants and others in the PUD 344 rate case, deserve to be heard by the OCC.

Southwestern Bell attempts to distance itself from the wrongdoing in PUD 260 when, in its Motion to Dismiss on page 3, it states, "No employee of Southwestern Bell was ever charged with any crime." At the Supreme Court of the United States, October Term, 1994, No. 94-73 (at page 3, footnote 1), SWB Petition for Writ of Certiorari, *Southwestern Bell Telephone Company v. Oklahoma Corporation Commission*, SWB tells the Court, "For the record, Southwestern Bell's position is this: Any impropriety that may have been committed was not authorized by or attributable to it." As the Applicants propose in PUD 344, the Commission needs to assess old statements in view of new facts and new information.

The Majority appears to have fallen for this artful deception when it describes Southwestern Bell attorney of record in PUD 260 and convicted corporate bribery bagman Bill Anderson as just "a private outside attorney retained by SWBT." The implication that the bribery efforts by Southwestern Bell in PUD 260 were limited to Mr. Anderson is laughable. When facts so fundamental to the case are in dispute, dismissal of a cause is fundamentally unjustifiable and a violation of due process.

Lastly, how can the Majority recognize that the PUD 344 application is "legislative" and therefore *res judicata* doesn't apply, but still dismiss it "with prejudice"? Such a legal finding is oxymoronic.

Commission Majority believes Bribed PUD 260 Order is still good legislation; apparently dirty hands can produce unsullied utility rates.

The Majority finds:

> In the [Bribed] Cause 260 Order, the Commission addressed such known and measurable changes, and specifically found that Staff appropriately considered this information pursuant to the Cause 260 Stipulation.

Subsequently, again citing the [Bribed] Cause 260 Order, the Majority declares:

> Consistently, the Commission has found upgrading service and modernizing SWBT's central offices – as opposed to ordering a refund – to be in the public interest.

The fact that the Majority treats findings made in the Bribed Order as legitimate is highly questionable.

The Majority also imputes the Oklahoma Supreme Court:

> The Supreme Court likewise recognized there was no doubt the service improvements were inherently beneficial. *See Henry* 1991 OK 134 . . .
>
> The Court further acknowledged the [Bribed] Cause 260 Order, which explained that: One of the most important goals espoused consistently over the years by this Commission has been the goal of universal service. . . .

If a baby were stolen from the hospital, and the abductor subsequently raised the child – feeding, clothing, educating and loving it – a judge asked to determine the fitness of the abductor parent might reasonably conclude he/she had been a good parent. But such positive attributes would be deemed completely immaterial if the birth parents subsequently came forward and proved to the judge that the child had been abducted, demanding it back. No amount of good stewardship after the fact can abrogate the criminal act that removed the child from its legal guardian.

Likewise I suspect the Oklahoma Supreme Court would bristle at its 1991 *Henry* decision, made before the bribery in the PUD 260 case was publicly known, being used to legitimize findings in the Bribed PUD 260 Order.

Commission Majority also wrong to believe a Bribed Order can "ultimately determine" anything, including the rate reduction allowed for in the Stipulation.

The Oklahoma Supreme Court in its decision *State ex rel. Henry v. Southwestern Bell Telephone Co.*, 1991 OK 134, 825 P.2d 1305 at paragraph 2 addresses both PUD 260 "rates" and a June 23, 1987 PUD 260 "Stipulation" when it states,

> Staff and SWB stipulated in writing that if the Commission, after taking into account "all known and measurable changes" in SWB's business, determines a reduction in the utility's

> rates to be warranted, the reduced rates would become effective July 1, 1987, the effective date of the Tax Reform Act of 1986. The Commission approved the stipulation.[7] (Footnote: [7]The Commission expressly found the terms of the stipulation between SWB and Staff to be "fair, reasonable and equitable.") (Emphasis added.)

The Oklahoma Supreme Court in *State ex rel. Henry v. Southwestern Bell Telephone Co.* also addresses, under "The Critical Facts in Litigation" at paragraph 6(a), the annual percent interest that was supported in 1989 by all three commissioners in PUD 260 stating,

> ¶6 In accordance with these findings the Commission ordered that (a) interest is to be applied to SWB's surplus cash (or revenue excess) at the annual rate of 11.589% . . .

The ratemaking and legislative nature of PUD 260, and therefore also of PUD 344, is further indicated by the actual language of both the all-important Stipulation (sometimes called the Refund Agreement) and the Commission's June 23, 1987 Order No. 313853 (Stipulation Order) adopting the Stipulation. Paragraph 4 of the (still legally binding) Stipulation states,

> 4. In order to allow the full benefits of the 1986 Tax Reform Act to accrue to the benefit of Respondent's Oklahoma customers, Respondent and Staff agree that if the Commission, after hearing, ultimately determines a rate reduction is appropriate for Respondent, taking into account all known and measurable changes in Respondent's business, that said

> reduction will be effective as of July 1, 1987. (Emphasis added.)

The Stipulation Order includes the Stipulation as its "Attachment 'A'" and concludes,

> It is further ordered that if the Commission ultimately determines that a rate reduction is required for Respondent, Southwestern Bell Telephone Company, that said reduction shall be effective July 1, 1987. (Emphasis added.)

The Brief of the Commission Staff filed in PUD 260 on August 23, 1989 contains the subtitle "The Commission's Authority to Require a Refund is Derived from the Stipulation." The Brief of the Commission Staff states,

> The Commission has jurisdiction to require a refund of the revenues in question pursuant to the stipulation signed by Southwestern Bell on June 23, 1987. Absent the stipulation, the Commission would be unable to order a refund because Southwestern Bell was charging their authorized tariffed rates at all times in question.

Commission Staff's Responses to Appeals Concerning Southwestern Bell Telephone Company filed in PUD 260 on July 12, 1989 (p. 10) state,

> Southwestern Bell has apparently forgotten that the stipulation they signed [seven days before] June 30, 1987, stated that any rates found to be appropriate as a result of the Commission's review of this cause will be retroactive to the time of July 1, 1987. But for the

> stipulation, the Staff agrees that this would be retroactive ratemaking. However, because of the stipulation and Southwestern Bell's agreement to have the rates reduced as of July 1, 1987, the Oklahoma ratepayers should be compensated for the use of their money during the time that the refund has accrued and during such time as the refund is returned in some manner to the ratepayers of Oklahoma.

The Stipulation is the one most significant and controlling document in PUD 260. Again, over 20 times the PUD 344 Application with Exhibits references the PUD 260 Stipulation or the Commission's Stipulation Order. The Stipulation Order is the lynchpin to the Applicants' case here.

The Southwestern Bell and Attorney General Motions to Dismiss, claiming no OCC jurisdiction, fail to discuss or acknowledge even once this cornerstone of the PUD 344 Application, let alone address this legal basis of jurisdiction. Disallowing PUD 344 testimony, a hearing on the merits and Administrative Law Judge recommendations, the Majority's order demonstrates a complete failure to comprehend the infectious and defective consequences of bribery, claiming "the Cause 260 Stipulation was fully satisfied" by the determination in the Bribed Order.

To repeat, the Majority finds:

> In the [Bribed] Cause 260 Order, the Commission addressed such known and measurable changes, and specifically found that Staff

> appropriately considered this information pursuant to the Cause 260 Stipulation.

Again, how the Majority can affirm findings of the Bribed Order without reopening the record of the PUD 260 case and properly redetermining its tainted determinations is stupefying.

In my opinion, the Southwestern Bell Motion to Dismiss sets forth disputed facts or gives mischaracterizations that compromise the legitimacy of its Motion. Some of these are addressed in Applicants' Combined Response to Motions. Other examples from just the first page of the Southwestern Bell Motion occur with "the seventh time" inaccurate statement, when Southwestern Bell mischaracterizes Applicants as seeking to argue "Bell owes a refund of alleged overcharges" (instead of "excess revenues" per the Stipulation), and with Southwestern Bell claiming, "Applicants lack any legal basis for their position." On page 5, Southwestern Bell inaccurately says OCC Order No. 477436 was "unanimous" when, in fact, one of the commissioner signature lines is blank.

In point of fact, if, as the Majority claims, the Bribed Order "fully satisfied" the Stipulation and "ultimately determined" $31 million surplus cash, why did the Commission initiate another cause and issue the 3-0 order with 1989 as the test year in PUD 662?

The year 1989 was the last year Southwestern Bell's "excess revenues" were subject to a rate order determination by the Commission. But actually, Southwestern Bell's revenue requirements and "excess revenues" for

the year 1989 now have been determined twice by the Commission. PUD 260, started in 1986, determined $7.8 million of Southwestern Bell "excess revenues" for the year 1989, but the companion case PUD 662, started in 1989, determined $100.5 million of SWB "excess revenues" for the same 1989 year. In today's PUD 344 case the Applicants ask the OCC to use its rate-making jurisdiction to ultimately determine between these two "excess revenue" outcomes (or otherwise resolve the discrepancy). The $7.8 million annual amount for 1989 from the PUD 260 order came from projections, old and criticized test year data, and a bribed 2-1 vote. The $100.5 million annual amount for 1989 from the PUD 662 order followed a full on-the-record hearing of actual audited data (not estimates) and received a unanimous and constitutionally valid 3-0 vote.

Applicants have argued that applying the 11.589% annual interest to the Commission's ultimate determination of $100.5 million in excess SWB revenues for test year 1989 and beyond could yield some $16 billion for Southwestern Bell customers. It is instructive to observe the "rate refund" term used just above the signature of Assistant Attorney General Robert A. Butkin in the September 17, 1991 filing of the Attorney General in PUD 662. In my opinion, the Attorney General's PUD 662 concluding admonition using the term "rate refund" applies equally to PUD 260 at this time. It states,

> . . . the efforts of the parties should focus on quantifying the amount of that rate refund

> and prospective reduction. Bell's motion should be denied.

The "full benefits of the 1986 Tax Reform Act" involve a great deal more than a reduction of corporate tax rates from 46 percent to 34 percent. This federal legislation had over 800 pages containing numerous provisions (e.g., depreciation, accounting, amortization, and investment tax credits) that were meant to favorably impact the economy and consumers. Therefore, "taking into account all known and measurable changes in Respondent's business" is forward-looking and includes the years into the future until the Corporation Commission finally makes its ultimate determination of rates.

Majority misinterprets the relationship between PUD 260 and PUD 662

The problems, inaccuracies, mischaracterizations and, yes, injustice of deciding a case without the Corporation Commission first hearing the case is demonstrated by today's Majority trying to re-characterize the relationship between PUD 260 and PUD 662.

In section 8 on pages 16-17 of its Findings of Fact and Conclusions of Law, the Majority states:

> However, the Commission specifically addressed the interrelation of Cause 260 and the Cause 662 Order. *See* discussion, *supra*, ¶¶17-18. The Cause 662 Order unequivocally addressed Cause 260, and the Commission specifically found the matters to be separate

> proceedings [and provided for specific treatment therein]. . . . The Commission, through both the Remand Order (June 1997) and the Cause 662 Settlement Order (October 1995), made significant ratemaking decisions affecting SWBT after it was aware of the bribery. In both instances, the Commission took into account SWBT's [bribery] actions in making its decisions.

Note especially, in 1995 the statement from the Attorney General, " . . . 260 remand to be settled or litigated separately." Contrary to the Majority's assertion, *PUD 662 did not settle PUD 260*, at least according to a written OCC legal opinion. The Majority statements above are moreso problematic when compared to settlement and other official documents now made public, as indicated below:

> A May 20, 2002 written legal opinion to the General Counsel of the Oklahoma Corporation Commission addresses "the question of whether or not Cause No. PUD 860000260 was concluded by the settlement of Cause No. PUD 890000662." The document states, "In my opinion, the answer to your question is 'no'."
>
> A June 21, 1994 letter from Attorney General Susan B. Loving regarding SBC 662 settlement discussions with SBC states, "Finally, [SBC]'s proposed treatment of the [SBC] 260 remand is unacceptable."
>
> The September 13, 1994 Commission proposal regarding the SBC 662 case addresses "Other

> Issues" by saying, "Settlement of [SBC] 260 and the future treatment of the effects of FASB 106 not to be considered in settlement of [SBC] 662."
>
> A March 1, 1995 letter from SBC circulates a new page 3 of a proposed settlement of the SBC 662 case. The referenced section from page 3 in part states, " . . . those parties agree that this [662] Agreement shall not become effective until the [SBC] 260 Settlement Agreement is approved by the Corporation Commission by a final order." Significantly, however, this provision was rejected and omitted prior to the drafting and signing of the final SBC 662 Settlement Agreement.
>
> A March 30, 1995 Attorney General's settlement proposal for [SBC] 662 and related cases has a section entitled "[SBC] 260 REMAND" which states, "No consideration: [SBC] 260 remand to be settled or litigated separately."

Now, what does the final PUD 662 Settlement document itself say? The actual Settlement Agreement for the SBC 662 case was approved by the Commission on October 30, 1995. The signed Settlement Agreement omits any mention of the PUD 662 case settling the SBC 260 case.

Commission Majority doesn't understand its authority (or doesn't want to)

The Majority order (carefully avoiding the word "jurisdiction") states:

> . . . Applicants fail to recognize the Commission is still without authority to grant their requested relief.

The Majority obviously didn't look very hard to find that authority.

A subtitle on page 8 of the May 1, 1996 Attorney General Brief in PUD 260 states, "There is Ample Legal Authority for the Commission to Reopen and Rehear the Merits of this Cause."

At a minimum, the Commission has jurisdiction in Cause No. PUD 201500344 to grant the relief requested in the second paragraph of "*Relief Requested by Applicants.*" (Application pp. 10-11) This second paragraph requests "determination of the Excess Revenues for 1989 and each year thereafter" by asking the Commission to perform its legislative ratemaking duty to "determine that a refund of the Excess Revenues to the ratepayers . . . should be ordered . . . as per the parties' 'stipulation' that was adopted by the OCC on June 23, 1987." Indeed, the ratepayer Applicants certainly can ask the Commission to follow its own Stipulation Order in PUD 260. This second paragraph of *Relief Requested* can also be seen as an outstanding duty and responsibility of the Commission that should be performed on a stand-alone and legislative basis regardless of any other outcomes of PUD 344. In other words, surely the Commission has jurisdiction to follow its own Stipulation Order issued in PUD 260 with its attached Stipulation signed by both Southwestern Bell and Commission Staff.

AT&T Communications of the Southwest, Inc. in a June 10, 1996 filing in PUD 260 on page 11 states,

> The status of the *rates of SWBT* from July 1, 1987, until the conclusion of Cause 260 are stipulated to be interim and subject to refund. When the issues involved in Cause 260 are finally concluded, if there are excess earnings during the period from July 1, 1987, to the date those rates have been changed the excess earnings are subject to refund. . . . The Oklahoma law is clear, however, on the effect of Bob Hopkins' corruption which affected his vote on Order No. 341630. That order was not constitutionally adopted and should be vacated. (Emphasis added.)

Commission does have certain Jurisdiction, despite SWB and AG arguments otherwise.

The Oklahoma Supreme Court in its decision *State ex rel. Henry v. Southwestern Bell Telephone Co.*, 1991 OK 134, 825 P.2d 1305 in Paragraph 7 clearly states, "The State, AARP and SWB each seek corrective relief from various portions of the Commission's order. For the reasons to be stated we affirm in part, reverse in part and remand this cause for further proceedings." (Emphasis added.) Note that only "portions" of the Commission's September 20, 1989 order were appealed, and Paragraph 1 of the opinion numbers and names them 1 through 6 followed by 7(a), (b), (c) and (d). Note further that the Oklahoma Supreme Court decision twice states that "this cause" is remanded back to the Commission. *Henry* does not say, "Just the four remand

issues are remanded." Therefore, the Commission has jurisdiction to deal with the entire Cause PUD 260 as allowed under the *Henry* decision and *Stetler v. Boling*, 1915 OK 625, 52 Okla. 214, 152 P.2 452 and *Harper v. Aetna* 1922 OK 208, 211 P.2 1031 and *Anson Corp. v. Hill* 1992 OK 138, 841 P.2d 583. *Stetler v. Boling, in* its Syllabus states,

> When the Supreme Court acquires jurisdiction of a case by appeal, the jurisdiction of the trial court is ousted as to any question involved in the appeal; but jurisdiction of collateral matters, not involved in the appeal, or matters happening subsequent to the appeal, remains with the trial court.

The current Attorney General ignores this case law relevant to Commission jurisdiction. For example, Assistant Deputy Attorney General Abby Dillsaver at the November 2, 2015 hearing (Transcript Page 82, Lines 11-13) stated, "It's the fact that this order was appealed to the Oklahoma Supreme Court, and the Commission lost jurisdiction at that point."

Commission doesn't need this application to "correct abuses" but has a moral and constitutional duty to correct them regardless.

As if "repugnancy to the constitution" of Oklahoma is not enough, our legal process should look to the United States Supreme Court decision to "set aside fraudulently begotten judgments" stated in *Hazel-Atlas Glass Company v. Hartford-Empire Company*, 1944, 64 S.Ct.

997, 322 U.S. 238, 88 L.Ed. 1250. The U.S. Supreme Court, in an opinion by Justice Black, held that the judgment must be vacated; stating,

> Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. (64 S.Ct. at 1001, 322 U.S. at 245.) (Emphasis added.)

The U.S. Supreme Court thought it immaterial that Hazel may not have exercised proper diligence in uncovering the fraud. It first pointed out that the case did not concern only private parties and that there are "issues of great moment to the public in a patent suit." (64 S.Ct. at 1001, 322 U.S. at 246.)

> Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely, it cannot be that preservation of the integrity of the judicial process must always wait upon the

> diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud. (Emphasis added.)

Applicants and DOD/FEA both explicitly raise Intrinsic Fraud, seeking relief and justice.

Yes, the Oklahoma Corporation Commission does have a history of intrinsic fraud – not all of which involves bagman attorney Bill Anderson. The United States Tenth Circuit *Optima Oil v. Mewbourne Oil* case No. 11-6230 (D.C. No. 5:09-CV-00145-C) (W.D. Okla.) and the *Leck* case both address intrinsic fraud at the Commission as well as the Commission's jurisdiction to hear allegations of the intrinsic fraud and rule upon them. In Paragraph 22 of *Leck v. Continental Oil Co.* 1989 OK 173, 800 P.2d 224, the Oklahoma Supreme Court states,

> Relief from intrinsic fraud must be made by direct attack in the same case in which the fraud was committed. Since the Oklahoma Corporation Commission has the power and authority of a court of record in this state, it naturally follows that if intrinsic fraud occurred during an adversarial trial before the commission, then under our holding in *Chapman*, the proper forum to hear allegations of the intrinsic fraud and rule upon them is the commission.

More recently than the *Leck* decision, a Southwestern Bell Telephone Company ("SWBT") Motion and Brief from The District Court of Oklahoma County, Case No. CJ 99-6569-63 was filed by SWBT also at the Oklahoma Supreme Court in Case No. 96,164, *State ex rel. Henricksen v. State ex rel. Corporation Commission*, 37 P.3d 835 (2001). In it, SWBT on the first page states, " . . . allegations of intrinsic fraud . . . must be addressed at the Corporation Commission. . . . " Page 4 of this SWBT Motion and Brief contains a section entitled, "III. Complaints of Fraud Intrinsic to a Corporation Commission Order Must Be Brought at the Commission." Presumably the Commission has jurisdiction to hear cases raising intrinsic fraud that indeed actually occurred at the Commission. However, dismissing PUD 344 denies Applicants their ability to follow case law telling them to seek relief from intrinsic fraud at the Commission. Conveniently, while disclaiming responsibility, the Majority fails to offer any suggestion as to where else such relief might be sought.

In my opinion, dismissal of this ratepayer application is inconsistent with historical legislative intent. Although the Applicants in PUD 344 have not stated as their authority giving Oklahoma citizens the ability to come forward under Oklahoma Laws 1907-08 at Title 17, Section 2, this particular statute does provide,

> In case of failure of any corporation, person or firm to obey or comply with any order or requirement of the Corporation Commission,

> . . . contempt proceedings may be instituted by any citizen of this State . . .

Majority finds correcting the abuse of bribery is not in the public interest; $16 billion says otherwise

Without citing any case law, arguments or evidence to support it, the Majority finds:

> . . . the Commission is confident it has met its constitutional duty to the best of its ability – given the priority of serving the overall public interest.

A finding so completely contrary to logic requires some justification. What, if indeed any, efforts has the Commission undertaken to meet "its constitutional duty" to correct the abuse of bribery in PUD 260?

PUD 344 is legislative and OCC has jurisdiction and duty to hear it.

Southwestern Bell and the Attorney General argue the "matter has been presented" many times before and "here we go again." However, recently the Commission in Cause No. PUD 201600059, after declaring the case to be "legislative," ruled favorably on OG&E's third application for a $500 million plan to install scrubbers at its Sooner Generating Facility. The scrubbers had already been denied twice by the Commission. Motions to dismiss the third application were denied. The Commission's Order No. 652208 on page 7 states,

> The Commission finds that Cause 229 and this current proceeding [Cause 59] are legislative in nature and that the Oklahoma courts have concluded on several occasions that the res judicata doctrine is inapplicable to a legislative action by this Commission. *See e.g.*, *Chicago, Rock Island & Pacific R.R. Co.* **i'.** *State et al.*, 225 P.2d *363*, 368 (Okla. 1950) (the doctrine of res judicata is not recognized in legislative proceedings before the Corporation Commission); *Phillips v. Snug Harbor Water and Gas Co., 596* P. 2d 1273, 1275 (Okla. Ct. App. 1979) (questioning applicability of doctrine of res judicata in legislative action of Corporation Commission and citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 4 (1966) for proposition that Corporation Commission rate order was legislative in nature and therefore not *res judicata); Community Natural Gas Co. v. Corporation Commission et al., Lone Star Gas Co. v. Same*, 76 P. 2d 393, 398 (Okla. 1938) ("Ordinarily, the rule of res judicata applies only to judicial proceedings. As we pointed out in the Prentis Case . . . the findings of fact and rules of law announced in a legislative proceeding cannot be res judicata upon the issue subject to the *scrutiny of a court in judicial review.*") *See also Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corporation Commission*, 164 P.3d 150 (Okla. 2007) (addressing legislative action by this Commission.)

The Oklahoma Supreme Court in *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corporation*

Commission, 164 P.3d 150 (Okla. 2007) states, "This court has adopted *Prentis's* classic definition of legislative and judicial proceedings and has held that the kind of process that is a litigant's due flows from the label attached by law to a proceeding." *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 *(1908)* states,

> Proceedings legislative in nature are not proceedings in a court, . . . , no matter what may be the general or dominant character of the body in which they may take place. . . . That question depends not upon the character of the body, but upon the character of the proceedings. . . . The decision upon them cannot be res judicata when a suit is brought. . . . The nature of the final act determines the nature of the previous inquiry. . . . So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case.

As already stated, the present Cause PUD 344 is a Corporation Commission "rate case," and the case itself is "legislative." In the words of *Cox v. State ex rel. Corporation Commission*, 2007 OK 55, 164 P.3d 150, "Ratemaking has been definitely labeled and treated as legislative."

Conclusion

The Relief Sought in PUD 344 includes, "Vacate or Modify the Oklahoma Corporation Commission Order No. 341630, Cause No. PUD 260" (the Bribed Order).

The Bribed Order was entitled, "Order Regarding Rates of Southwestern Bell Telephone Company" and was issued on September 20, 1989 by a tainted 2-1 vote. Order No. 413667 dated June 26, 1997 was entitled "Order on Remand" and was the last OCC order issued in PUD 260. By its own terms, the Order on Remand restricted itself to only the four issues remanded to the Commission by the Supreme Court and did not reopen the entire PUD 260 case. Interestingly, no order entitled "Final Order" has ever issued in the legislative PUD 260 rate matter. In fact, certain aspects of PUD 260 are still open and unresolved, among them which rate reduction amount is right, the $7.8 million for 1989 that is part of the PUD 260 $31 million (as found in the Bribed Order) or the annual $100.5 million (as found in the evidentiary record of PUD 662)?

Finally, as stated on the last page of an Oklahoma Attorney General October 1, 1993 Motion to Reopen the Record submitted to the Special Master of the Oklahoma Supreme Court in Case No. 80,333 that involved PUD 260,

> Justice demands that SWBT not benefit from its own wrongdoing in the case below.

Note the Attorney General doesn't say Bill Anderson's wrongdoing, but Southwestern Bell's.

Justice demands the Commission correct the abuses of Southwestern Bell in PUD 260. Today's Majority order is a foolhardy, headstrong leap in the opposite direction.

September 7, 2016

P. S. In 1988, a friend and Crowe & Dunlevy attorney advised me that someone like me should not to [sic] run for election to the Oklahoma Corporation Commission, calling it the "perjury palace."

[Parts 2 And 3 Of Dissenting Opinion Omitted]

IN THE SUPREME COURT
OF STATE OF OKLAHOMA

<table>
<tr>
<td>HONORABLE SODY CLEMENTS, an Individual and Oklahoma Resident on behalf of herself and others similarly situated; LT. GENERAL (Ret.) RICHARD A. BURPEE, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; JAMES PROCTOR, an Individual and Kansas Resident on behalf of himself and others similarly situated; RODD A. MOESEL, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; RAY H. POTTS, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; BOB A. RICKS, an Individual and Oklahoma Resident on behalf of himself and others similarly situated.

Appellants

v.

SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a AT&T OKLAHOMA; STATE ex rel. OKLAHOMA CORPORATION COMMISSION,

Appellees.</td>
<td>)</td>
<td>NO. 115334

Appeal from the Oklahoma Corp. Comm’n Cause PUD201500344</td>
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APPELLANTS' BRIEF IN CHIEF

(Filed Jan. 30, 2017)

Respectfully submitted,

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DATE: January 30th, 2017

Oral Argument Requested
Precedence Upon Docket of Supreme Court
Requested (Okla. Constitution, Art 9, § 21)

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Introduction

This appeal involves the bribery of a state-wide elected public official by Southwestern Bell Telephone Company ("SWBT") in a public utility matter involving many millions of dollars. The bribery was done in direct violation of the Oklahoma Constitution, Art. 9, § 40. The bribery was proven beyond a reasonable doubt in federal district court. The bribery conviction of Corporation Commissioner Robert Hopkins was affirmed by the 10th Circuit Court of Appeals with the Court citing the strength of FBI Title III wiretaps of all involved, including top SWBT executives.

To this day, SWBT continues to enjoy the sweet fruit of its bribery as the underlying bribed Order has never been reformed. Perhaps shockingly, both SWBT and the Oklahoma Corporation Commission ("OCC"), directly blame the Oklahoma Supreme Court for the resulting injustice and ultimate failure to uphold the Oklahoma Constitution.[1] Here, the OCC majority found that, " . . . *the Oklahoma Supreme Court itself has previously upheld the bribed order*

[1] Such was the audacious argument made by SWBT's counsel. *See* **R. 17-18**, Transcript of Proceedings held November 3, 2015, pgs. 16-17 (Argument of SWBT's Counsel: "[The Oklahoma Supreme Court has previously upheld the bribery in this matter] – bribed votes do count . . . [n]ow, that may not be what you and I would have ruled. That may not be – if we took a vote, probably no one would have liked that ruling in – in this – in this courtroom today. It doesn't matter. That's the law."). In essence, SWBT's counsel boldly argued to a fully packed OCC hearing room that it is all the Supreme Court's fault; that even he thinks the Court *probably decided it wrong* in upholding bribery in violation of the Constitution, but that there is nothing we can do about it.

(notwithstanding the bribery) and/or ratified the intrinsic fraud herein at issue such that the matter is final even if the Oklahoma Corporation Commission wanted to correct the injustice . . . " *See* R. 5570, Chairman's Certificate of Record, filed November 16, 2016, p. 2. *See also* R. 86-87, R. 1515, ¶ 26; R. 1517, ¶ 30, **R. 1520, ¶ 5** *(The OCC finds that the Supreme Court has been made aware of the bribery of Commissioner Hopkins, has had opportunities to grant similar relief and has chosen not to grant relief).* Both SWBT and the OCC (majority) got it wrong; this appeal seeks to correct it.

Importantly, it should be noted that this is, in fact, the very first time that the "bribery matter" has ever been presented to the Supreme Court in an appeal brought as a matter of right. When the Oklahoma Supreme Court issued its opinion in *Robert Henry v. Southwestern Bell Telephone Company*, 1991 OK 134, SWBT's bribery was not *publicly* known.[2] *See* R. 717.

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[2] SWBT argues that its misconduct of bribing Commissioner Hopkins (which it oddly equates to exercising merely "improper influence") was misconduct in a "legislative" proceeding and as such " . . . *do not implicate judicial processes and do not require application of . . . judicial standards*." Fundamentally, this argument ignores the fact that SWBT senior employees, including inhouse counsel of record in *Henry* (*i.e.*, Glen Glass), were directly involved in SWBT's bribery schemes in PUD 260. *See* R. 701-702; R. 2346-2347. Title 5 O.S. 1988 App. 3-A, Rule 3.3 (a)2 provides that, "(a) A lawyer shall not knowingly (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." By not disclosing SWBT's bribery schemes to the Supreme Court in the *Henry* appeal, SWBT directly committed intrinsic fraud against the Supreme Court, a proceeding that is indisputably "**judicial**" in nature to

As such, the *Henry* decision could not have addressed the bribery issue. It is true that in 1997 (R. 2906, Order of May 19, 1997) and again in 2010 (R. 2953, Order of February 8, 2010), the Oklahoma Supreme Court declined to consider the bribery issue on the grounds that Commissioner Bob Anthony's " . . . *Suggestion to the Court does not invoke either the appellate or original jurisdiction of the Supreme Court*." *See* R. 723-724. Here, the OCC and SWBT seemingly believe that the Supreme Court's decision to only act within its jurisdiction evidences the Court's desire to rubber stamp the violation of Oklahoma's Constitution, or to sweep the bribery issue under the rug. This appeal tests that belief, as it squarely invokes the Court's "appellate jurisdiction" and puts the bribery issue before this Court in the context of a non-discretionary appeal, brought as a matter of right.

In OCC's remand proceedings following the *Henry* decision, the OCC (erroneously) believed it had no jurisdiction to remedy the bribery as, *inter alia*, it lacked " . . . *permission from the Oklahoma Supreme Court to rehear the entire cause*." *See* R. 1515, ¶ 26, *C.f.*, 851-852. The Appellants' Application was likewise <u>summarily dismissed</u> (with prejudice) on this same erroneous basis. *See* R. 1515, ¶ 26; R. 1517, ¶ 30; R. 1520, ¶ 5; R. 1524, ¶ 10. **It simply is not a correct statement or understanding of Oklahoma law.** *See* R. 717-718. To the extent that the OCC failed to consider

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which "judicial standards" apply. SWBT's argument also ignores Oklahoma Constitution Art. 9, § 40, and the key point that even "legislative" bodies must follow the Constitution.

subsequent undetermined issues under the erroneous belief that it is precluded from doing so by a prior appellate mandate, it commits a reversible error of law. *See Berland's of Tulsa v. Northside Vil. Shop Ctr.*, 1968 OK 136, ¶ 5-10, 14, 27, 30 (Reversing trial court that failed to consider subsequent issue not determined by prior appeal under the erroneous belief that prior appellate mandate restricted the consideration of such issue). Additionally, the OCC has repeatedly misinterpreted *Turpen v. Okla. Corp. Comm'n*, 1988 OK 126, the basis for its erroneous decisions.

Anticipating SWBT's arguments and indeed, the OCC's frequent misconceptions, two of the Appellants herein had sought a *discretionary* and extraordinary writ of mandamus and bill of review in June 2014 (Cause No. 122,973), an effort that was denied without the reason being stated. On this point, the Appellants and Appellees seemingly have a different reading of the "tea leaves" – that is, what was the meaning and effect of the Court's 2014 decision. Appellees and the OCC majority count it as an instance of the Supreme Court affirming the bribery at issue. *See* R. 1517, ¶ 30; R. 1520, ¶ 5. Appellants see it differently – as perhaps the Court's determination that the matter should first be raised with the OCC.[3] As such, Applicants, with

[3] The Oklahoma Supreme Court's 2014 decision (in Case No. 112,973) may have simply been the reaffirmation of its prior decision in *Henrickson v. Okla. Corp. Comm'n* 2001 OK 89, ¶ 15-16 (Subsequently raised issues of Southwestern Bell's fraud in prior rate making matters are exclusively within the Commission's jurisdiction and must be properly raised there.)

steadfast determination, have sought the appropriate relief before the OCC in the first instance.

The Appellants contend that there are two primary issues in this appeal. First, there is the issue of whether the OCC's (bribed) PUD 260 Order was entered in violation of the Oklahoma Constitution, Art. 9, § 40 (no corporation shall be permitted to influence official duty [with bribes]) and also Art. 9, § 18a (matters before OCC must be determined by a majority). Second, if the (bribed) PUD 260 Order was entered in violation of the Oklahoma Constitution, is the bribed PUD 260 Order void or voidable such that it must be re-determined? Certainly numerous other issues are presented by this appeal, but Appellants maintain that reversal and remand is required if these primary issues are answered in the affirmative.

Summary of the Record

1. This matter concerns the legacy misconduct of SWBT occurring in 1989 and thereafter (including in 1991, in not disclosing the bribery during the *Henry* appeal) in bribing Commissioner Robert Hopkins in relation to a rate matter known as PUD 260. The misconduct of SWBT attorney William L. Anderson and Commissioner Hopkins was fully adjudicated and determined in the criminal trial brought in the United States District Court for the Western District of Oklahoma, CR-93-137-A, wherein both Commissioner Hopkins and SWBT's attorney Anderson were found guilty of Accepting Money to Influence a Vote and Bribery,

respectively, in violation of 18 USC § 666 (a). *See* R. 196; R. 2333-2334; 2370-2372; R. 2379-2385.[4]

2. The criminal conviction of Robert Hopkins (Note: William Anderson never appealed his conviction) was affirmed by the Tenth Circuit in its Order and Judgment filed February 14, 1996 (Case No. 95-6120), wherein the Court wrote, in part, "*The 1991 tapes, properly admitted under Fed. R. Evid. 801(d) 2(E), detailed efforts to conceal the payoffs from the FBI. From those tapes [tapes of the FBI's Title III wire taps],* ***the jury heard recorded conversations among Hopkins, Anderson, Murphy and other Southwestern Bell executives plotting their "story" in the event federal agents questioned them***." (Emphasis added.) *See* R. 193-336, R. 2379-2385.

3. Telephone rates and telephone company earnings are regulated to ensure that only fair rates are imposed, because left unregulated, charges for telecommunication services might be unfair due to lack of competition and the existence of monopolies. The OCC is the governmental agency with jurisdiction to determine such matters pursuant to the Oklahoma

[4] The Superseding Indictment filed on July 7, 1994, asserted, *inter alia*, that on or about September, 1989, Robert E. Hopkins "knowingly and corruptly agreed to accept something of value, intending to be influenced or rewarded in connection with the business of the Oklahoma Corporation Commission; that is, [he] agreed to accept money offered to influence or reward his vote on PUD 260, permitting Southwestern Bell Telephone Company to reinvest approximately $30,000,000 rather than reimburse that amount to Oklahoma rate-payers." *See* R. 2374-2378, superseding Indictment filed on July 7, 1994.

Constitution and statutes. *See* Oklahoma Constitution, Art. 9 and 17 O.S. § 131 *et seq*. PUD 260 was an Application brought by the Public Utility Division of the OCC on October 23, 1986, to determine the effect of the newly enacted (United States) Tax Reform Act of 1986 on Oklahoma utilities. Specifically, because the federal government had reduced the corporate federal income tax rate from 46% to 34%, effective July 1, 1987, such resulted in an annual "windfall" to SWBT under the existing rates and generated "excess revenues" which the OCC might order be refunded to Oklahoma consumers such as the Appellants. Motivating its wrongdoing, SWBT wished to keep for itself these "excess revenues" which later were found to amount to over $100,000,000 per year.[5] R. 193-336.

4. The details of SWBT's wrongdoing, as set forth in the Trial Brief of the United States, were that a conspiracy between Anderson and others began in early September 1989. *See* R. 2439-2444. The plan

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[5] On August 26, 1992, after extensive discovery, 37 days of witness testimony and lengthy hearings, the OCC unanimously approved its rate making Order in Cause No. PUD 662, Order No. 367868, which established SWBT's annual revenue excess to be more than $100,000,000 based upon the actual data (not estimated data) for the complete test year 1989. *See* R. 3753-4009, Cause PUD 662, Order No. 367868. Applying the annual revenue excess as determined by the valid (unanimous) Commission Order No. 367868, with the approved 11.589% compounded annual interest rate as established in Commission Order No. 342343, the Appellants' expert has determined that the citizens of Oklahoma are due some **16 billion dollars**. R. 896-913. Appellants recognize that any amount due for SWBT's "excess revenues" over **28 years** is a matter for the OCC to determine.

involved enlisting a third party to approach and influence Commissioner Hopkins in connection with his vote on PUD 260 (specifically, Commission Order No. 341630), a matter then pending before the Commission. *Id.* In furtherance of that conspiracy, Anderson called Michael R. Murphy (a state Representative) and asked him to approach Hopkins and offer him $10,000 if the Commissioner voted for the position advanced by Anderson. *Id.* Murphy also received a call from Jewel Callahan, who told Murphy that he had $5,000 more for Hopkins in the event of such a vote. Murphy agreed to act as the "go-between" or "bagman" between Anderson/Callahan and Commissioner Hopkins. *Id.* Within days, Murphy contacted Hopkins and advised that Anderson and Callahan had $15,000 that he and Hopkins could "split" if Hopkins would vote for "reinvestment" in the PUD 260 case. *Id.* On or about September 18, 1989, Hopkins accepted the money in exchange for his vote in PUD 260, Order No. 341630, which occurred on September 20, 1989. *Id.* The vote was two votes in favor (including Hopkins' bribed vote), and one vote against. Excluding Hopkins' bribed vote, the vote on the Order was one in favor and one against, a vote which lacks approval from a majority and renders the ultimate Order unconstitutional, invalid and void. *See* R. 1816-1828. Oklahoma Constitution, Art. 9, § 18a(B); Art. 9, § 40.[6]

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[6] Because of the extreme time constraints imposed by the Tax Reform Act of 1986 and the impossibility of examining rates prior to its effective date July 1, 1987, SWBT entered into a binding "Stipulation" on June 23, 1987 which was accepted by the

5. The Title III wiretaps played in the federal criminal trial and relied upon by the Tenth Circuit in its Opinion, have to this day never been made public. Such tapes were, in part, the subject of Applicants' Motion for Full Evidentiary Hearing filed with the OCC (R. 878-880) and also with the Oklahoma Supreme Court in this matter. Recently, however, the contents of some tapes were described under oath and uncovered by summaries; the tapes of conversations between Bill Anderson and Bill Free (a Southwestern Bell senior executive and attorney) on March 19, 1991 – nine months before the *Henry* decision – reveal that "**[Glen] Glass knew the whole deal**."[7] *See* R. 825. Indeed, the evidence shows that SWBT's (in-house) attorney Glen Glass, counsel of record in the *Henry* appeal, was an active participant in SWBT's bribery schemes as many of the false "campaign contributors," whose names and addresses were provided so to make the bribes "untraceable," were, in fact, the obscure out-of-state relatives of SWBT's attorney **Glen Glass**.[8]

OCC in Order No. 313853, that, " . . . *if the Commission ultimately determines that a rate reduction is appropriate for [SWBT], that said reduction would be effective as of July 1, 1987, in order to allow the full benefits of the Tax Reform Act to accrue to [SWBT's] customers*." *See* R. 1741-1745. It is because of this Stipulation and Order that SWBT may owe customers the "excess revenues" as "ultimately determined" by the OCC, with interest, from July 1, 1987 to the present. Due to SWBT's own Stipulation, such is not impermissible retroactive rate making.

[7] *See* R. 416-417, Affidavit and Deliberations, p. 9-10, ¶ 19, filed on September 16, 2015.

[8] *Compare* R. 409-411, 434, 438-449, Commissioner Anthony Affidavit, p. 2-4, ¶ 2-7, and Exhibit 5A thereto with the FBI

6. On September 14, 2015, the Applicants filed at the OCC their Application pursuant to OAC 165:5-17-2, a rule which allows the filing of an Application by " . . . *any person, whether or not a party of record in the original cause*." R. 193-336. By their filing, the Applicants presented the needed evidence and legal basis required to remedy the intrinsic fraud utilized by SWBT to obtain ill-begotten orders and judgments from the OCC and this Court. The Application sets forth Applicants' legal standing for making the Application. R. 197-202. The Applicants requested that the OCC vacate or modify its Order No. 341630 (subject to protecting the rights of innocent parties, if any), and that it reconsider certain of the issues which were determined therein. R. 202-203. Order 341630 was entered in Cause No. PUD 260 on September 20, 1989. *Id.*

Interview Transcripts: Robert Finnigsmier (Nebraska resident who never gave any contributions to Commissioner and only knows one person who works for SWBT in Oklahoma, Glen Glass, who happens to be a cousin of his wife Judy), Eric White (Missouri resident who never gave any contributions to Commissioner, but his brother-in-law is Glen Glass), Raymond White (Missouri resident who never gave any contributions to Commissioner, but his son-in-law is attorney Glen Glass), Mildred White (Missouri resident who never gave any contributions to Commissioner, but her son-in-law is Glen Glass). *See also* Memo/Affidavit of FBI Special Agent John Hippard, R. 724-794, ¶ 4-6, 36-37, 43, 45, **57**, 67-73 (probable cause exists to believe that Glen Glass is committing or about to commit bribery, conspiracy, *etc.;* outlining **98 phone calls** between Anderson and Glass over ten weeks.); FBI's time line of investigation with citation to wiretaps (**Note**: entry of **August 3, 1989**, (R. 801-802)) *Anderson makes corrupt bargain with Anthony on PUD 260 and then " . . . went right over to SWB & told Miller, **Glass** and Caldwell of deal & was big hero"*, **10-20-89** (R. 808) **and also 3-14-91 to 3-19-91**, R. 821-825, R. 200, Footnote 4.

Specifically, the Applicants seek to vacate or modify Section III, Part K of the Order determining the "Excess Revenues" as being $7,847,172 for 1989, and each year thereafter, and also, Section IV, setting forth the OCC's determination on how the revenue excess should be used. *Id.* The Application asserts that the (bribed) PUD 260 Order was obtained by intrinsic fraud. *Id.*

7. On October 2, 2015, both SWBT and the Oklahoma Attorney General ("AG") filed their Motions to Dismiss the Application. R. 618-629, R. 648-663. The AG's principal argument was that the Application was barred by this Court's holding in *Turpen*. R. 648-663. SWBT's principal arguments aped the AG and add that the Application was unmeritorious under the Court's holdings in *Henry* and *Wiley v. Oklahoma Nat. Gas Co.*, 1967 OK 152, 429 P.2d 957. R. 618-629.

8. On November 2, 2015, the Applicants filed their Combined Response to the Motions to Dismiss of SWBT and the AG. R.699-867. Therein, the Applicants state the substantial legal and factual errors made by SWBT and the AG in their respective Motions to Dismiss. *Id.*

9. On November 2, 2015, the Applicants also filed three motions: a Motion to Strike those portions of the Motions to Dismiss that assert new (unsupported or disputed) facts outside of the Application (R. 868-870), a Motion to Apply Heightened Scrutiny to the AG's filings based upon an apparent conflict of interest (R. 871-877), and a Motion for Full Evidentiary Hearing

pursuant to Oklahoma Constitution, Art. 9, § 22 (R. 878-880).

10. On November 3, 2015, the OCC conducted a (non-evidentiary) hearing on the Motions to Dismiss filed by SWBT and the AG. *See* R. 2-89. At the hearing, SWBT's counsel argued, in part: "[The Oklahoma Supreme Court has previously upheld the bribery in this matter] – bribed votes do count . . . [n]ow, that may not be what you and I would have ruled. That may not be – if we took a vote, probably no one would have liked that ruling in – in this – in this courtroom today. It doesn't matter. That's the law." R. 17-18. The AG, for its part, repeatedly argued "the OCC has no jurisdiction to reopen or reconsider the bribed vote based on the prior *Henry* appeal and *Turpen*." R. 23-30, R. 35-37, R. 69-70. The Applicants thereafter addressed the history of the case, why the matter should be reformed and also the errors in SWBT's and the AG's arguments. R. 38-59. Ultimately the OCC took the matter under advisement, the expressly stated concern being that the Oklahoma Supreme Court's prior decisions may "jurisdictionally" prevent the OCC from reopening the bribed PUD 260 matter and entering a constitutionally valid order. *See* R. 86-87.

11. During the time period the matter was under advisement, the Applicants further supplemented the briefing on three occasions with additional argument and evidence. On November 25, 2015, the Applicants supplemented the record with additional evidence detailing, *inter alia.*, the flaws of the (bribed) 260 Order, misconceptions involving SWBT's Stipulation, the

propriety of placing rates subject to refund, the need here to re-determine the "excess revenues," and the propriety of refunding excess revenues to the ratepayers. R. 893-941. On January 22, 2016, the Applicants supplemented the record with additional evidence detailing, *inter alia.*, other instances of rates being made subject to refund, how such is not "retroactive ratemaking," and how SWBT's Stipulation makes such refund required. R. 1179-1242. Finally, on February 23, 2016, the Applicants supplemented the record with additional evidence detailing, *inter alia.*, the shifting positions and inconsistencies of Oklahoma's AG, the history of the PUD 260 matter following the *Henry* remand, and the errors in the OCC's Remand Order and remand proceedings. R. 1249-1352. The additional argument and evidence submitted was never refuted or challenged.

12. On September 7, 2016, the OCC (majority) issued its Order No. 655899 dismissing the Application with prejudice. R. 1507-1541. In substance, the OCC (majority) found that the bribery of Commissioner Hopkins did not make the PUD 260 Order unconstitutional (relying on *Wiley*, the OCC found that bribes are permissible in legislative matters) notwithstanding either Oklahoma Constitution, Art. 9, § 40 or Art. 9, § 18a, or the prior contrary position taken by the AG. *See* R. 1519, ¶ 3, **R. 852-854**. Quite amazingly, neither Art. 9, § 40 nor § 18a were even mentioned in the "legal analysis" provided. *See* R. 1519, ¶ 3. The OCC (majority) relied heavily on its determination that the Supreme Court has long known of the bribery of Commissioner

Hopkins, but never chosen to grant relief. *See* R. 1517, ¶ 30, R. 1520, ¶ 5, R. 5570. The OCC (majority) determined that the PUD 260 Stipulation was "satisfied" by the bribed 260 Order (because the bribed Order says so), and that further review is precluded by the *Turpen* decision. R. 1522, ¶ 7.

Finally, the OCC concludes that the bribed Order was in the public interest because, in the *Henry* decision, the Court affirmed reinvestment rather than the refund of excess revenues. R. 1523-1524, ¶ 10. Here, the OCC majority decision fails to appreciate that on appeal, the Oklahoma Supreme Court's review is different from that of the OCC in the first instance – the Court's review being only focused on whether the decision is legally permissible. Indeed, the Court is prohibited from reaching a different weighing of the facts if it finds the OCC Order is supported by "substantial evidence." *Henry*, ¶ 14. Just how the Court's "appellate review" in *Henry* could rightfully substitute for the (untainted) "merits review" it should have received in the OCC, is left unexplained. *Id.* All pending motions, including those referenced in ¶ 9, *Supra*, were denied. R. 1524.

13. The dissent to the OCC's September 7, 2016 Order was filed on September 7, 2016 (R. 1491-1506), September 8, 2016 (R. 1544-1560), and September 9, 2016 (R. 1564-1736). Additional materials were filed by the dissenting Commissioner prior to the decision in the form of a Transcript Errata with Deliberations (R. 942-996), a Deliberations Memorandum (R. 1401-1410) and Deliberations (R. 1417-1460). Indeed,

numerous additional points were made by the dissenting Commissioner in the hearing on November 3, 2015. R. 9-11, R. 19-22, R. 30-37 and R. 76-87.

As shown by the dissent, the flaws of the majority opinion are numerous. The dissenting opinion correctly notes in detail how the OCC majority decision wrongfully abdicates its constitutional duty "to correct abuses" (R. 1491-1493), how it ignores the actual holding of *Wiley* (R. 1493-1494), how the majority's summary dismissal of the Application denies due process (R. 1494-1497), how the majority errors in relying upon the bribed order itself as grounds for upholding the bribed order (R. 1497-1500), how the majority has misinterpreted the relationship between PUD 260 and PUD 662 (R. 1500-1501), how the majority has misconstrued its proper jurisdiction (R. 1501-1504), how the majority opinion ignores the public interest (R. 1504-1506), and how the majority errors [sic] in finding the SWBT Stipulation was "satisfied" by the bribed order (R. 1564-1567).

14. Pursuant to the Oklahoma Constitution, Art. 9, § 22, on November 16, 2016, the OCC Chairman filed his "Certificate of Record" summarizing the facts essential for a prompt resolution of this appeal as well as evidence he deemed proper to certify. *See* R. 5569-5576. The Certificate of Record details certain important evidence not in the record (precisely because the majority *summarily* (and wrongfully – R. 878-880) denied the request for an evidentiary hearing), as well as various other errors in the record, including on the issue of whether OCC "staff" had ever been influenced or

bribed by SWBT in the PUD 260 matter. *See* R. 5571-5576; *C.f.*, R. 856, R. 1522.

STANDARD OF REVIEW

Motions to dismiss are generally viewed with disfavor and the standard of review is *de novo*. *Dani v. Miller*, 2016 OK 35, ¶10, 374 P.3d 779, *citing Ladra v. New Dominion, LLC*, 2015 OK 53, ¶8, 353 P.3d 529; *Id.*, *citing Simonson v. Schaefer*, 2013 OK 25, ¶3, 301 P.3d 413; *Hayes v. Eateries, Inc.*, 1995 OK 108, ¶2, 905 P.2d 778. The purpose of a motion to dismiss is to test the law that governs the claim, not the underlying facts. *Id.*, *citing Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶4, 270 P.3d 155; *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶7, 176 P.3d 1204; *Zaharias v. Gammill*, 1992 OK 149, ¶6, 844 P.2d 137. Accordingly, when considering the legal sufficiency of the petition (Application) the court takes all allegations in the pleading as true together with all reasonable inferences that may be drawn from them. *Id.*, *citing Ladra*, 2015 OK 53, ¶8; *Simonson*, 2013 OK 25, ¶3; *Fanning v. Brown*, 2004 OK 7, ¶4, 85 P.3d 841. A plaintiff is required neither to identify a specific theory of recovery nor to set out the correct remedy or relief to which the plaintiff may be entitled. *Id.*, *citing Gens v. Casady School*, 2008 OK 5, ¶8, 177 P.3d 565; *Darrow*, 2008 OK 1, ¶7; *May v. Mid-Century Ins. Co.*, 2006 OK 100, ¶10, 151 P.3d 132.

If relief is possible under any set of facts which can be established and is consistent with the allegations, a

motion to dismiss should be denied. *Id.*, ¶11 *citing Gens*, 2008 OK 5, ¶8; *Darrow*, 2008 OK 1, ¶7; *Lockhart v. Loosen*, 1997 OK 103, ¶4, 943 P.2d 1074. A motion to dismiss is properly granted only when there are no facts consistent with the allegations under any cognizable legal theory or there are insufficient facts under a cognizable legal theory. *Id.*, *citing Wilson*, 2012 OK 2, ¶4; *Darrow*, 2008 OK 1, ¶7; *Lockhart*, 1997 OK 103, ¶5. Where not all claims appear to be frivolous on their face or without merit, dismissal for failure to state a claim upon which relief may be granted is premature. *Id.*, *citing Gens*, 2008 OK 5, ¶8; *Washington v. State ex rel. Dept. of Corrections*, 1996 OK 139, ¶12, 915 P.2d 359. The party moving for dismissal bears the burden of proof to show the legal insufficiency of the petition. *Id.*, *citing Ladra*, 2015 OK 53, ¶8; *Simonson*, 2013 OK 25, ¶3; *Tuffy's, Inc. v. City of Oklahoma City*, 2009 OK 4, ¶6, 212 P.3d 1158.

Additionally, this appeal raises legal issues such that a *de novo* review is required. The OCC's construction of the Constitution or other issues of law is subject to an independent and non-deferential *de novo* review. *Neil Acquisition v. Wingrod Inv. Corp.*, 1996 OK 125, ¶ 5, 932 P.2d 1100. Indeed, *de novo* review is also warranted based on the nature of the record made; Oklahoma law recognizes that here the reviewing court is free to substitute its own judgment of the record for that of the inferior court. *Loofland Brothers Company, v. C.A. Overstreet*, 1988 OK 60, ¶ 15.

ARGUMENTS & AUTHORITIES

1. THE BASIS FOR OCC'S ORDER IS FUNDAMENTALLY FLAWED, LEGALLY AND FACTUALLY.

A. The OCC's Bribed PUD 260 Order Violated the Oklahoma Constitution

Importantly, the Oklahoma Constitution mandates that it takes at least two (unbribed) Commissioner votes to determine matters before the OCC. *See* Oklahoma Constitution, Art. 9, § 18(a)B. Here, it is inherently repugnant to the Oklahoma Constitution that the "concurrence" of a Commissioner on a public matter and the *necessary vote* to decide a question in dispute could be fraudulently and **feloniously bought** by a regulated entity against the interests of the public.[9] Excluding the bribed vote of Commissioner Hopkins, the Commission's Order 341630 was simply not approved by a majority, and thus, is Constitutionally invalid and **void**. Indeed, this legal conclusion is mandated by the fact that SWBT's act of obtaining Commissioner Hopkins' vote by means of bribery is made

[9] The principle that "bribed" (Constitutional Votes) do not count has been repeatedly adopted by this Court. *See Okla. Co. v. O'Neil*, 1967 OK 105, ¶0, 9, 13-14, **¶ 17-24**, 431 P.2d 445; *Marshall v. Amos*, 1968 OK 86, ¶ 22-32, **¶ 33-36**; 442 P.2d 500; *Johnson v. Johnson*, 1967 OK 16, ¶ 14, 20, **31**, **33**, and Special Concurring Opinion, ¶ 3-5. Indeed, in addressing the cancerous effects of bribery, the Supreme Court said in *State ex rel Okla. Assoc. v. James*, 1969 OK 119, ¶23, " . . . [such is a circumstance that] cannot do else, if continued, but to destroy our system of justice which, in a free society, depends for its effectiveness upon the continued confidence and trust of the people."

directly illegal by **<u>the Oklahoma Constitution itself</u>**. *See* Oklahoma Constitution, Art. 9, § 40, which clearly and unequivocally states:

> **No corporation organized or doing business in this State shall be permitted to influence elections or official duty by contributions of money or anything of value.**

This Constitutional provision could not be written any clearer. Indeed, the plain intent behind this Constitutional provision is to prevent the exact abuse that occurred here: a regulated company bribing a Commissioner (who regulates the company) to obtain a result contrary to the public interest. Obviously it cannot be *legitimately* argued, and in this matter has never even been suggested, that the bribery of a public official is somehow the rightful exercise of "free speech" rights under the 1st Amendment to the United States Constitution. Perhaps, SWBT is just too afraid to argue it. It is noteworthy that this Oklahoma Constitutional provision is found in Art. 9, the same article which governs the OCC. Clearly this provision is meant to apply to the OCC Commissioners.

By its express terms, SWBT's bribery of Commissioner Hopkins was constitutionally **impermissible** *<u>regardless</u>* of whether in his "official duty" Hopkins was acting in a "legislative" verses "judicial" capacity.[10]

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[10] SWBT thus got it wrong when it argued that bribery is only wrongful/correctable if the matter is a "judicial proceeding," for which "judicial processes" and "judicial standards" apply. *See* R. 624-625, <u>Constitution, Art. 9, § 40</u>. Importantly, the Court in

On its face, Oklahoma Constitution, Art. 9, § 40 establishes a mandatory rule which is **not dependent** on "the capacity" upon which the "official duty" was rendered. Of course, bribery is also illegal by statute. *See* 17 O.S. 1968 § 177. Under Oklahoma law, a corporate attorney illegally giving money to a Commissioner is "presumed to be acting for such corporation." *See* 26 O.S. 1974 § 15-110. On these facts, Oklahoma Attorney General Drew Edmondson previously argued to the Oklahoma Supreme Court that the bribed PUD 260 order " . . . **was not constitutionally adopted**." R. 836, **852-854**.[11] With all due respect, either the Oklahoma

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Wiley, the case relied upon by SWBT, never even considered this provision of the Constitution; the contention apparently was not one made by the appellant as the bribery there didn't involve the Commissioners themselves. Fundamentally, and more bluntly, *Wiley* also held that legislative acts which are **repugnant to the Constitution** may be declared void. *See Wiley*, ¶ 5. The OCC ignores these important points and distinctions.

Obviously all Commissioners are bound by oath, upon entering office, to uphold the Oklahoma Constitution. *See* Okla. Constitution, Art. 9, § 17 (Upon entry to office, Commissioners shall under oath, swear to "faithfully and justly execute and enforce the provisions of this Constitution, and all the laws of this State)." As Commissioner Hopkins clearly did not faithfully uphold the Constitution in the PUD 260 matter, it is proper for the OCC to rehear the matter. Anything less would not be the "faithful and just" enforcement of the law.

[11] Substantial evidence and argument for ***why*** reconsideration of the PUD 260 matter is in the public interest has been presented. Indeed, there could be **16 billion reasons** why the matter should be re-determined – *assuming arguendo that upholding the Oklahoma Constitution is not reason enough*. *C.f.*, R. 852-857. Such evidence includes the gross miscalculation of SWBT's "excess earnings" in the bribed order, evidence of "OCC staff misconduct" leading up to the Order (never even considered by the AG's

Constitution means something or it doesn't. Either the Oklahoma Constitution is the supreme state law of the land, or it is a historical written statement of false and insincere aspirations, largely wasteful of paper and ink. Such is the issue presented here.

By this appeal the Appellants are not seeking to enforce "judicial standards" in "legislative proceedings;" rather, the Appellants seek to enforce Constitutional standards applicable in *all* manner of proceedings. SWBT's position that Oklahoma law holds *only* the bribery of judges to be wrongful and correctable, but that bribery of other elected officials, to include Oklahoma Corporation Commissioners, is not correctable if such occurred in a "quasi-legislative" proceeding, is both erroneous and absurd.[12] Rather, the Oklahoma Constitution plainly says that

office) and the massive benefit that SWBT ratepayers could receive upon rehearing the matter. *See* R. 38-54, R. 893-941, R. 1179-1242, R. 1249-1352. *See also* Dissent of Commissioner Anthony, R. 1497-1506, R. 1564-1567. Perhaps, the key point to be made, however, is that by *summarily dismissing* the Application (based on gross legal error), the OCC has denied Appellants with even the *chance* to prove in trial that upon the proper (unbribed) consideration of the PUD 260 matter, a different result in the public interest is appropriate.

[12] *For that to be the law*, Constitution, Art. 9, § 40, would have to read something like: "No corporation organized or doing business in this State shall be permitted to influence elections or official duty by contributions of money or anything of value, except in cases of legislative or quasi-legislative proceedings, in which case cash is king, the more the better." Thankfully, our Oklahoma founding fathers with their pioneers' wisdom and good sense did not adopt this alternate language.

bribery of Commissioners with respect to their "*official duty*" is impermissible.

Importantly, following the Constitution is a requirement of *even* "legislative" bodies. Here, the OCC, like all branches of government, shares equally in the responsibility to faithfully uphold the Oklahoma Constitution. To that end, the Commissioners individually are duty bound to **faithfully and justly** uphold the Oklahoma Constitution. This Court likewise serves the critical function of enforcing the faithful and just upholding of the Constitution by all governmental bodies.

Indeed, where a legislative body has not acted within the framework of the Constitution, it has not acted; an unconstitutional statute confers no rights, imposes no duties and affords no protection. *See General Motors Corp v. Okla. Board of Equalization*, 1983 OK 59, ¶ 17 (General Motors was obligated to pay ad valorem taxes on its lease of public trust property [the Oklahoma City plant], notwithstanding execution of a tax abate agreement done pursuant to statute; as the underlying statue violated the Oklahoma Constitution – any tax abate agreement granted under the void statute was likewise void.) *citing Norton v. Shelby County*, 118 U.S. 425; 6 S.Ct. 1121; 30 L.Ed. 178 (1886) (An unconstitutional statute confers no rights, imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.); *Zane v. Hamilton County*, 189 US 370; 23 S.Ct. 538; 47 L.Ed. 858 (1903) (County bonds issued pursuant to statute which is later declared unconstitutional are void; no

protectable federal interest is created because the Federal Constitution does not protect contract rights which are invalid or illegal. A right resting on an void and unconstitutional legislative act, is likewise void.).

For the reasons set forth above, the Court should find that the OCC's bribed PUD 260 Order violates the Oklahoma Constitution, that it by definition is unconstitutional, and thus, is **void**. Any "fruit" that derives from this "poisonous," **Void** Order, is likewise **Void**.

B. Because the PUD 260 Order was never constitutionally determined, it should be Remanded for proper determination.

Appellants assert that it is obvious and axiomatic that if the PUD 260 Order is unconstitutional and void, that the matter should be remanded for a constitutionally valid determination. Such was, after all, the natural relief granted in *O'Neil*, *Marshall* and *Johnson*. *C.f.*, R. 852-854. Under the Oklahoma Constitution, only the OCC – not this Court and certainly not the AG's office – has the jurisdiction to determine the PUD 260 cause in the first instance. Here, the enforcement of Oklahoma's Constitution should not be made dependent upon the AG's (superficial and un-reviewed) determination of whether enforcement is "worth it," or even on the OCC's apparent reluctance to confront its sordid past. The OCC's ultimate, unbribed determination of the PUD 260 Order on the merits should only then be subject to this Court's "appellate review."

In deciding this matter, the OCC (wrongfully and quite improperly) concluded that the bribed Order was in the public interest because in the *Henry* decision *this Court* affirmed reinvestment rather than the refund of excess revenues. R. 1523-1524, ¶ 10. Here, the OCC majority decision fails to appreciate that on appeal, the Oklahoma Supreme Court's review is different from that of the OCC in the first instance – the Court's review being only focused on whether the decision is legally permissible. Indeed, the Court is prohibited from reaching a different weighing of the facts if it finds the OCC Order is supported by "substantial evidence." *Henry*, ¶ 14. Just how the Court's "appellate review" in *Henry* could rightfully <u>substitute</u> for the (untainted) "merits review" it should have received in the OCC is left totally unexplained – and is, in fact, inexplicable. *Id.*

Respectfully, under the Oklahoma Constitution, this Court's "appellate review" given in the *Henry* appeal can not be *a proper substitute* for the unbiased and unbribed consideration that it was due at the OCC. *See* R. 1522, 1524. Indeed, with the proper "merits decision" of the PUD 260 matter seemingly being abdicated by the OCC to the Oklahoma Supreme Court, or being directly bound by the *Henry* decision (absurdly putting the cart in front of the horse), the whole process is "tainted" because the "poisonous fruit" (the bribed result) gets the benefit of a presumption of correctness while the Appellants, and indeed all Oklahomans, are deprived of proper "appellate review." *See* R. 1522, 1524. Absent doing it right, <u>as the Oklahoma Constitution</u>

requires, due process and justice are thwarted and Oklahomans' faith in government is inherently undermined.

2. WITH PROPER NOTICE, THE OCC HAS THE FULL POWER TO VACATE OR MODIFY ITS PRIOR ORDERS UPON NEW APPLICATION, TO INCLUDE THE POWER TO CONSIDER THE BRIBERY ISSUE NEVER ADJUDICATED IN THE *HENRY* APPEAL.

A. The OCC, SWBT and the Attorney General have misapplied the *Turpen* holding.

This matter was filed as a new proceeding pursuant to OAC 165:5-17-2, on September 14, 2015. The application is based, in large part, on information that has only become publicly available within the past few years. Documents only recently made public include FBI witness transcripts, FBI witness and wiretap summaries, timelines, as well as affidavits and other key information that was not publicly available due to the needs and secrecy of the criminal proceedings. This evidence presents a compelling picture of corruption and fraud undermining the rule of law itself and establishes a wrong against the very institutions set up to safeguard the public good. R. 196-336.

Significantly, the Applicants/Appellants have never before sought relief from the OCC on these matters. Moreover, no Court (nor the OCC) has ever entered a Judgment holding that members of the public-at-large are or should be barred from seeking relief before the

OCC on these issues. The OCC's rules specifically allow any person, whether an original party or not, to file a new application seeking to vacate or modify a prior OCC order. *See* OAC 165:5-17-2. Indeed, under the Oklahoma Constitution, Art. 2, § 3, "The people have the right peaceably to assemble for their own good, and to apply to those invested with redress of grievances by petition, address or remonstrance." Here, for the Appellants, the OCC abolishes this right "with prejudice." R. 1524.

In the AG's Motion to Dismiss, the AG argued that under *Turpen*, OCC orders cannot be modified by the Commission after thirty days, such orders having become final. *See* R. 654-655. Such arguments were mirrored by SWBT (R. 622) and were accepted by the OCC as, in part, the basis for its ruling. R. 1522. **Such is a complete misread and misapplication of the *Turpen* case**. Specifically, the issue in *Turpen* was whether the OCC could, under its Rule 24, consider a timely filed Motion to Reconsider **filed in the same matter**, where the hearing on such Motion only occurs after the 30 day deadline to appeal (analogous to how Motions to Reconsider are treated under 12 O.S. § 1031), and while the case is on appeal. *Id.* ¶ 12, 18.

In a 5-4 decision, the Supreme Court answered "no," finding that 12 O.S. § 1031 had no application to OCC Orders because the appeals from such Orders are made directly to the Supreme Court only, a rule which provides an appellant with access for immediate review. *Id.*, ¶ 21. This Court also noted that the underlying statute for district court proceedings provides that

a timely filed motion for new trial will delay the time to appeal in district court, but such does not apply to OCC orders. Id. Based on these differences, this Court held that Motions to Modify filed in the **same matter** (and not as a new application – the circumstance here) had to be heard and decided prior to any appeal and within thirty days of the original Order. Id., ¶ 20. It is only in this specific circumstance that, "[an OCC Order's] vacation [is] beyond that agency's power." *C.f.*, R. 1522, ¶ 7.

Contrary to the AG's and SWBT's argument and the OCC's ultimate determination, the holding in *Turpen* does not prohibit a new Application seeking to vacate or modify a prior OCC order. If indeed such were the holding of *Turpen*, then **OAC 165:5-17-2** (which requires and allows Applications to Vacate or Modify after thirty days, if filed as new proceedings) would be inherently illogical, pointless and void. How could the OCC have a rule allowing Applications to Modify or Vacate prior orders after thirty days, if the underlying orders were not modifiable after thirty days? Here, the purpose for requiring a **new application** is so that all proper parties can be provided the necessary notice. Notice to all interested persons is a necessary element to the OCC exercising its jurisdiction. Importantly, even the language used in *Turpen* makes clear that with proper notice to all interested parties, the OCC, in fact, does have the power to review or modify its prior orders. *See Turpen*, ¶ 21 ("The Commission is without authority even to review and modify the order **unless statutory notice of a hearing concerning**

the proposed modification is given to all interested parties"). (Emphasis added.) *Citing* [in footnote 18] *Crews v. Shell Oil Company*, 1965 OK 151, 406 P.2d 482. The "*Turpen*" arguments advanced by SWBT, the AG, and accepted by the OCC, frankly, don't pass "the laugh test." They are near frivolous, if not well past it.

Indeed, in *Crews*, ¶ 15-18, the case upon which *Turpen* relies for its holding, this Court makes clear that with the proper statutory notice to all interested persons, the OCC has the authority to review and modify or change a former order which has become a final order. *Citing Carter Oil Co. v. State*, 1951 OK 327, ¶ 0, 9, 17; *Carpenter v. Powell Briscoe*, 1963 OK 33, ¶ 5-7. Here, the AG and SWBT, and the OCC in accepting this erroneous legal argument, have clearly erred in applying the *Turpen* holding as prohibiting new applications which would seek to vacate or modify a prior order of the Commission. *Turpen* did not even concern new applications, but rather addressed applications filed in the original matter. *See Turpen*, ¶ 12, 18. When filed as a new application with proper notice given, nothing prohibits the OCC from reviewing its prior determinations.

Such is especially true in legislative matters. In this specific matter involving public utilities, the OCC acted as a legislative body. *See Southwestern Bell Tel. Co. v. Okla. Corp. Comm'n*, 1994 OK 38, ¶ 8-9 (The Commission's PUD 260 matter is "legislative in nature," and the Commissioners thus act in their legislative capacity). Obviously in the exercise of "legislative power," a legislative body is free to consider and/or

reconsider matters as much as it deems proper; indeed, no legislative body can limit the legislative power of a future legislature.[13]

B. SWBT and the OCC have misapplied the *Wiley* holding.

In its Motion to Dismiss, SWBT disingenuously cited to *Wiley* as holding that the OCC cannot modify its PUD 260 Order as the Applicants seek, because ratemaking proceedings are legislative not judicial acts. R. 625-626. SWBT's argument was nonsensical. **In the exercise of "legislative power," a legislature is free to consider and/or reconsider matters as much as it deems proper.** *See authorities cited, Supra. Dobbs v. Board of County Commissioners Okla. Co.*, 1953 OK 159, ¶ 0, 21, 43-46; *In re Block 1,*

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[13] *See Op. of Oklahoma Atty Gen.*, *1995 OK AG 86*, ¶ 6-8 (There is nothing in our Constitution which prohibits a Legislature from repealing or modifying the acts of its predecessors or its own; it is fundamental that the Legislature cannot pass an irrepealable law), *citing Granger v. City of Tulsa*, 1935 OK 801, ¶ 0, 9, 18 (Legislative acts may be amended or repealed by a legislative body at will); Op. *of Oklahoma Atty Gen., 69-221* (A legislature is not bound by its own acts or the acts of a previous legislature, any amendment of the laws passed is thus valid). *Marlin Oil Corp. v. Okla. Corp. Comm'n*, 1977 OK 67, ¶ 5, 18, 20 (To hold that the Commission cannot modify its own final orders so to account for new circumstances, could impermissibly prevent the Commission from performing its mandated statutory duties. Such is not Oklahoma law; not every application for modification of a final order is deemed a collateral attack); *Henrickson*, ¶ 15-16 (Subsequently raised issues of Southwestern Bell's *fraud* in prior rate-making matters are exclusively within the Commission's jurisdiction and thus must be properly raised there).

Donly Heights Addition, 1944 OK 213, ¶ 11; *Prairie Oil and Gas Co. v. District Court of Grady County*, 1918 OK 505, ¶ 3-4; *Coyle v. Smith*, 1911 OK 64, ¶ 93, 119, 123-124 (Oklahoma legislature had power to relocate state capitol and seat of government notwithstanding limitations in Enabling Act which prohibited removal of capitol prior to certain date; as a sovereign state Oklahoma's legislative power cannot be limited by prior legislative act), *affirmed* 221 U.S. 559; 31 S.Ct. 688; 55 L.Ed. 853 (1911).

Obviously a legislative "do-over" is especially proper when the prior legislative act was done in some way that directly violated the Constitution. The *Wiley* decision itself expressly recognizes that legislative acts can be "annul[ed] and pronounce[d] void" on grounds of "**repugnancy to the Constitution**." *See Wiley*, ¶ 5. While legislative power is vast, it must be utilized in substance and process within the limits of the Constitution. *Dobbs*, ¶ 0, 43-45. Clearly, bribery is not an acceptable "process" within the Constitution's allowable limits. *See* Okla. Constitution, Art. 9, § 40. **Indeed, where a legislative body has not acted within the framework of the Constitution, it has not acted; an unconstitutional statute confers no rights, creates no liability and affords no protection.** *See General Motors*, ¶ 17, *citing U.S. Supreme Court cases of: Norton, Zane*.

Here, it is inherently repugnant to the Oklahoma Constitution that the required "concurrence" of a Commissioner on a public matter and the *necessary vote* to decide a question in dispute could be fraudulently and

feloniously bought by a regulated entity against the interests of the public. This legal conclusion is mandated by the fact that SWBT's act of obtaining Commissioner Hopkins' vote by means of bribery was directly unconstitutional under the Oklahoma Constitution. *See* Oklahoma Constitution, Art. 9, § 40. Again, Oklahoma law is plain: where a legislative body has not acted within the framework of the Constitution, it has not acted; an unconstitutional "legislative act" confers no rights, creates no liability and affords no protection. *General Motors*, ¶ 17.

C. Even under legal standards which limit the reconsideration of matters decided, reconsideration is proper here.

Even if the Supreme Court were to consider the (bribed) PUD 260 Order to be like a Court Judgment (with the limitations to reconsideration that Judgments inherently present) or to consider the bribery issues in the context of SWBT's **fraud** on *this Court* in the *Henry* appeal (clearly a "judicial" proceeding to which "judicial standards" apply), the fact is it is never too late to correct a fraud. The principle is perhaps best articulated by the distinguished jurist Justice Hugo Black, who writing the Opinion for the United States Supreme Court in the case *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-245 (1944) wrote:

> Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments

after the expiration of the term at which the judgments were finally entered. [Citation omitted.] This salutary general rule springs from the belief that, in most instances, society is best served by putting an end to litigation after a case has been tried and judgment entered. This has not meant, however, that a judgment finally entered has ever been regarded as completely immune from impeachment after the term. From the beginning, there has existed along side the term rule a rule of equity to the effect that, under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of their term of entry. [Citation omitted.] This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. Out of deference to the deep-rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments. [Citation omitted.] But where the occasion has demanded, where enforcement of the judgment is "manifestly unconscionable" [Citation omitted.], they have wielded the power without hesitation. [Citation omitted.] [I]n cases where courts have exercised this power, the relief granted has taken several forms; setting aside the judgment to permit a

new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it. But, whatever form of relief has taken . . . the net result in every case has been the same; where situation has required, the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away.

Every element of the fraud here disclosed demands the exercise of this historic power of equity to set aside fraudulently begotten judgments. [. . .] Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.

The Circuit Court did not hold that Hartford's fraud fell short of that which prompts equitable intervention, but thought Hazel had not exercised proper diligence in uncovering the fraud, and that this should stand in the way of its obtaining relief. We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. [Citation omitted.] Furthermore, tampering with the administration of justice in the manner undisputably shown here involves far more

> than an injury to a single litigant. **It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistent with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.** (Emphasis added.)

The same principles have been repeatedly adopted by the Oklahoma Supreme Court. *See Oklahoma Company v. O'Neil*, 1967 OK 105, ¶0, 9, 13-14, **¶ 17-24**, 431 P.2d 445; *Marshall v. Amos*, 1968 OK 86, ¶22-32, **¶ 33-36**; 442 P.2d 500; *Johnson v. Johnson*, 1967 OK 16, ¶ 14, 20, 31, 33, and Special Concurring Opinion, ¶ 3-5.[14] *See also* R. 852-854.

[14] In *O'Neil*, ¶ 13, the Oklahoma Supreme Court held that any "vote" resulting from bribery was "null and void and of no force and effect." In *Amos*, ¶ 24, the Court clarified that bribery did not render a "judicial" decision "absolutely void" in a "legal sense," as the rights of innocent third parties are protected for those who may have acted in reliance upon the legitimacy of the decision fair on its face. Such is not a concern in this matter, even if the PUD 260 Order were considered "judicial". Here, the only party who could be negatively effected by modifying the PUD 260 Order would be SWBT, *which clearly is not an innocent party*. Oklahoma ratepayers could only be benefitted by the just determination of what amount of "excess earnings" did SWBT receive and whether these true "excess earnings" should be "refunded." Moreover, in "legislative" matters, unconstitutional acts are void even if innocent parties are prejudiced. *General Motors*, ¶ 17.

D. The *Henry* decision does not preclude consideration of the bribery issue.

In *Henry*, ¶ 1, the Supreme Court considered seven specific questions answering each of them. The issue of SWBT's bribery of Commissioner Hopkins was not an issue on appeal and could not have been an issue as the bribery was not publicly known in 1991. The issue of whether the OCC *may* order "refunds" of excess earnings was also not an issue on appeal as the (bribed) Order authorized solely "reinvestment." *Id.* The permissibility of refunds simply was not the issue. *Id.*

The "settled-law-of-the-case" doctrine only bars the relitigation of issues that were actually or necessarily settled by a prior appeal. *See Parker v. Elam*, 1992 OK 32, ¶ 9. *See also Russell v. Board of County Commissioners*, 1997 OK 80, ¶ 35; *Willis v. Nowata Land & Cattle Co., Inc.*, 1989 OK 169, ¶ 7; *Seymour v. Swart*, 1985 OK 9, ¶ 8 (Actions reversed on appeal proceed in the lower court anew as if no prior proceedings had occurred except as for issues actually settled in the appeal). On all other issues of a case, to include unknown or subsequently raised issues, upon remand from a reversed Judgment, a lower court may freely consider and determine the effect of any new or expanded issues as if no prior trial had been ever held. *Parker*, ¶ 13. Here, the *Henry* case remanded to the Commission the PUD 260 matter " . . . **for all further proceedings not inconsistent with the Opinion**." *Henry*, ¶ 44. Here, to the extent that the OCC fails to consider subsequent undetermined issues under the

erroneous belief that it is precluded from doing so by prior appellate mandate, it commits a reversible error of law. *See Berland's of Tulsa*, ¶ 5-10, 14, 27, 30 (Reversing trial court that failed to consider subsequent issue not determined by prior appeal under the erroneous belief that prior appellate mandate restricted the consideration of such issue).

3. THE BRIBED PUD 260 ORDER IS VOID AS UNCONSTITUTIONAL AND MAY BE CHALLENGED AT ANY TIME.

O'Neil, ¶ 0, 9, 13-14, **¶ 17-24**; *Amos*, ¶22-32, **¶ 33-36**; and *Johnson v. Johnson*, 1967 OK 16, ¶ 14, 20, **31**, **33**, make clear that "judicial" Orders not constitutionally passed (due to bribery), are **absolutely void** ***unless*** it can be established they were "relied upon" by "innocent parties." *Amos*, ¶ 24. It is only in this narrow "technical" exception that Constitutionally invalid (bribed) Orders are not "absolutely void." *Id.* Because no innocent parties have relied upon the PUD 260 Order, this "technical" exception is inapplicable here, and thus, the bribed PUD 260 Order is properly treated as **void**. Void Orders may be challenged at any time. *See* 12 O.S. § 1038 ("A void judgment, decree or order may be vacated at any time, on motion of a party, or any person affected thereby").

Obviously these cases only apply to unconstitutional judgments rendered in "**judicial**" proceedings. For "legislative" matters, the rule is even more absolute. In legislative matters, Courts accept the harsh

results that may flow from declaring unconstitutional "legislative" acts void, even when otherwise "innocent parties" are prejudiced. *See General Motors*, ¶ 6, 17 (GM was obligated to pay ad valorem taxes on its lease of public trust property [the OKC plant], notwithstanding its execution of a tax abate agreement with the State done in good faith pursuant to statute; as the underlying statue violated the Oklahoma Constitution – any tax abate agreement granted under the void statute was likewise void. GM willingly accepted the legal risks when it relied on a flawed AG's opinion as to the statute's constitutionally and did so at its peril). *As the Court knows, in declaring void an unconstitutional legislative act, the issue is never what "innocent parties" are hurt by the removal of a monument from the Capital grounds.* Here, SWBT clearly assumed the risk that PUD 260 (SWBT's monument to bribery) could ultimately be declared unconstitutional, *when it fraudulently bribed Commissioner Hopkins to achieve it*. *See* Oklahoma Constitution, Art. 9, § 40.

Time and again this Court, in upholding its critical role of enforcing the Oklahoma Constitution, has declared "**legislative acts**" passed in violation of the Oklahoma Constitution to be ***void*** and of no effect. *See Vasquez v. Dillard's Inc.*, 2016 OK 16, ¶ 0 (Statute is "special law" in violation of Constitution, Art. 5, § 59, declared unconstitutional); *Maxwell v. Sprint PCS*, 2016 OK 41, ¶ 0 (Statute is "special law" in violation of Constitution, Art. 5, § 59, declared unconstitutional); *Burns v. Cline*, 2016 OK 99, ¶ 0 (Statute violates "logrolling" provision of Constitution, Art. 5, § 57,

declared unconstitutional); *Burns v. Cline*, 2016 OK 121, ¶ 0 (Statute violated "single subject rule" in violation of Constitution, Art. 5, § 57, declared unconstitutional); *Prescott v. Okla. Capitol Preservation Comm'n*, 2015 OK 54, ¶ 0 (Legislative act approving placement of Ten Commandments Monument violates Constitution, Art. 2, § 5, declared unconstitutional); *Montgomery v. Potter*, 2014 OK 118, ¶ 0 (Statute is "special law" in violation of Constitution, Art. 5, § 46, declared unconstitutional); *Fent v. Fallin*, 2013 OK 107, ¶ 0 (Statute violates "single subject rule" in violation of Constitution, Art. 5, § 57, declared unconstitutional); *Wall v. Marouk*, 2013 OK 36, ¶ 0 (Statute is "special law" in violation of Constitution, Art. 5, § 46, declared unconstitutional); *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37, ¶ 0 (Statute violates "single subject rule" in violation of Constitution, Art. 5, § 57, declared unconstitutional and **void**). While legislative power is vast, it must be utilized in substance and process within Constitutional limits. *Dobbs*, ¶ 0, 43-45. Bribery is not acceptable "process" within the Constitution's limits. Okla. Constitution, Art. 9, § 40.

The Appellants have looked for, but have yet to find, cases where the Oklahoma Supreme Court held that some parts of Oklahoma's Constitution are without effect, are entirely unimportant, or for some reason are not binding on Oklahoma legislative bodies. To the Appellants' knowledge, **never** has the Supreme Court ruled that Oklahoma Constitution, Art. 9, § 40 is meaningless, unimportant or unenforceable. To the Appellants' knowledge, **never** has the Supreme Court

ruled that Oklahoma Constitution, Art. 9, § 18a(B) is meaningless, unimportant or unenforceable. Seemingly, the prevention of bribery and upholding of the (fundamental) rule that the "concurrence of a majority" of Commissioners is necessary to decide a matter before the OCC would be important, and, it being expressly established by the Oklahoma Constitution, would be **binding.** Indeed, Appellants respectfully assert that these Constitutional provisions are important even today and that our founding fathers clearly intended them to be in full force as the supreme law.

Whether one is an "*Originalist*" or not, bribery of public officials is still wrong, *even today*. It is an affront to the "rule of law" itself that Constitutional provisions such as Art. 9, § 18a(B) and Art. 9, § 40 would be *summarily ignored* – the OCC never even *mentioning them* in its Order on appeal. R. 1507-1525.[15] Ignoring them is exactly what the OCC has done here – invoking *this Court's* name to do it. When upholding the Oklahoma Constitution, this Court has, at least figuratively, "parted the Red Sea" – pushing its own power and jurisdiction to the very limits. *See Lockett v. Evans*, 2014 OK 33 (Granting stay of execution in capital criminal matter by "necessity," despite proper jurisdiction being

[15] These plainly relevant and applicable Oklahoma Constitutional provisions were cited by the Appellants in their Application and Response to Motions to Dismiss more than **a dozen times**. *See* R. 193-336, R. 699-867. Clearly they are the focal point of Appellants' Application. The fact that the OCC's Order never even mentions them shows its inherent and utter arbitrariness. R. 1507-1525.

in Court of Criminal Appeals). This matter plainly invokes the Court's proper appellate jurisdiction. It likewise simply seeks to enforce the Oklahoma Constitution.

As shown by the dissent, the flaws of the majority opinion are numerous. *See* R. 1491-1506, R. 1564-1567; R. 9-11; R. 19-22; R. 30-37 and R. 76-87. Moreover, the OCC majority decision is plainly contrary to the evidence submitted. *See* R. 193-336; R. 699-867; 893-941; R. 1179-1242; R. 1249-1352. While yet further evidence could have been submitted, the OCC majority wrongfully denied Appellants with an evidentiary hearing (as was requested, per Oklahoma Constitution, Art. 9, § 22). *See* R. 878-880; R. 1524. The OCC also wrongfully allowed the Motions to Dismiss to assert disputed facts outside of the Application and based its decision on such disputed facts contrary to law. *See* R. 868-870; R. 705-706, R. 724-725; R. 5571-5576. Even when the United States Department of Defense and Federal Executive Agencies sought to intervene in the case, such was blocked by the OCC majority. R. 1466-1485, R. 1524. Here, the Appellants have worked hard, tirelessly, and with steadfast determination to put this *admittedly* long injustice before this Court under its plainly proper jurisdiction. Respectfully, Appellants ask this Court to do the right thing: to declare SWBT's bribery to be wrong, unconstitutional, and **void** and to order the proper remedy.

4. EVEN ON THE MERITS, APPELLANTS' CLAIMS ARE NOT BARRED BY "JUDICIAL" ISSUE OR CLAIM PRECLUSION OR BY SETTLED-LAW-OF-THE-CASE.

While the OCC majority rejected the "issue preclusion" and other arguments raised by the AG and SWBT, they are addressed herein because they might nonetheless be raised by Appellees as "alternative grounds" in support of the OCC's appealed Order. *See* R. 1519, ¶ 4. Even if considered on the merits, the arguments fail. In its 2010 Oklahoma Supreme Court submissions the AG argued that Commissioner Anthony's "Suggestion" was "*without force*" because he "*cannot alone act in the name of the Corporation Commission*" (yet inconsistently, the AG now argues that it took only one unbribed Commissioner vote to decide PUD 260) because it is only the Attorney General who "*is charged by statute with the responsibility of representing the collective interests of all Oklahoma utility customers in state and federal administrative and judicial proceedings*," and because his "Suggestion" fails to even establish his "*standing as a private citizen in the present matter*." *See* R. 2753. In effect, the AG argued that Commissioner Anthony's two "Suggestions" were not properly made on behalf of the Commission, the public (ratepayers such as Appellants), or even himself. *Id.* Issue and claim preclusion only prevents the re-litigation of facts and issues <u>actually litigated</u> and <u>necessarily determined</u> in an earlier proceedings [sic] <u>between the same parties or their privies</u>. *See* R. 658. *See Valley View Angus Ranch v. Duke Energy Field*

Servs., Inc., 497 F.3d 1096, 1106 (10th Cir. 2007); *State of Okla. Ex rel. Dep't of Transp. v. Little*, 2004 OK 74. As the AG agued, Anthony lacks privity with the Appellants. They were also not decided "on the merits." *See* R. 723-724.

Moreover, SWBT's "bribery" could not have been "actually litigated" and "necessarily determined" in the 1991 *Henry* decision, because the bribery was not publicly disclosed until October 1992, and was not proven until 1995. In the 1991 *Henry* appeal, the AG appealed the (bribed) PUD 260 Order and sought on behalf of all Oklahoma ratepayers a refund of SWBT's "excess revenues." Clearly then, the AG was in legal privity with Appellants when the AG brought the *Henry* appeal and the AG had aligned its interest with that of Oklahoma ratepayers. In that matter, the AG's office argued that a "refund" of "excess earnings" was in the public interest. How times have changed.

Although the AG previously argued that SWBT's actions were a deprivation of other parties' constitutional due process rights and provide "**Ample Legal Authority**" to reopen the PUD 260 case, the AG thereafter (for factually erroneous reasons) never brought any proceeding nor made any effort to uphold the Constitution or to rehear the PUD 260 case. R. 852-856. After the bribery was established, the AG aligned itself to SWBT's positions and thereafter abandoned the

Oklahoma ratepayers.[16] These failings are fatal to the AG's efforts to apply issue and claim preclusion here.

5. APPELLANTS DO NOT SEEK EITHER A RATE CHANGE OR THE RECLASSIFICATION OF "SURPLUS FUNDS" AS "OVERCHARGES."

In this matter, SWBT fails to correctly cite the holding of *Henry* [1991 OK 134], which only held (¶ 1, 10-11) that "surplus funds" were not "overcharge[s]" under 17 O.S. 1981 § 121, for which "refunds" were **<u>required</u>**. Contorting *Henry*, SWBT disingenuously argues that *Henry* held that the Commission was not even **permitted** to order refunds and that Appellants cannot get the relief they seek. *See* R. 619, 625-626. Such was not the issue raised in the *Henry* appeal, nor was such the holding of *Henry*. *See Henry*, ¶ 1, 10-11. *See also* R. 724, Footnote 14.

[16] In the OCC proceedings, Applicants filed a motion to employ "Heightened Scrutiny" to the AG's filings herein, it being publicly reported that in 2014 dozens of AT&T executives (at virtually the exact same time, at least suggesting improper "corporate bundled" contributions) gave in excess of $40,000 to the AG's election campaign (although the AG ran unopposed) literally weeks after the AG supported SWBT's positions at the Supreme Court. R. 871-877. Previously, the Supreme Court favorably discussed the use of "heightened scrutiny" where the bias of public officials might be questioned, but by "necessity," such are not subject to disqualification. *See Southwestern Bell*, 1994 OK 38, ¶ 29-33. Applicants did not request that the AG's briefing be subject to a different standard of review, but that such be reviewed, "*with a more critical eye than is usual*." *Id.*, ¶ 32. This same request is made for the AG's filings in this appeal.

CONCLUSION

SWBT's Motion to Strike portions of the Record should be denied as the record designated is appropriate for the issues of this case, this Court may take judicial notice of the filings in other related OCC proceedings (12 O.S. 2002 § 2202 B-D) and the Oklahoma Constitution, Art, 9, § 22 provides the OCC's Chairman vast discretion to supplement the record on appeal.

Appellants respectfully request that this Court reverse the OCC's Order on appeal, find that the PUD 260 Order is void for the reason that it was "not constitutionally adopted," recall the mandate issued in *Henry* (which was obtained by SWBT's intrinsic fraud[17]) to the extent inconsistent with this Opinion (granting a Bill of Review, if appropriate) and remand the Appellants' Application and the PUD 260 matter back to the OCC for a constitutionally proper determination.

Respectfully submitted,

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[17] If the Court had been informed of SWBT's bribery, would *Henry* have upheld the PUD 260 Order? As the obvious answer is "no," the matter should be reheard and the intrinsic fraud reformed.

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ATTORNEY FOR APPELLANTS

DATE: January 30th, 2017

[Certificate Of Mailing To All
Parties And Court Clerk Omitted]

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

HONORABLE SODY CLEMENTS, an Individual and Oklahoma Resident on behalf of herself and others similarly situated; LT. GENERAL (Ret.) RICHARD A. BURPEE, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; JAMES PROCTOR, an Individual and Kansas Resident on behalf of himself and others similarly situated; RODD A. MOESEL, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; RAY H. POTTS, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; BOB A. RICKS, an Individual and Oklahoma resident on behalf of himself and others similarly situated. Appellants vs. SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a AT&T OKLAHOMA; STATE ex rel. OKLAHOMA CORPORATION COMMISSION, Appellees.	NO. 115334 Appeal from the Oklahoma Corp. Comm'n Cause PUD201500344

APPELLANTS' REPLY BRIEF

(Filed Apr. 19, 2017)

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DATE: April 19th, 2017

Oral Argument Requested
Precedence Upon Docket of Supreme Court Requested (Okla. Constitution, Art 9, § 21)

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APPELLANTS' REPLY BRIEF

Introduction

On September 17, 1907, seventy-one (71%) percent of the voting residents of both the Oklahoma and Indian Territories voted for the adoption of the Oklahoma Constitution. It was a Tuesday, of course. The proposed Oklahoma Constitution was a long one, approximately fifty thousand words long, more than three times the average length of a state constitution. As explained by the Oklahoma Historical Society, "[w]hile there was little that was new in the Oklahoma Constitution, the members of the convention followed [William Jennings] Bryan's advice and consulted numerous state constitutions, the proceedings of the Sequoyah Convention, and the US Constitution in producing a document that was innovative in the sense that so many progressive provisions were included." (www.okhistory.org [Encyclopedia-Oklahoma Constitution])

"Progressivism" at the dawn of the Twentieth Century meant, at its core, protecting "the little guy" and controlling the corrupting influence of "big business." The back story behind the adoption of Oklahoma's Constitution and its content was explained in the book

Oklahoma Politics and Policies: Governing the Sooner State by David R. Morgan (Univ. of Nebraska Press, 1991), pg 73:

> Why did the [Oklahoma Constitutional Convention] delegates see a need to place strict regulations on corporations? As noted in chapter 3, the Progressive movement and its critique of the ills of big business provided a tonic to Oklahoma's boomers, who believed that the evils of the trust-dominated national economy conflicted with the pioneer philosophy built on the virtues of individual effort. Territorial concerns about the unhealthy aspects of economic giants, however, were not only intellectual. People of the territories had witnessed tremendous inflation, at levels of 35 to more than 50 percent annually, which had "awakened a consumer consciousness." Sharp increases in the cost of living were blamed on the trusts' manipulation of the economy in order to enhance corporate profits. Another concern was taxation; corporations simply were not paying their fair share. Small businessmen, along with farmers and laborers, naturally felt outraged by this state of affairs. And legislatures seemed unable to protect the people. As James R. Scales and Danney Goble comment:
>
>> *The power of business was pervasive in government. Mass frustration turned to mass rage as citizens saw the Standard Oil Company* **twice bribe** *the territorial legislature to emasculate any attempt to regulate the quality of its kerosene. The experience was*

> *repeated when the American Book Company – the "textbook trust" –* **successively bribed two territorial assemblies and innumerable local school boards** *to subject helpless parents to outrageous prices for textbooks. (Emphasis added)*

> In studying Oklahoma's constitution, two law professors have concluded: "The task undertaken at Guthrie was not to 'get' corporations but rather to have a way of 'getting at' them if need be . . . the attitudes were not essentially anti-corporation but, rather, anti-trusts or <u>against evil corporations and corporations acting in an evil and destructive manner</u>.

With this context and background in mind, it is understandable why our Oklahoma forefathers proposed <u>eight</u> separate Constitutional provisions intended to reign [sic] in the corruption of "evil corporations and corporations acting in an evil and destructive manner". Among the proposed Constitutional provisions was Article IX, Section 40 of the Oklahoma Constitution, which clearly and unequivocally states:

> **No corporation organized or doing business in this State shall be permitted to influence elections or official duty by contributions of money or anything of value.**

This constitutional provision could not be written any clearer. The plain intent behind this Constitutional provision was to prevent and make unconstitutional the exact abuse that occurred here, a regulated

corporate entity outright **bribing** a Commissioner to obtain a result contrary to the public interest. When this Constitutional provision was written, the Constitutional delegates and the voters who adopted it certainly knew what they were prohibiting: "Mass frustration turned to mass rage as citizens saw the Standard Oil Company twice bribe the territorial legislature to emasculate any attempt to regulate the quality of its kerosene. The experience was repeated when the American Book Company – the 'textbook trust' – successively bribed two territorial assemblies and innumerable local school boards to subject helpless parents to outrageous prices for textbooks." *Supra.*, <u>Oklahoma Politics</u>, pg 73.

Four score and two years later (in 1989), our state and its citizens faced, yet again, that which our forefathers feared and which they so carefully sought to prevent. Simply stated, Southwestern Bell (SWBT) <u>senior executives</u> and its in-house counsel perpetrated a massive scheme to bribe state-wide elected officials so to get what SWBT wanted, the pocketing of hundred of millions of dollars of "excess revenues," all at the expense of the "little guy," the abused Oklahoma ratepayer. After that, and so to keep the ill-gotten gain, SWBT through its in-house counsel then committed intrinsic fraud against the Oklahoma Supreme Court by failing to disclose the bribery during the appeal (clearly a "judicial proceeding"), *Robert Henry v. Southwestern Bell Telephone Company*, 1991 OK 134. To this day, SWBT continues to enjoy the sweet fruit of its bribery as the underlying "bribed PUD 260 Order" has

never been reformed. Indeed, the true amount of SWBT's "excess earnings" from July 1, 1987 to April 18, 1991 has never been determined in PUD 260, although it is clear from the OCC's findings in PUD 662 that the proper amount is more than fifteen times that stated in the bribed PUD 260 Order. SWBT wrongly argues that its fraud can't be reformed.

This case is a legal battle testing whether *portions of the Oklahoma Constitution are utterly toothless and irrelevant*, as SWBT and the Oklahoma Attorney General (AG) now argue, and whether the clear intentions of our Oklahoma forefathers and the votes approving the Oklahoma Constitution were all for nothing, because in the end, they were simply outwitted by the evil forces of contemptuous, corrupt big business. Integrity, justice, honesty, and good government all hang in the balance. Respectfully, this is an important case. Back when Oklahoma was founded, the moral argument of the day [raised by William Jennings Bryan and others] was whether man should be crucified on a "Cross of Gold" (big banks and business favoring the gold standard, over a bi-metal standard for sound money). Sadly, today, the issue is as depressing as it is ridiculous. The issue today is whether the Oklahoma ratepayers are to be crucified on Southwestern Bell's carefully, but fraudulently crafted *Cross of Corruption,* notwithstanding the clear constitutional provision intended to prevent it. Frankly, it should not even be an issue.

Some people reasonably frame the issue of this case as "Does bribery win?" or "Do bribed votes count?"

Perhaps another way to frame it is: "*Must* the little guy always lose?" or "What's wrong with us if bribery is permitted and sucessful, notwithstanding a plainly written constitutional provision that expressly states that such shall not be permitted?" While legislative power is vast, it must be utilized in substance and process within the limits of the Constitution. *Dobbs v. Board of County Commissioners Okla. Co.*, 1953 OK 159, ¶ 0, 43-45. Clearly, bribery is not an acceptable "process" within the Constitution's allowable limits. *See* Okla. Constitution, Art. 9, § 40.

With respect to the substance of the Appellees' Answer Briefs, it should be noted first and foremost that Appellees, largely, do not address or dispute the specific arguments which the Appellants made in their Brief in Chief. The legal and factual issues raised by Appellants, but ignored by the Appellees, are as follows:

Legal arguments raised in Appellants' Brief in Chief	*Appellees' Response*
a. SWBT miscites the holding in the *Wiley* case. *Wiley v. Oklahoma Natural Gas*, 1967 OK 152, Par. 5, expressly recognized that legislative acts can be "annul[ed] and pronounce[d] void" on grounds of "repugnancy to the constitution").	Not addressed or refuted by Appellees in Response Briefs
b. Bribing an OCC Commissioner is repugnant to the Oklahoma Constitution and Oklahoma	Not addressed or refuted by Appellees in Response Briefs

law. Oklahoma Constitution, Art. 9, Section 40; 17 O.S. 1968 177.	
c. Allowing OCC matters to be determined by a minority of Commissioners is repugnant to the Oklahoma Constitution. Oklahoma Constitution, Art. 9, Section 18a.	Not addressed or refuted by Appellees in Response Briefs
d. Commissioners are bound by oath to uphold the Constitution. *See* Oklahoma Constitution, Art. 9, Section 17.	Not addressed or refuted by Appellees in Response Briefs
e. *Wiley* did not address or consider the requirements of the Oklahoma Constitution, Art. 9, Section 40 or Art. 9, Section 18a. As such, the *Wiley* decision has no precedential value. *See Southwestern Bell Tel. Co. v. Oklahoma Corp Comm'n*, 1994 OK 38, Par. 34 (Where arguments and issues were not previously made, prior decision has no precedential value.)	Not addressed or refuted by Appellees in Response Briefs
f. Unconstitutional legislative acts are **void**, regardless of whether they have been relied upon in good faith. *See General Motors Corp v. Okla. Board of Equalization,* 1983 OK 59, Par. 17, *citing Norton v. Shelby County,* 118 U.S. 425; 6 S. Ct. 1121; 30 L.Ed. 178 (1886) (An unconstitutional statute confers	Not addressed or refuted by Appellees in Response Briefs

no rights, imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.); *Zane v. Hamilton County,* 189 US 370; 23 S.Ct. 538; 47 L.Ed. 858 (1903).	
g. In any event, legislative acts maybe amended or repealed at will for any reason. *Granger v. City of Tulsa,* 51 P.2d 567 (Okla. 1935); Op. of Oklahoma Atty Gen., 1995 OK AG 86, Par 6-8.	Not addressed or refuted by Appellees in Response Briefs
h. The OCC has jurisdiction to modify or reconsider its prior orders to account for new circumstances. *Marlin Oil Corp. v. Okla. Corp. Commission,* 1977 OK 67, Par. 5, 18, 20 (To hold that the Commission cannot modify its own final orders so to account for new circumstances, could impermissibly prevent the Commission from performing its mandated statutory duties. Such is not Oklahoma law; not every application for modification of a final order is deemed a collateral attack).	Not addressed or refuted by Appellees in Response Briefs

i. The Oklahoma Supreme Court has expressly recognized the OCC's jurisdiction to address SWBT's fraud in the prior rate-making matter. *See Henrickson v. Okla. Corp. Commission,* 2001 OK 89, Par. 15-16 (Subsequently raised issues of Southwestern Bell's *fraud* in prior rate-making matters are exclusively within the Commission's jurisdiction and thus must be properly raised there).	Not addressed or refuted by Appellees in Response Briefs
j. Never has the Oklahoma Supreme Court ruled that the PUD 260 case cannot be reopened.	Not addressed or refuted by Appellees in Response Briefs
k. Motions to dismiss may only be granted if it is beyond "a reasonable doubt that applicant could prove no set of facts that would entitle them to relief." *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).	Not addressed or refuted by Appellees in Response Briefs
l. The "settled-law-of-the-case" doctrine only bars the relitigation of issues that were actually or necessarily settled by a prior appeal. *See Parker v. Elam,* 1992 OK 32, Par. 9. *See also Russell v. Board of County Commissioners,* 1997 OK 80, Par. 35; *Willis v. Nowata Land & Cattle Co., Inc.,* 1989 OK 169, Par. 7. The bribery issue	Not addressed or refuted by Appellees in Response Briefs

could not have been settled by the prior *Henry* appeal, as the bribery was not publically known in 1991.	
m. Cases reversed on appeal proceed in the lower court anew as if no prior proceedings had occurred except as for issues actually settled in the appeal. *Seymour v. Swart,* 1985 OK 9, Par. 8. On all other issues of a case, to include unknown or subsequently raised issues, upon remand from a reversed Judgment a lower court may freely consider and determine the effect of any new or expanded issues as if no prior trial had been ever held. *Parker v. Elam*, 1992 OK 32, Par. 13.	Not addressed or refuted by Appellees in Response Briefs
n. The *Henry* case remanded to the Commission the PUD 260 matter " . . . for all further proceedings not inconsistent with the Opinion." *Henry,* Par 44. *Henry* only answered certain specific questions presented on appeal.	Not addressed or refuted by Appellees in Response Briefs
o. The Attorney General has previously admitted that Southwestern Bell's actions were a deprivation of other parties' constitutional due process rights and provide "*Ample Legal Authority*"	Not addressed or refuted by Appellees in Response Briefs

to reopen and rehear the PUD 260 case. *See* AG's 1997 Supreme Court Brief, pp. 2-6, 8-10. R. 852-854.	
p. Contrary to the AG's argument, *Tupen* and the other cases cited therein make clear that the OCC has proper jurisdiction to reconsider matters upon the subsequent filing of a new application with proper notice given. *See Turpen,* Par 21 ("The Commission is without authority even to review and modify the order unless statutory notice of a hearing concerning the proposed modification is given to all interested parties"). *Citing* [in footnote 18] *Crews v. Shell Oil Company*, 1965 OK 151, 406 P.2d 482, 487 (Okla. 1965) (With the proper statutory notice to all interested persons, the Commission has the authority to review and modify or change a former order which has become a final order.); *Carter Oil Co. v. State,* 1951 OK 327, Par. 0, 9, 17; *Carpenter v. Powell Briscoe*, 1963 OK 33, Par. 5-7.	Not addressed or refuted by Appellees in Response Briefs

q. Both SWBT and the OCC blame the Oklahoma Supreme Court for the resulting injustice and the ultimate failure to uphold the Oklahoma Constitution.	Not addressed or refuted by Appellees in Response Briefs
r. To the extent that the OCC fails to consider subsequent undetermined issues under the erroneous belief that it is precluded from doing so by prior appellate mandate, it commits a reversible error of law. *See Berland's of Tulsa v. Northside Vil. Shop Ctr.,* 1968 OK 136, Par. 5-10, 14, 27, 30 (Reversing trial court that failed to consider subsequent issue not determined by prior appeal under the erroneous belief that prior appellate mandate restricted the consideration of such issue).	Not addressed or refuted by Appellees in Response Briefs
s. The Appellants have presented substantial evidence and argument for ***why*** reconsideration of the PUD 260 matter is in the public interest. Rate payers may be owed over **16 billion** dollars. Such evidence includes the gross miscalculation of SWBT's "excess earnings" in the bribed order, evidence of "OCC staff misconduct" leading up to the Order (never even	Not addressed or refuted by Appellees in Response Briefs

considered by the AG's office) and the massive benefit that SWBT ratepayers could receive, and should have received, absent SWBT's fraud. *See* R. 38-54, R. 893-941, R. 1179-1242, R. 1249-1352. *See also* Dissent of Commissioner Anthony, R. 1497-1506, R. 1564-1567.	

The over-arching theme of SWBT's brief, that the issue of the case has been "repeatedly determined" over the past twenty-eight years, is built on a false or misleading narrative. In fact, this case is the very first time that the "bribery matter" has ever been presented to the Oklahoma Supreme Court in an appeal brought as a matter of right. When the Oklahoma Supreme Court issued its opinion in *Robert Henry v. Southwestern Bell Telephone Company*, 1991 OK 134, SWBT's bribery was simply not publically known at the time. *See* R. 717. As such, the *Henry* decision could not have addressed the bribery issue.

It is true that in 1997 (R. 2906, Order of May 19, 1997, Cause No. 74,194) and again in 2010 (R. 2953, Order of February 8, 2010, Cause No 74,194), the Oklahoma Supreme Court declined to consider the bribery matter on the grounds that Commissioner Anthony's "*. . . Suggestion to the Court does not invoke either the appellate or original jurisdiction of the Supreme Court.*"[1] *See* R. 723-724. Such a procedural determination,

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[1] In their Answer Briefs, both SWBT and the OCC disingenuously count the Court's prior 1997 and 2010 procedural determinations that its jurisdiction was "*not properly invoked*" as instances

however, should not be taken as an "on the merits" determination of the constitutional issues raised herein. Here, the AG, OCC and SWBT seemingly believe that the Supreme Court's decision only to act within its jurisdiction evidences the Court's true desire to rubber stamp with approval the violation of Oklahoma's Constitution and/or just to sweep the bribery issue under the rug. The Appellants respectfully challenge this conclusion.

In OCC's prior remand proceedings following the *Henry* decision, the OCC (erroneously) believed it had no jurisdiction to remedy the bribery and fraud, as it lacked " . . . permission from the Oklahoma Supreme Court to rehear the entire cause." *See* R. 1515, Par. 26. The Appellants' current Application was likewise summarily dismissed (with prejudice) on this same erroneous basis (*See* R. 1515, Par. 26). It simply is not a correct statement or understanding of Oklahoma law. *See* R. 717-718. To the extent that the OCC fails to consider subsequent undetermined issues under the erroneous belief that it is precluded from doing so by prior appellate mandate, it commits a reversible error of law. *See Berland's of Tulsa v. Northside Vil. Shop Ctr.*, 1968 OK 136, Par. 5-10, 14, 27, 30 (Reversing trial court that failed to consider subsequent issue not determined by prior appeal under the erroneous belief that prior appellate mandate restricted the consideration of such issue). Moreover, no evidence or argument on the "bribery issue" was heard in the 1997 remand proceedings,

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where the Court upheld on the merits the bribery of public officials or the lack of any remedy for it.

precisely because the OCC, by order, strictly limited the "reconsideration on remand" to only those limited issues expressly determined and remanded by the *Henry* appeal. R. 2211. Again, the *Henry* appeal never addressed the bribery, it being unknown to the general public at the time.

Anticipating SWBT's arguments and indeed, the OCC's frequent misconceptions, two of the Appellants herein had sought a <u>discretionary</u> and <u>extraordinary</u> writ of mandamus and bill of review in June 2014 (Cause No. 112,973), an effort that was denied, as SWBT admits (SWBT's Answer Brief, p. 12) <u>without the reason being stated</u>.[2] Oddly, and perhaps disingenuously, the Appellees nonetheless count it as yet another instance of the Oklahoma Supreme Court reaffirming the bribery at issue here. *See* R. 1517, Par. 30; R. 1520, Par. 5. Appellants see it differently; as perhaps the Court's determination that the matter should first be raised with the OCC.[3]

Finally, the PUD <u>250</u> matter (OCC's 2003 Order) could not have been the vehicle by which the OCC

---

[2] Again, the AG, SWBT and the OCC *presume* that the Supreme Court denied the Application to Assume Original Jurisdiction because the Court upheld the bribery of public officials done in violation of the Constitution or determined that there was a lack of any remedy for it.

[3] The Oklahoma Supreme Court's 2014 decision (in Cause No. 112,973) may have simply been the reaffirmation of its prior decision in *Henrickson v. Oklahoma Corp. Comm'n* 2001 OK 89, Par. 15-16 (Subsequently raised issues of Southwestern Bell's fraud in prior rate making matters are exclusively within the Commission's jurisdiction and must be properly raised there.)

ratified the bribed PUD 260 order, because PUD 250 was merely an administrative "inquiry" that was opened and closed by Commissioner Anthony, *before* any subsequent OCC order "dismissing" it. R. 5563-5566. No evidence or argument, or even an *application*, was presented by anyone in the PUD 250 matter. R. 5564.

Appellants' Statement of the Record

In the Answer Brief of the Attorney General, nowhere is it argued that the Appellants' Statement of the Record is incorrect or incomplete. In the Answer Brief of Southwestern Bell, SWBT *superficially* argues that the Appellants' Summary of the Record is incorrect or incomplete (SWBT Answer Brief, pg. 3), but nowhere therein does SWBT's Summary of the Record actually and specifically dispute any fact as set forth by the Appellants. As such, the Appellants dispute that SWBT has properly challenged any portion of the Appellants' Statement of the Record. Finally, in the Answer Brief of the Oklahoma Corporation Commission, the OCC raises only two specific objections to Appellants' Statement of the Record.

First, the OCC objects to *certain* of the Appellants' citation references on the basis that they are to "[too] large portions of the record" and that they lack required detail. OCC Answer Brief, p. 2. Specifically, the OCC cites to certain references in Appellants' Statement of Record Paragraphs 2, 3, 8, 11 and 14. Here, the OCC's objection is unfounded as the cited

paragraphs largely assert what filings were made in the underlying proceeding, and the citations are merely to the referenced filing in their entirety. For example, Appellants' Paragraph 8 to the Statement of the Record states "On November 2, 2015, the Applicants filed their Combined Response to the Motions to Dismiss of SWBT and the AG." The record citation thereafter given *is to this filing in its entirety*, which naturally, is the correct "citation to the record where such facts occur." Citing to an entire filing to support the assertion of **when** and **what** filing was made in the underlying proceeding does not *legitimately* present a difficulty to the OCC in "assessing the accuracy of such references." Here, the OCC's objection is utterly meritless.

Second, the OCC objects to the Appellants' citation of the OCC Chairman's "Certificate of Record" [R. 5569-5576] in support of the assertion that certain material evidence was denied the Appellants precisely because the OCC *summarily* denied Appellants' request for an evidentiary hearing, a request proper pursuant to Oklahoma Constitution, Art. 9, Section 22. In fact, contrary to the OCC's argument, the OCC Chairman's Certificate is a part of the record on appeal. R. 5569-5576. The Chairman's Certificate is not "out of the record" as the OCC seemingly argues, and indeed, per the Oklahoma Constitution, Art. 9, Section 22, such must be included in the record on appeal. Contrary to the OCC's argument, the OCC Chairman's "Certificate of Record" is a Constitutionally required and recognized submission from the OCC itself on the underlying

record (per Oklahoma Constitution, Art. 9, Section 22), not merely a statement of "the opinion of but one commissioner". Finally, the OCC Chairman's "Certificate of Record" [R. 5569-5576] properly evidences the existence of certain material evidence that was denied the Appellants precisely because the OCC *summarily* denied Appellants' request for an evidentiary hearing, a request proper pursuant to Oklahoma Constitution, Art. 9, Section 22. In all respects, the citation made is proper; the OCC's objection is meritless.

Appellees' Summary of the Record

As stated below, the Appellants object to certain portions of the Summary of the Record as advanced by SWBT, the AG, and the OCC, as being incorrect, misleading or incomplete.

1. In its Summary of the Record, Part A (p. 3), SWBT asserts that "Commission Staff" and later the "Commission Hearing Officer" determined that "reinvestment would best serve the interests of Oklahoma consumers." Of course, this asserted fact is totally irrelevant given that under the Oklahoma Constitution, "Commission Staff" and/or the "Commission Hearing Officer" are not the *functional equivalent and suitable replacement* of Commissioners in the event of bribery, or otherwise. The assertion is also misleading, given that excluding the bribed vote, the findings of the "Commission Staff" were simply "not approved" by a majority of the Commissioners, as required per Oklahoma Constitution, Art. 9, Section 18a. R. 1816-1828.

Finally, the assertion is misleading in light of the November 16, 2016, OCC Chairman's "Certificate of Record," filed per Oklahoma Constitution Art. 9, Section 22, summarizing the facts essential for a prompt resolution of this appeal as well as evidence he deemed proper to certify. *See* R. 5569-5576. The Certificate of Record details certain important evidence not in the record (precisely because the majority *summarily* (and wrongfully – R. 878-880) denied the request for an evidentiary hearing), as well as various other errors in the record, including on the issue of whether "Commission staff" had ever been influenced or bribed by SWBT in the PUD 260 matter. *See* R. 5571-5576; *C.f.*, R. 856, R. 1522.

In its Summary of the Record, Part B (p. 5), SWBT misleadingly implies that only Anderson and Hopkins, and not SWBT senior executives and its in-house counsel, were involved in SWBT's bribery scheme. This is incorrect. *See* Appellants' Brief in Chief, Statement of Record Par. 2, 5.

In its Summary of the Record, Part C (p. 6), SWBT falsely suggests that PUD 662 superseded and effectively mooted the PUD 260 matter. Such is incorrect. First, the settlement in PUD 662 explicitly excluded from settlement the PUD 260 case. *See* R. 1536. Second, the time periods covered by these respective cases were different. As SWBT itself admits, the PUD 662 order only calculated "excess revenues" from **April 19, 1991 to August 26, 1992**. For this short, fourteen month time period, the OCC ultimately found SWBT's excess earnings amounted to **$148,393,959**. *See* SWBT's

Answer Brief, pg. 6. Unlike PUD 662, however, PUD 260 placed SWBT rates under review effective July 1, 1987, and made any ultimate rate reduction effective as of July 1, 1987. *See* SWBT's Answer Brief, pg. 3. Ignoring any excess revenues earned by SWBT after April 18, 1991 and focusing solely on the effective dates of PUD 260 that are *indisputably* beyond the scope of the PUD 662 order (that is, **from July 1, 1987 to April 18, 1991**, or nearly 46 months), it is clear that if SWBT's excess revenues for 14 months in 1991-1992 exceeded $148 million, its excess revenues for the preceding 46 months total, at minimum, **many hundreds of millions of dollars**. SWBT disingenuously sidesteps this colossal financial obligation to Oklahoma ratepayers (which the bribed PUD 260 order fraudulently resolved by a mere $30 million reinvestment in infrastructure) with one single (unsupported and disingenuous) sentence, to wit: "In short, after the conclusion of PUD 662, PUD 260 had *no ongoing effect* on Oklahoma ratepayers." (Emphasis added.) *See* SWBT's Answer Brief, pg. 7. Not surprisingly, the *unresolved prior effect* – many hundreds of millions of dollars owed to Oklahoma ratepayers and never refunded – goes unmentioned by SWBT.

In its Summary of the Record, Part D (p. 7), SWBT falsely suggests that reinvestment of $30 million was in the public interest. As shown above, it is clear that if SWBT's excess revenues for 14 months in 1991-1992 exceeded $148 million (as determined in the PUD 662 order), its excess revenues for the preceding 46 months (part of the revenue period subject to refund under

PUD 260) total, a minimum, **many hundreds of millions of dollars**. Nowhere does SWBT explain how the bribed PUD 260 order's under-calculation of SWBT's "excess earnings" by hundreds of millions of dollars (versus the $30 million ordered for reinvestment) was in the public interest, or indeed, where, when and how the OCC has **ever before** considered this issue.

In its Summary of the Record, Part E (p. 11), SWBT falsely suggests that this Court has rejected on the merits, three separate attempts to reform the bribed PUD 260 order. In 1997 (R. 2906, Order of May 19, 1997, Cause No. 74,194) and again in 2010 (R. 2953, Order of February 8, 2010, Cause No 74,194), the Oklahoma Supreme Court declined to consider the bribery matter on the grounds that Commissioner Anthony's " . . . *Suggestion to the Court does not invoke either the appellate or original jurisdiction of the Supreme Court*." *See* R. 723-724. Later, two of the Appellants herein sought a discretionary and extraordinary writ of mandamus and bill of review in June 2014 (Cause No. 112,973), an effort that was denied, as SWBT admits (SWBT's Answer Brief, p. 12) without the reason being stated. Again, Appellants maintain such a procedural determination should not be taken as an "on the merits" determination of the constitutional issues raised herein.

Finally, in its Summary of the Record, Part F (p. 12), SWBT misleadingly argues that the OCC, in 1997 and also in 2003, knowingly rejected the efforts to reopen PUD 260 so to reconsider the bribery issue.

In fact, in the OCC's remand proceedings following the *Henry* decision, the OCC (erroneously) believed it had no jurisdiction to remedy the bribery and fraud, as it lacked " . . . permission from the Oklahoma Supreme Court to rehear the entire cause." *See* R. 1515, Par. 26. Such is simply not a correct statement or understanding of Oklahoma law. *See* R. 717-718. *See Berland's of Tulsa v. Northside Vil. Shop Ctr.*, 1968 OK 136, Par. 5-10, 14, 27, 30 (Reversing trial court that failed to consider subsequent issue not determined by prior appeal under the erroneous belief that prior appellate mandate restricted the consideration of such issue). Moreover, no evidence or argument on the "bribery issue" was heard in the 1997 remand proceedings precisely because the OCC, by order, <u>strictly limited the "reconsideration on remand" to only those limited issues expressly determined and remanded by the *Henry appeal*</u>. R. 2211. Again, the *Henry* appeal never addressed the bribery, it being unknown to the general public at the time.

Lastly, the PUD <u>250</u> matter could not have been the vehicle by which the OCC ratified the bribed PUD 260 order in 2003 because PUD 250 was merely an administrative "inquiry" that was opened <u>and closed</u> by Commissioner Anthony, *before* any subsequent OCC order "dismissing" it. R. 5563-<u>5566</u>. No evidence or argument, or even *application*, was presented by anyone in the PUD 250 matter. R. 5564.

2. In its Summary of the Record, the Attorney General asserts (p. 1) that the OCC based its ruling solely on its conclusion that it lacked jurisdiction to grant

Appellants' requested relief. Admittedly, not on the table was any consideration of whether PUD 260 grossly underdetermined SWBT's "excess earnings," or what the OCC should do with the bribed PUD 260 order in the best interests of Oklahoma payers. *Id.* The Appellants absolutely agree.

In the underlying proceeding, SWBT, the AG and ultimately the OCC, point the finger directly at the Oklahoma Supreme Court as the reason why the bribed PUD 260 Order could not be reformed. The AG and SWBT both argued the OCC lacked jurisdiction to proceed. Specifically, the OCC majority found that, " . . . *the Oklahoma Supreme Court itself has previously upheld the bribed order (notwithstanding the bribery) and/or ratified the intrinsic fraud herein at issue such that the matter is final even if the Oklahoma Corporation Commission wanted to correct the injustice* . . . " *See* R. 5570, Chairman's Certificate of Record, filed November 16, 2016, p. 2. *See also* R. 86-87, R. 1515, ¶ 26; R. 1517, ¶ 30, **R. 1520, ¶ 5** (*The OCC finds that the Supreme Court has been made aware of the bribery of Commissioner Hopkins, has had opportunities to grant similar relief and has chosen not to grant relief*). Importantly, Commissioner Hiett stated that his decision rested solely on legal/jurisdictional grounds, not on factual or "policy grounds" that the bribed PUD 260 Order correctly decided the amount of SWBT's excess revenues, or that reinvestment of excess revenues was what should be done in the public interest. R. 112-113.

In its Summary of the Record, the Attorney General asserts (pg. 5) that on remand in 1997, the OCC

properly considered the issue of Hopkins bribery and what action the public interest demanded. Respectfully, the Appellants disagree. In OCC's remand proceedings following the *Henry* decision, the OCC (erroneously) believed it had no jurisdiction to remedy the bribery and fraud, as it lacked " . . . permission from the Oklahoma Supreme Court to rehear the entire cause." *See* R. 1515, Par. 26. The Appellants' current Application was likewise summarily dismissed (with prejudice) on this same erroneous basis. *See* R. 1515, Par. 26. Such simply is not and was not a correct statement or understanding of Oklahoma law. *See* R. 717-718. *See* argument on p. 7 herein, *Supra.*

In its Summary of the Record, the Attorney General asserts (p. 6) that three other challenges were made to the bribed PUD 260 order. Again, such procedural determinations should not be taken as "on the merits" determinations of the constitutional issues raised herein. *See Supra*, p. 6-8.

3. The Summary of Record from the Attorney General (p. 8) and the OCC (p. 10) differ somewhat on the "reasons" for the OCC (majority's) dismissal with prejudice of this action. Per the AG's Answer Brief, p. 8, the decision was based upon three determinations: (1) that legally speaking, "legislative decisions" may not be set aside due to bribery, (2) that granting the Appellants' the requested relief would be impermissible retroactive ratemaking, and that (3) intervening industry restructuring had placed the requested relief outside its reach. Interestingly, as per the AG, the Order now on

appeal was *not decided based upon any analysis of " – what was in the public interest."*

According to the OCC's Answer Brief (pg. 10), somewhat alternative *grounds* were offered for the OCC's Order now on appeal. First, that "legislative decisions" may not be set aside due to bribery, (2) that concepts of "intrinsic fraud" are inapplicable in legislative actions – noting that the OCC and the Supreme Court have refused to grant relief on multiple prior occasions, and (3) that reinvestment was in the public interest. According to the OCC's Answer Brief, p. 10, but contrary to the AG's brief, concerns over "retroactive ratemaking" *were not the basis of the OCC's Order on appeal. Id.* In any event, as relates to the "reasons" why the OCC (majority) ruled as it did, the Appellees all agree on one point: That the OCC found that **bribed** Commissioner votes do count if one's 'official duty' is acting in "a legislative capacity." This argument fundamentally ignores Oklahoma Constitution, Art. 9, Sect. 40, in addition to its other flaws.

Standard of Review

The Answer Briefs of SWBT (SWBT Answer Brief, p. 14), the AG (AG Answer Brief, p. 9) and the OCC (OCC Answer Brief, p. 10) have all noted the standard of review set forth in the Oklahoma Constitution, Art. 9, Sect 20, which provides that " . . . *in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall*

exercise its own independent judgment as to both the law and the facts." SWBT also acknowledges that irrespective this Court reviews jurisdictional and fundamental legal issues "*de novo*." SWBT's Answer Brief, p. 14.

This case directly involves alleged violations of the Oklahoma Constitution, Art. 9, Sections 18a and 40. Clearly, citizens have a protectable right and interest in enforcing the Oklahoma Constitution against violation from an Oklahoma legislative body. *Vasquez v. Dillard's Inc.*, 2016 OK 16, ¶ 0 (Statute declared unconstitutional); *Maxwell v. Sprint PCS*, 2016 OK 41, ¶ 0 (Statute declared unconstitutional); *Burns v. Cline*, 2016 OK 99, ¶ 0 (Statute declared unconstitutional); *Burns v. Cline*, 2016 OK 121, ¶ 0 (Statute in violation of Constitution, declared unconstitutional); *Prescott v. Okla. Capitol Preservation Comm'n*, 2015 OK 54, ¶ 0 (Legislative act declared unconstitutional); *Montgomery v. Potter*, 2014 OK 118, ¶ 0 (Statute declared unconstitutional); *Fent v. Fallin*, 2013 OK 107, ¶ 0 (Statute violates Constitution, declared unconstitutional); *Wall v. Marouk*, 2013 OK 36, ¶ 0 (Statute is declared unconstitutional); *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37, ¶ 0 (Statute declared unconstitutional and **void**).

If citizens had no right to enforce the Oklahoma Constitution on invalid legislative acts, then none of the above litigants would have had proper standing. Here, all the Applicants were Oklahoma ratepayers at the time at issue and all were directly injured by the improper actions of SWBT and the OCC in direct

violation of the Constitution. All the Appellants herein brought this action seeking to protect their own interests. Moreover, on the specific facts of this case, the Oklahoma Attorney General has already recognized that SWBT's actions of bribing a Commissioner in PUD 260 were a deprivation of other **parties' constitutional due process rights** and provide "Ample Legal Authority" to reopen the PUD 260 case. R. 852-856. The non-differential de novo standard of review applies on all issues of fact or law.

In its "Standard of Review," the AG argues (p. 9) that the proper issue is whether "the Commission has the legal authority to grant the relief sought – a de novo evidentiary hearing on a twenty-five year-old rate case of a utility no longer regulated by the Commission." Of course, no one disputes the OCC's proper jurisdiction when the PUD 260 case was filed. This proper jurisdiction of the OCC with respect to these prior matters and for time periods before ["]deregulation,["] is not retroactively "defeated" merely when a new system is created, any more here than in Oklahoma's *dual* Worker's Compensation System. No authority is cited in any brief establishing otherwise.

Additionally, the Appellants absolutely dispute the AG's argument (p. 9-10) that the "threshold" issue should not be whether "the bribery in PUD 260 violated the Oklahoma Constitution." That is exactly the key threshold issue and any argument otherwise is incorrect. If the bribery in PUD 260 violated the Oklahoma Constitution, then logically, it is **void** as unconstitutional. The law is clear: Where a legislative body

has not acted within the framework of the Constitution, it has not acted; an unconstitutional statute confers no rights, imposes no duties and affords no protection. *See General Motors Corp v. Okla. Board of Equalization*, 1983 OK 59, ¶ 17 (General Motors was obligated to pay ad valorem taxes on its lease of public trust property [the Oklahoma City plant], notwithstanding execution of a tax abate agreement done pursuant to statute; as the underlying statue [sic] violated the Oklahoma Constitution – any tax abate agreement granted under the void statute was likewise void.) *citing Norton v. Shelby County*, 118 U.S. 425; 6 S. Ct. 1121; 30 L.Ed. 178 (1886); *Zane v. Hamilton County*, 189 US 370; 23 S.Ct. 538; 47 L.Ed. 858 (1903).

Appellants respectfully maintain that if the bribed PUD 260 Order is **void** as unconstitutional, then by definition, the OCC must re-determine the PUD 260 issues therein. Absent such, the Oklahoma Constitution is not "supported, protected and defended." Void, unconstitutional orders simply are not allowed to stand. Although SWBT and the AG seemingly believe otherwise, **unconstitutional legislative acts** may be challenged at time, even decades later, and indeed regardless of how many times a Court, *even the United States Supreme Court*, has ruled them proper. Case in point: *Plessy v. Ferguson*, 163 U.S. 537; 16 S.Ct. 1138, 41 L.2d. 256 (1896) (US Supreme Court holds in a 7-1 opinion that racial segregation laws for public facilities do not violate the 14th Amendment, if the facilities are "separate but equal"); *Lum v. Rice*, 275 U.S. 78; 48 S.Ct. 91; 72 L.Ed 172 (1927) (Reaffirming thirty-one years

later in 9-0 decision the "separate but equal" doctrine as applied to racial segregation laws); *Brown v. Board of Education of Topeka*, 347 US 483; 74 S.Ct. 686; 98 L.Ed 873 (1954) (US Supreme Court in 9-0 decision reversing after fifty-eight years, the "separate but equal" doctrine as applied to racial segregation laws, declaring such laws unconstitutional and void). In fact, there is no "statute of limitations" for upholding the Constitution.

Indeed, when it comes to enforcing the Oklahoma Constitution, even otherwise absent "jurisdiction" will arise under the "rule of necessity." *See Lockett v. Evans*, 2014 OK 33 (Granting stay of execution in capital criminal matter by "necessity," despite proper jurisdiction being in Court of Criminal Appeals). The paramount obligation of the Court is to enforce the Constitution of United States and the Constitution of the State of Oklahoma. The key, threshold issue of this lawsuit is thus simply: Did SWBT's bribery of Commissioner Hopkins make the PUD 260 Order unconstitutional pursuant to Oklahoma Constitution, Art. 9, Sections 18a and 40? On this score, it is noteworthy that previously, the Oklahoma Attorney General's office took the position that the PUD 260 Order "was not constitutionally adopted." R. 854.

Legal Arguments & Authorities

1. THE BASIS FOR OCC'S ORDER IS FUNDAMENTALLY FLAWED, LEGALLY AND FACTUALLY.

A. The OCC's Bribed PUD 260 Order Violated the Oklahoma Constitution

In none of the Answer Briefs filed by Appellees is it disputed that the Oklahoma Constitution mandates that it takes at least two (unbribed) Commissioner votes to determine matters before the OCC. *See* Oklahoma Constitution, Art. 9, § 18(a)B. This constitutional provision clearly is a *limitation directly upon the OCC*, to include on the OCC in its exercise of "legislative power." Indeed, not even SWBT is able to muster an argument otherwise. *See* SWBT's Answer Brief, p. 19, footnote 2.[4] No Appellees dispute that it is inherently repugnant to the Oklahoma Constitution that the "concurrence" of a Commissioner on a public matter and the *necessary vote* to decide a question in dispute could be fraudulently and **feloniously bought** by a regulated entity against the interests of the public.[5] Excluding

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[4] While SWBT attempts to argue away the meaning and effect of Oklahoma Constitution, Art. 9, Sect 40 (SWBT's Answer Brief, p. 19, footnote 2); SWBT at the same time notes that the Appellants' arguments are also based on the language of Oklahoma Constitution, Art. 9, Sect 18(a)B (it takes two votes for the OCC to act). *C.f.*, R. 852-854. As for this provision, SWBT seemingly can't even think of an argument for how such is inapplicable, given that this provision is plainly "directed to the OCC" and directly limits the "OCC's" exercise of power.

[5] The principle that "bribed" (Constitutional Votes) do not count has been repeatedly adopted by this Court. *See Okla. Co. v. O'Neil*, 1967 OK 105, ¶0, 9, 13-14, **¶ 17-24**, 431 P.2d 445; *Marshall v. Amos*, 1968 OK 86, ¶22-32, **¶ 33-36**; 442 P.2d 500; *Johnson*

the bribed vote of Commissioner Hopkins, the Commission's Order 341630 was simply not approved by a majority, and thus, is Constitutionally invalid and **void**. R. 852-854. Indeed, this legal conclusion is mandated by the fact that SWBT's act of obtaining Commissioner Hopkins' vote by means of bribery is made directly illegal by **the Oklahoma Constitution itself**. *See* Oklahoma Constitution, Art. 9, § 40 (No corporation organized or doing business in this State shall be permitted to influence elections or official duty by contributions of money or anything of value.)

The plain intent behind this Constitutional provision is to prevent the exact abuse that occurred here: a regulated company outright bribing a Commissioner (who regulates the company) to obtain a result contrary to the public interest. It is noteworthy that this Oklahoma Constitutional provision is found in Art. 9, the same article which governs the OCC. Clearly this provision is meant to apply to the OCC Commissioners.

In determining the meaning of a Constitution or Enabling Act provision, the court naturally looks to the **framers' intent**, asking "why or for what reason did the framers" write the provision at issue. *Okla. Ed. Ass'n, Inc., v. Nigh*, 1982 OK 22, Par. 13. The language is not read in isolation from the entire contextual content of the relevant sections. *Id.*, Par. 12. Here, it is

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v. Johnson, 1967 OK 16, ¶ 14, 20, **31**, **33**, and Special Concurring Opinion, ¶ 3-5. Indeed, these cases were previously found by the Oklahoma Attorney General's office to be "remarkably similar" to the circumstances of this matter. R. 852-854.

understandable why our Oklahoma forefathers proposed eight separate Constitutional provisions intended to reign [sic] in the corruption of "evil corporations and corporations acting in an evil and destructive manner," to include Article IX, Section 40 of the Oklahoma Constitution. When this Constitutional provision was written, the Constitutional delegates and the voters who adopted it certainly knew what they were prohibiting: "M*ass frustration turned to mass rage as citizens saw the Standard Oil Company twice bribe the territorial legislature to emasculate any attempt to regulate the quality of its kerosene. The experience was repeated when the American Book Company – the 'textbook trust' – successively bribed two territorial assemblies and innumerable local school boards to subject helpless parents to outrageous prices for textbooks.*" *Supra.,* Oklahoma Politics, pg 73.

By its plain express terms, SWBT's bribery of Commissioner Hopkins was constitutionally **impermissible** *regardless* of whether in his "official duty" Hopkins was acting in a "legislative" verses "judicial" capacity.[6] On its face, Oklahoma Constitution, Art. 9,

[6] SWBT thus got it wrong when it argued that bribery is only wrongful/correctable if the matter is a "judicial proceeding," for which "judicial processes" and "judicial standards" apply. *See* R. 624-625, Constitution, Art. 9, § 40. Importantly, the Court in *Wiley*, the case relied upon by SWBT, never even considered this provision of the Constitution; the contention apparently was not one made by the appellant as the bribery there didn't involve the Commissioners themselves. Fundamentally, and more bluntly, *Wiley* also held that legislative acts which are **repugnant to the Constitution** may be declared void. *See Wiley*, ¶ 5. The OCC ignores these important points and distinctions.

§ 40 establishes a mandatory rule which is **not dependant** on "the capacity" upon which the "official duty" was rendered. On these facts, and given the requirement of Oklahoma Constitution, Art. 9, Section 18a, Oklahoma Attorney General Drew Edmondson previously argued to the Oklahoma Supreme Court that the bribed PUD 260 order " . . . **was not constitutionally adopted**." R. 836, **852-854**.[7] Clearly he was right. No authority is cited in any brief establishing otherwise.

Upon review of the Appellees' Answer Briefs, it is clear no one disputes that following the Constitution is a requirement of *even* "legislative" bodies. Here, the OCC, like all branches of government, shares equally in the responsibility to faithfully uphold the Oklahoma Constitution. To that end, the Commissioners individually are duty bound to faithfully and justly uphold the

[7] Substantial evidence and argument for ***why*** reconsideration of the PUD 260 matter is in the public interest has been presented. Indeed, there could be **16 billion reasons** why the matter should be re-determined – *assuming arguendo that upholding the Oklahoma Constitution is not reason enough. C.f.*, R. 852-857. Such evidence includes the gross miscalculation of SWBT's "excess earnings" in the bribed order, evidence of "OCC staff misconduct" leading up to the Order (never even considered by the AG's office) and the massive benefit that SWBT ratepayers could receive upon rehearing the matter. *See* R. 38-54, R. 893-941, R. 1179-1242, R. 1249-1352. *See also* Dissent of Commissioner Anthony, R. 1497-1506, R. 1564-1567. Perhaps, the key point to be made, however, is that by *summarily dismissing* the Application (based on gross legal error), the OCC has denied Appellants even the *chance* to prove in trial that upon the proper (unbribed) consideration of the PUD 260 matter, a different result is appropriate and in the public interest.

Oklahoma Constitution. This Court likewise serves the critical function of enforcing the faithful and just upholding of the Constitution by all governmental bodies.

Indeed, where a legislative body has not acted within the framework of the Constitution, it has not acted; an unconstitutional statute confers no rights, imposes no duties and affords no protection. *See General Motors Corp v. Okla. Board of Equalization*, 1983 OK 59, ¶ 17, *citing Norton v. Shelby County*, 118 U.S. 425; 6 S. Ct. 1121; 30 L.Ed. 178 (1886) (An unconstitutional statute confers no rights, imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.); *Zane v. Hamilton County*, 189 US 370; 23 S.Ct. 538; 47 L.Ed. 858 (1903).

For the reasons set forth above, the Court should find that the OCC's bribed PUD 260 Order violates the Oklahoma Constitution, that it by definition is unconstitutional and thus, is **void**.

B. Because the PUD 260 Order was never constitutionally determined, it should be Remanded for proper determination.

In their Brief in Chief, the Appellants asserted that it is obvious and axiomatic that if the PUD 260 Order is unconstitutional and void, that the matter should be remanded for a constitutionally valid determination. Such was, after all, the natural relief granted in *O'Neil, Marshall* and *Johnson. C.f.*, R. 852-854. Under

the Oklahoma Constitution, only the OCC – not this Court and certainly not the AG's office – has the jurisdiction to determine the PUD 260 cause in the first instance. Here, the enforcement of Oklahoma's Constitution should not be made dependant upon the AG's (superficial and un-reviewed) determination of whether enforcement is "worth it," or even on the OCC's apparent reluctance to confront its sordid past. The OCC's ultimate, unbribed determination of the PUD 260 Order on the merits should only then be subject to this Court's "appellate review." In none of the Answer Briefs filed by the Appellees are these points refuted.

In deciding this matter, the OCC (wrongfully and quite improperly) concluded that the bribed Order was in the public interest because in the *Henry* decision *this Court* affirmed reinvestment rather than the refund of excess revenues. R. 1523-1524, ¶ 10. Here, the OCC majority decision fails to appreciate that on appeal, the Oklahoma Supreme Court's review is different from that of the OCC in the first instance – the Court's review being only focused on whether the decision is legally permissible. Indeed, the Court is prohibited from reaching a different weighing of the facts if it finds the OCC Order is supported by "substantial evidence." *Henry*, ¶ 14. Just how the Court's "appellate review" in *Henry* could rightfully substitute for the (untainted) "merits review" it should have received at the OCC is left totally unexplained – and is, in fact, inexplicable. *Id.* Nothing in the Answer Briefs filed herein argues otherwise.

Respectfully, under the Oklahoma Constitution, this Court's "appellate review" given in the *Henry* appeal can not be *a proper substitute* for the unbiased and unbribed consideration that it was due at the OCC. *See* R. 1522, 1524. Indeed, with the proper "merits decision" of the PUD 260 matter seemingly being abdicated by the OCC to the Oklahoma Supreme Court, or being directly bound by the *Henry* decision (absurdly putting the cart in front of the horse), the whole process is "tainted" because the "poisonous fruit" (the bribed result) gets the benefit of a presumption of correctness while the Appellants, and indeed all Oklahomans, are deprived of proper "appellate review." *See* R. 1522, 1524. Absent doing it right, *as the Oklahoma Constitution requires*, due process and justice are thwarted and Oklahomans' faith in government is inherently undermined. Because the OCC erred in its Order, and because the OCC's Order is contrary to law, the Order should be reversed and the matter remanded for the OCC to consider the merits of the Appellants' Application and enter the proper determination on the established facts and law.

C. SWBT and the OCC continue to misapply the *Wiley* holding.

In its Answer Brief, SWBT continues to disingenuously cite *Wiley* as holding that the OCC cannot modify its (bribed) PUD 260 Order as the Applicants seek, because ratemaking proceedings are legislative not judicial acts. R. 625-626. In the Brief in Chief, the Appellants argued first and foremost that in the exercise of

"legislative power," a legislature is free to consider and/or reconsider matters as much as it deems proper. *Dobbs v. Board of County Commissioners Okla. Co.*, 1953 OK 159, ¶ 0, 21, 43-46; *In re Block 1, Donly Heights Addition*, 1944 OK 213, ¶ 11; *Prairie Oil and Gas Co. v. District Court of Grady County*, 1918 OK 505, ¶ 3-4; *Coyle v. Smith*, 1911 OK 64, ¶ 93, 119, 123-124 (Oklahoma legislature had power to relocate state capitol and seat of government notwithstanding limitations in Enabling Act which prohibited removal of capitol prior to certain date; as a sovereign state Oklahoma's legislative power cannot be limited by prior legislative act), *affirmed* 221 U.S. 559; 31 S.Ct. 688; 55 L.Ed. 853 (1911). Nothing in the Answer Briefs disputes these points.

Second, the Appellants argued in the Brief in Chief that the *Wiley* decision itself expressly recognizes that legislative acts can be "annul[ed] and pronounce[d] void" on grounds of "**repugnancy to the Constitution**." *See Wiley*, ¶ 5. While legislative power is vast, it must be utilized in substance and process within the limits of the Constitution. *Dobbs,* ¶ 0, 43-45. Clearly, bribery is not an acceptable "process" within the Constitution's allowable limits. *See* Okla. Constitution, Art. 9, § 40. **Indeed, where a legislative body has not acted within the framework of the Constitution, it has not acted; an unconstitutional statute confers no rights, creates no liability and affords no protection.** *See General Motors*, ¶ 17, *citing U.S. Supreme Court cases of: Norton, Zane.* Here again, nothing in the Answer Briefs filed by Appellees argues otherwise.

Here, it is inherently repugnant to the Oklahoma Constitution that the required "concurrence" of a Commissioner on a public matter and the *necessary vote* to decide a question in dispute could be <u>fraudulently and feloniously bought</u> by a regulated entity against the interests of the public. This legal conclusion is <u>mandated</u> by the fact that SWBT's act of obtaining Commissioner Hopkins' vote by means of bribery was directly unconstitutional under the Oklahoma Constitution. *See* Oklahoma Constitution, Art. 9, § 40.

Finally, the Appellants' argued in the Brief in Chief that *Wiley* is distinguishable because it, specifically, **did not involve the bribery of the Commissioners themselves** (rather, it concerned two attorneys in the OCC's general counsel's office [ironically, one being William Anderson – the very same lawyer convicted in the PUD 260 bribery scandal R. 19] accepting gifts and favors) and because ***Wiley*** **did not consider the effect of Oklahoma Constitution, Art. 9, Section 18a and Section 40**. On this first point – in its Answer Brief, p. 18, SWBT argues that Appellants got their facts wrong in asserting that *Wiley* "didn't involve the [bribery of] the Commissioner's themselves." Specifically, SWBT quotes the language of the *Wiley* decision, Par. 2, wherein the Court writes that the allegation was that "members of the Corporation Commission were influenced . . . by contributions and favors received from a lobbyist." According to SWBT, the language used by the Court in *Wiley*, Par. 2, is language "disproving Appellant's [sic] assertion . . . " *See* SWBT's Answer Brief, p. 18.

While the Appellants can concede that the language used by the Oklahoma Supreme Court in the *Wiley* decision, referencing "members of the Corporation Commission" as allegedly receiving "contributions" and "favors" was somewhat vague and confusing, in fact, the Appellants didn't get their facts wrong. *See* also R. 19. The *Wiley* case was on the Oklahoma Supreme Court's docket as Cause No. 42432. A review of the filings made therein (of which the Court can take judicial notice) show that Louise Wiley's specific allegations were not that the Commissioner's themselves were taking "bribes" from regulated companies. Rather, as reflected in the Court filing made in *Wiley* on April 13, 1967, pgs. 8-9 (ONG's Motion to Dismiss), the ***"Plaintiff's allegations [were] that two former attorneys for the Corporation Commission received sums of money from an individual, Clyde Hale, Sr." On these facts, ONG argued that such, ". . . is not sufficient to state a cause of action because (1) the two attorneys were not decision making officers, and (2) the interests of plaintiff were fully and completely represented by others having a common interest with plaintiff who participated in the rate increase proceedings in question."*** *See* ONG's filing of April 13, 1967, Cause 42432, pg. 8. Interestingly, Oklahoma Natural Gas, the Appellee in the 1967 *Wiley* case, recognized that if the issue had concerned the *quid pro quo* bribery of a Commissioner, that is, a "**decision making officer**" – that such would be a entirely different circumstance indeed. In fact, the Appellee in the *Wiley* case, in its briefing, actually cited the *Johnson v. Johnson* case (38 Okla. Bar

J. 224 – a case involving the bribery of a Supreme Court Justice, also from 1967), but very carefully distinguished such from the facts in *Wiley* noting that the "***plaintiff [in Wiley] does not allege that said contributions caused the Commission to enter an inappropriate order, or one they would not otherwise have entered***." *See* ONG's filing of April 13, 1967, Cause 42432, pg. 9.

Aside from the clear factual differences, *Wiley* has no precedential value in the circumstances of this case precisely because *Wiley* never considered the Oklahoma Constitutional provisions that are at the heart of this case, Oklahoma Constitution, Art. 9, Section 18a and Section 40. *See Southwestern Bell Tel. Co. v. Oklahoma Corp Comm'n*, 1994 OK 38, Par. 34 (Where the specific arguments and issues being presently raised were not previously made and decided, a prior decision has no precedential value.) Because *Wiley* didn't involved the bribery of an actual Oklahoma Corporation Commissioner by the regulated entity, it didn't consider and couldn't consider the unique and significant issue that such presents vis-a-vis the Oklahoma Constitution, Art. 9, Section 18a and Section 40.

Finally, it should be noted that the actual authority cited in *Wiley* in support of the holding that in legislative actions, bribery is permissible because the "motives of legislators can't be questioned" is *sparse to non-existent*. Specifically, in support of its holding that, "The Court may not inquire into the motives of the Legislature, as motives cannot be made a subject of judicial inquiry for the purposes of invalidating an act of

the legislature," *Wiley* (Par. 5) actually only cites one treatise: 16 American Jurisprudence 2d, Constitutional Law, Secs. 158, 163, 169. While recognizing that the law "may have evolved" since 1967, nothing in the current 2009 version of 16 Am. Jur. 2d, Constitutional Law, Sects. 158, 163 or 169, seemingly supports the *Wiley* holding.

Section 158 concerns who may challenge the constitutionality of a statute, that is, the issue of standing; it seemingly has nothing to do with any inquiry into "motives." Section 163 addresses "presumptions of constitutionally – generally;" the section states that generally "all statutes are of constitutional validity unless they are shown to be invalid." This overly broad, unhelpful legal statement could have been made by a first grader. Nothing in Section 163 address [sic] court inquiries into "motives." Lastly, Section 169 addresses "Construction in favor of Constitutionality – General Rule." Again, nothing in the section concerns, "court inquiries into motives."

It should be noted that other sections in 16 Am. Jur. 2d, Constitutional Law do seem to go against the holding of *Wiley.* For example, in 16 Am. Jur. 2d, Constitutional Law, Sects. 187, the treatise states, "While courts generally may not, in determining the constitutionally of a statute, consider the motivation of legislators, **they may do so in a few types of cases**." (Emphasis added). Of course, how the Oklahoma Constitution, Art. 9, Sections 18a and 40 would impact the review of legislative acts – proven enacted due to impermissible *quid pro quo* bribery is obviously an issue

of first impression. Section 187 does note, however, that where improper motivation or impermissible purpose is shown, "the burden shifts to the decision making authority to establish that the same decision would have resulted even had the impermissible purpose not been considered." In 16 Am. Jur. 2d, Constitutional Law, Sects. 165, the treatise states, that "Although the presumption of constitutionality afforded to legislation is a strong and heavy one, **it is not absolutely conclusive and may be rebutted**." (Emphasis added). Finally, in Section 193, the treatise notes that in the very strictest jurisdictions, legislative acts will only be overturned due to an "impermissible motive of a legislator" when such is proven "beyond a reasonable doubt," a near impossible standard to meet. Of course, in this case, this incredibly high standard is in fact satisfied, as the jury that convicted Commissioner Hopkins (and the 10th Circuit that affirmed the conviction) had to determine, beyond a reasonable doubt, that Hopkins sold his vote in the PUD 260 matter, *quid pro quo*, in exchange for the bribe that SWBT paid him.

D. The OCC, SWBT and the Attorney General continue to misapply the *Turpen* holding.

The Appellees, in their Answer Briefs, do not dispute that even the language used in *Turpen* makes clear that with proper notice to all interested parties, the OCC, in fact, does have the power to review or modify its prior orders. *See Turpen*, ¶ 21 ("The Commission is without authority even to review and modify the order **unless statutory notice of a hearing**

concerning the proposed modification is given to all interested parties"). (Emphasis added.) *Citing* [in footnote 18] *Crews v. Shell Oil Company*, 1965 OK 151, 406 P.2d 482.

Indeed, in *Crews*, ¶ 15-18, the case upon which *Turpen* relies for its holding, this Court makes clear that with the proper statutory notice to all interested persons, the OCC has the authority to review and modify or change a former order which has become a final order. *Citing Carter Oil Co. v. State*, 1951 OK 327, ¶ 0, 9, 17; *Carpenter v. Powell Briscoe*, 1963 OK 33, ¶ 5-7. Here, the AG and SWBT, and the OCC in accepting this erroneous legal argument, have clearly erred in applying the *Turpen* holding as prohibiting new applications which would seek to vacate or modify a prior order of the Commission. *Turpen* did not even concern new applications, but rather addressed applications filed in the original matter. *See Turpen*, ¶ 12, 18. When filed as a new application with proper notice given, nothing prohibits the OCC from reviewing its prior determinations.

Such is especially true in legislative matters. In this specific matter involving public utilities, the OCC acted as a legislative body. *See Southwestern Bell Tel. Co. v. Okla. Corp. Comm'n*, 1994 OK 38, ¶ 8-9 (The Commission's PUD 260 matter is "legislative in nature," and the Commissioners thus act in their legislative capacity). Obviously in the exercise of "legislative power," a legislative body is free to consider and/or reconsider matters as much as it deems proper; indeed, no legislative body can limit the legislative power of a

future legislature.[8] None of these points are disputed in the Appellees' Answer Briefs.

E. The relief sought by Applicants does not constitute retroactive ratemaking precisely because SWBT's rates were properly made subject to refund effective July 1, 1987; such issue has previously been litigated to the Oklahoma Supreme Court.

Because of the extreme time constraints imposed by the Tax Reform Act of 1986 and the impossibility of examining rates prior to its effective date July 1, 1987, SWBT entered into a binding "Stipulation" on June 23, 1987 which was accepted by the OCC in Order No. 313853, that, " . . . *if the Commission ultimately determines that a rate reduction is appropriate for [SWBT],*

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[8] *See Op. of Oklahoma Atty Gen.*, 1995 OK AG 86, ¶ 6-8 (There is nothing in our Constitution which prohibits a Legislature from repealing or modifying the acts of its predecessors or its own; it is fundamental that the Legislature cannot pass an irrepealable law), *citing Granger v. City of Tulsa*, 1935 OK 801, ¶ 0, 9, 18 (Legislative acts may be amended or repealed by a legislative body at will); Op. *of Oklahoma Atty Gen., 69-221* (A legislature is not bound by its own acts or the acts of a previous legislature, any amendment of the laws passed is thus valid). *Marlin Oil Corp. v. Okla. Corp. Comm'n*, 1977 OK 67, ¶ 5, 18, 20 (To hold that the Commission cannot modify its own final orders so to account for new circumstances could impermissibly prevent the Commission from performing its mandated statutory duties. Such is not Oklahoma law; not every application for modification of a final order is deemed a collateral attack); *Henrickson*, ¶ 15-16 (Subsequently raised issues of Southwestern Bell's *fraud* in prior rate-making matters are exclusively within the Commission's jurisdiction and thus must be properly raised there).

that said reduction would be effective as of July 1, 1987, in order to allow the full benefits of the Tax Reform Act to accrue to [SWBT's] customers." *See* R. 1741-1745. It is because of this Stipulation and Order that SWBT owes customers the "excess revenues" as "ultimately determined" by the OCC, with interest, from July 1, 1987 to the present. Because SWBT obtained the Order in PUD 260 by means of bribery, it knew or should have known that the September 1989 OCC Order was not the "ultimately determined" result of the PUD 260 matter. No party that obtains a favorable result by means of bribery can legitimately argue or expect that the result is cloaked in the righteous protection of "finality." Importantly, due to SWBT's own Stipulation, the "ultimate determination" of SWBT rates and any refund due is not impermissible retroactive ratemaking.

The correctness and legality of Commission Orders approving or making "rates subject to refund" has already been extensively litigated between Southwestern Bell and the OCC. On May 16, 1991, in Cause No. 77,521, SWBT filed with the Oklahoma Supreme Court its "*Petition to Assume Original Jurisdiction*," wherein it argued that the Commission's Orders placing its rates subject to refund constituted impermissible "retroactive ratemaking." R. 902. To respond, the OCC hired Scott Hempling, a national expert in regulatory law to brief the issue before the Oklahoma Supreme Court. R.902-903. On June 14, 1991, the OCC filed its Amended Response of the OCC in Case No. 77,521. R. 922-941. As was set forth in the OCC's detailed Amended Response (R. 922-941), which is

<u>*incorporated and adopted herein by reference*</u>, the Commission's actions and Orders placing SWBT's rates subject to refund simply are not impermissible retroactive ratemaking. R. 903, 922-941. Ultimately, SWBT's arguments were unsuccessful as on June 20, 1991, the Oklahoma Supreme Court declined SWBT's request to assume original jurisdiction. R. 903. It should be noted that the Oklahoma Attorney General has also asserted that the Commission's actions and Orders of placing SWBT's rates subject to refund simply are not impermissible retroactive ratemaking. R. 909-913, 3017-3019. Here, the Appellees' argument that granting Applicants the relief sought would be impermissible, retroactive ratemaking is meritless. R. 902-903; 909-913; 922-941; 3017-3019.

2. APPELLANTS DO NOT SEEK EITHER A RATE CHANGE OR THE RECLASSIFICATION OF "SURPLUS FUNDS" AS "OVERCHARGES."

<u>The *Henry* decision does not preclude consideration of the bribery issue.</u>

In *Henry*, ¶ 1, the Supreme Court considered seven specific questions, answering each of them. The issue of SWBT's bribery of Commissioner Hopkins was <u>not</u> an issue on appeal and could not have been an issue as the bribery was not publicly known in 1991. The issue of whether the OCC *may* order "refunds" of excess earnings was also <u>not</u> an issue on appeal as the (bribed) Order authorized solely "reinvestment." *Id.* The permissibility of refunds simply was not at issue. *Id.*

CONCLUSION

SWBT's Motion to Strike portions of the Record should be denied as the record designated is appropriate for the issues of this case, this Court may take judicial notice of the filings in other related OCC proceedings (12 O.S. 2002 § 2202 B-D) and the Oklahoma Constitution, Art, 9, § 22 provides the OCC's Chairman vast discretion to supplement the record on appeal.

Appellants respectfully request that this Court reverse the OCC's Order on appeal, find that the PUD 260 Order is **void** for the reason that it was "not constitutionally adopted," recall the mandate issued in *Henry* (which was obtained by SWBT's intrinsic fraud) to the extent inconsistent with this Opinion (granting a Bill of Review, if appropriate) and remand the Appellants' Application and the PUD 260 matter back to the OCC for a constitutionally proper determination.

Respectfully submitted,

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DATE: April ___, 2017

[Certificate Of Mailing To All Parties And Court Clerk Omitted]