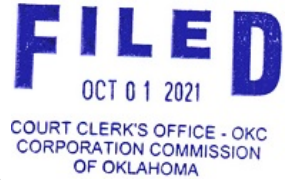


BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

JOINT APPLICATION OF CENTERPOINT)
ENERGY RESOURCES CORP., SOUTHERN)
COL MIDCO, LLC, AND SUMMIT UTILITIES)
OKLAHOMA, INC. FOR TRANSFER OF)
JURISDICTIONAL UTILITY ASSETS AND)
CUSTOMER ACCOUNTS PURSUANT TO)
OAC 165:45-3-5)

CAUSE NO. PUD 202100114



ATTORNEY GENERAL’S EXCEPTIONS TO THE REPORT AND RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

John O’Connor, the Attorney General of Oklahoma, on behalf of the utility customers of this State, hereby submits his Exceptions to the Report and Recommendation of the Administrative Law Judge (“ALJ Report”) in the proceeding referenced above. The ALJ Report applies the wrong standard, would allow a post-acquisition utility to set rates based on stale data, ignores previous Commission orders, and allows irregular and inappropriate evidence into the record. In support of his Exceptions, the Attorney General submits the following.

Introduction

CenterPoint Energy Resources Corp. (“CenterPoint Oklahoma”) seeks to transfer substantially all of its Oklahoma utility assets, along with the service of its customers, to Summit Utilities, Inc., in particular to its newly created subsidiary Summit Utilities Oklahoma, Inc. (“SUO”). The crux of the dispute in this case is whether annual rate reviews under the Performance Based Rate Change (“PBRC”) plan should continue without a pause or other review despite the transfer of control. Continuing such reviews as if no transfer happened would result in setting forward-looking rates for SUO based on the test year data of CenterPoint Oklahoma, despite numerous factors that are expected to change. As described below, the Oklahoma Corporation Commission (“Commission”) has rejected using stale and mixed data to set utility rates. The Attorney General recommends that SUO not be allowed to continue making PBRC plan filings

with stale and mixed data; instead, an appropriate test year should be identified, which should be the subject of a general rate case that can update cost of capital, shared services allocations, and other new expenses in a single case. Further, such a case would be an ideal time to review depreciation and class cost of service issues. The Commission would also be able to mandate PBRC annual reviews again after the rate case.

Argument and Authorities

I. The ALJ Report applied the wrong standard to the case by restricting consideration to the burden of production rather than considering whether the acquisition is fair, just, reasonable, and in the public interest.

Many of the acquisitions considered by the Commission in recent years have involved the application of the public utility merger and acquisition statutes at 17 O.S. § 191.1 *et seq.* These statutes require a utility purchaser to submit various materials and the Commission to approve the acquisition if various harms are not present, subject to terms and conditions necessary under the public interest.¹ Crucially, the acquisition statutes only apply when an utility purchaser obtains *control* of a public utility company, generally meaning the direct or indirect ownership of the public utility's common equity.²

The present case does not involve the acquisition statutes. Instead, Summit Utilities, Inc. has agreed to purchase the *assets* of CenterPoint Oklahoma, transferring the utility operations to SUO without ever gaining control over the selling utility.³ The asset transfer rules under OAC 165:45-3-5 therefore apply, and these rules are distinct from the acquisition statutes. Under the asset transfer rules, the asset purchaser must produce various information relevant to

¹ 17 O.S. § 191.5(A).

² *Compare id.* §§ 191.2, 191.7 (applying only to transfers of control) *with* § 191.1(4) (defining “control” to mean the “power to direct or cause the direction of the management and policies of a person”).

³ Direct Test. of Stephen E. Birchfield on Behalf of Summit Utilities Oklahoma, Inc. 5:5–22 (June 24, 2021) [hereinafter “Birchfield Direct”].

consideration,⁴ but the Commission is ultimately called upon to consider whether the acquisition is “fair, just, reasonable, and in the public interest.”⁵ The relief requested in the case must be considered through that applicable standard. The requested relief includes the adoption by SUO of *all* CenterPoint Oklahoma tariffs, including its PBRC plan tariff.⁶

The ALJ Report ignores the applicable standard in this case, instead requiring only the production of various materials required to be filed and deeming discussion of any other matter “irrelevant.”⁷ The ALJ’s application of the wrong standard, and failure to make any reference or discussion of the Attorney General’s evidence or previous Commission orders regarding stale and mixed data, reveals error that this Commission should reverse.

II. SUO should not be allowed to set rates after the acquisition based on stale, mixed data from CenterPoint Oklahoma. The Attorney General’s proposal resolves this issue.

A. Previous Commission orders and utility applications have recognized that relying on stale, mixed data to set rates after an acquisition is inappropriate.

The purpose of using a historical test year, including in the PBRC plan tariff, is to create a reasonably accurate forecast of future costs in order to set rates. The Oklahoma Supreme Court has explained the use of a historical test year in the following way:

A test year is a mirror view of the past suspended within a limited but definite time frame through which we prophesy its duplication in the future. To alter the image is to risk the distortion for the future.⁸

Major corporate events such as the acquisition of the relevant utility can impact the quality of historical data for rate-setting purposes. The Commission has previously made similar findings in Cause No. PUD 201600468, where the evidence indicated the following:

⁴ OAC 165:45-3-5(b)(1)–(14).

⁵ OAC 165:45-3-5(d).

⁶ Appl. 7–8; Birchfield Direct 20:9–18.

⁷ ALJ Report 5–6, ¶ 17.

⁸ *Sw. Pub. Serv. Co. v. State*, 1981 OK 136, ¶ 14, 637 P.2d 92.

[A]s a result of the Acquisition, some costs may be spread over a larger number of customers, and the structure of these costs may also be different. It is anticipated that services provided by affiliates may replace services that Empire has traditionally provided itself.⁹

The Commission therefore concluded the following based on the evidence:

A general rate case after at least a full year of Liberty Utilities' ownership would ensure that Empire's rates are set with cost information reflecting these changes. . . . Here, the Acquisition impacts the accuracy of the historical data presented by Empire, thereby affecting the predictive power of the historical data for Empire.¹⁰

Additionally, the Commission has previously recognized the need for suspending PBRC plan filings in relation to acquisitions in the past with respect to a different acquisition by Summit Utilities, Inc. In Cause No. PUD 201700469, Arkansas Oklahoma Gas Corp. requested that its annual rate filing be waived, in part, due to the lack of quality data supporting test year calculations.¹¹ The Commission agreed to waive annual rate filings after settlement agreements were reached with PUD and the Attorney General.¹² As PUD witness John Givens recognized during cross-examination, it would have been inappropriate to review "mixed data" in an annual PBRC review for Arkansas Oklahoma Gas Corp.¹³

In comparing the present case to Cause No. PUD 201600468, there is no material difference just because of The Empire District Electric Company's status as an electric utility or its lack of a PBRC plan tariff. First, the need for a waiver after the acquisition of Arkansas Oklahoma Gas Corp. shows that similar issues can arise for natural gas utilities with PBRC plan

⁹ Final Order, Order No. 667,123, at 7, *The Empire Dist. Elec. Co., a Kan. Corp., Rates & Charges for Elec. Serv.*, No. PUD 201600468 (Aug. 17, 2017).

¹⁰ *Id.* at 7–8.

¹¹ Responsive Test. of Todd F. Bohrmann on Behalf of Dawn Cash, Oklahoma Attorney General 17:1–11 (July 23, 2021) [hereinafter "Bohrmann Responsive"].

¹² Final Order, Order No. 684,561, *Ark. Okla. Gas Corp. Waiver of Review of Performance Based Rates for 2017*, No. PUD 201700495 (Oct. 9, 2018).

¹³ Hrg. Tr. 8/26/21 27:4–14.

tariffs. Second, both natural gas utilities and electric utilities rely on a historical test year that is used to develop fair, just, and reasonable forward-looking rates. Third, rate reviews under both general rate cases and under PBRC plan tariffs use historical test years. Multiple witnesses recognized the use of the historical test year under the PBRC plan tariff.¹⁴ There is no reason to distinguish this situation from Cause No. PUD 201600468.

B. Allowing SUO to continue making PBRC plan applications would result in ratemaking using stale, mixed data.

Allowing SUO to make annual reviews would result in the same problems discussed by this Commission its order in Cause No. PUD 201600468. As explained in the responsive testimony of Attorney General witness Bohrmann,¹⁵ costs now incurred by CenterPoint will be spread over a very different number of customers. Currently, CenterPoint's Oklahoma customer base represents a small portion of its overall customer base. For Summit Utilities, Inc., on the other hand, CenterPoint's Oklahoma and Arkansas customer bases together would be around five times the number of existing customers. Further, shared services upon which CenterPoint Oklahoma has relied will be shifted to Summit Utilities, Inc. over a year-long transition period.¹⁶ It is undisputed that any rate filings made in 2022 would reflect old data from CenterPoint. For example, SUO witness Birchfield acknowledged that a PBRC filing made for SUO in 2022 would reflect CenterPoint's 2021 costs.¹⁷ PUD witness Givens also acknowledged this point.¹⁸

Other items will need to be updated soon in addition to jurisdictional cost allocation and shared services models. SUO will likely experience a different cost of capital that needs to be

¹⁴ Hrg. Tr. 8/17/21 44:24–45:6; Rebuttal Test. of John Givens 6:11–16 (Aug. 5, 2021) [hereinafter “Givens Rebuttal”].

¹⁵ Bohrmann Responsive 9:16–10:8.

¹⁶ Birchfield Direct 6:22–7:4; Bohrmann Responsive 11:16–12:2; Hrg. Ex. 9; Hrg. Tr. 8/17/21 61:12–23.

¹⁷ Hrg. Tr. 8/17/21 44:24–45:6.

¹⁸ Givens Rebuttal 7:2–3; Hrg. Tr. 8/26/21 28:2–6.

updated, particularly with respect to its lower cost of debt.¹⁹ The testimony of both Todd F. Bohrmann and John Givens indicated that a range of additional issues should be studied, including depreciation rates and class cost of service allocations.²⁰

Due to the length of the transition period and the items that need to be updated, rate filings should not be conducted until all major items can be updated with a quality historical test year. Since the acquisition will not close until the end of 2021 and SUO intends to rely on transition services during 2022,²¹ SUO may not be able to make any rate filings until it can rely upon a 2023 test year. Nevertheless, SUO would have some alternatives, including ending its use of transition services earlier than December 2022 and/or using a six-month update period to correct for data quality problems, allowing the use of an earlier test year.²²

C. A general rate case is a more practical and efficient way to update SUO's rates for the first time after the acquisition than sequentially updating major issues across PBRC filings.

As referenced above, shortly after the acquisition, the Commission will need to review SUO's new jurisdictional cost allocation and shared service models.²³ The Commission will also need to review SUO's cost of capital, including return on equity, capital structure, and cost of debt.²⁴ If cost of capital is not reviewed in the next proceeding, SUO would rely on CenterPoint's debt, even though SUO's cost of debt is likely to be lower.²⁵ SUO will need to conduct a new

¹⁹ Hrg. Tr. 8/17/21 39:11–40:23.

²⁰ Bohrmann Responsive 13:6–13; Responsive Test. of John Givens 10:3–5 (July 23, 2021) [hereinafter "Givens Responsive"].

²¹ Hrg. Tr. 8/17/21 61:12–23.

²² Hrg. Tr. 8/17/21 122:23–123:10.

²³ Hrg. Tr. 8/26/21 20:2–10; Hrg. Ex. 7; Hrg. Ex. 8; Hrg. Ex. 11; Bohrmann Responsive 11:16–12:2; *see also* Direct Test. of Fred Kirkwood on Behalf of Summit Utilities Oklahoma, Inc. 5:21–6:20 (June 24, 2021) (describing SUO's reliance on shared services from Summit Utilities, Inc., which will need to be expanded to serve the new customers).

²⁴ Hrg. Ex. 5; Hrg. Ex. 6; Hrg. Tr. 8/17/21 39:11–40:23; Hrg. Tr. 8/26/21 19:22–20:1; Bohrmann Responsive 13:8–9.

²⁵ Hrg. Tr. 8/17/21 39:11–40:23.

depreciation study and a new class cost of service study in the near future due to the length of time since CenterPoint's most recent studies on these issues.²⁶ SUO's retirement plans will be different from those of CenterPoint and will need to be reviewed for recovery in rates.²⁷

The Commission will also need to ensure a careful review of the acquisition's impact on tax savings occurs in the next rate review. The acquisition will result in the elimination of Accumulated Deferred Income Tax balances.²⁸ Accumulated Deferred Income Tax balances generally offset rate base and provide a significant benefit to customers.²⁹ While SUO proposes to provide the same benefits to customers, it will have to carefully track related balances and study normalization impacts from the balances.³⁰

Reviewing all of these issues in a single PBRC plan proceeding would be difficult due to the number of issues, their complexity, and the time allotment in a single PBRC proceeding. PUD witness Givens acknowledged that "addressing a large number of potentially complex issues would be difficult in the timeline of a single PBRC filing."³¹ A general rate case would allow greater time to address the numerous, complex issues that need to be reviewed for SUO after the acquisition.³² A general rate case also offers sufficient procedural protections for all parties and is consistent with due process and a utility's opportunity to earn a fair rate of return on its investments.³³ A rate case would allow for the review of all legal, policy, and factual issues at a

²⁶ Givens Responsive 10:3–5; Bohrmann Responsive 13:10; Hrg. Tr. 42:3–12.

²⁷ Hrg. Tr. 8/17/21 44:18–23 (noting that in some cases CenterPoint and Summit retirement plans are different).

²⁸ Birchfield Direct 19:19–20:2; Betchan Responsive 6:19–22; Hrg. Tr. 8/17/21 42:17–43:7.

²⁹ Betchan Responsive 7:1–11; Hrg. Tr. 8/17/21 43:8–17.

³⁰ Betchan Responsive 8:1–17; Hrg. Tr. 8/17/21 44:5–11.

³¹ Givens Rebuttal 5:14–15; *see also* Bohrmann Responsive 14:12–15:2.

³² Hrg. Tr. 8/26/21 22:17–22; Bohrmann Responsive 14:12–15:2.

³³ *See* 17 O.S. § 152(B); OAC 165:70.

given point in time, allow examination by the parties, and allow the Commission to set fair, just, and reasonable rates going forward.³⁴

The Attorney General recommends that SUO not adopt the PBRC plan tariff upon acquisition until it has filed a general rate case under chapter 70 of the Commission's rules and regulations. SUO should be required to file the general rate case no later than June 30, 2024, and it should file the case only after it can present representative post-test-year data to support its filing. Such rate case filing should address post-acquisition cost of capital, jurisdictional allocation and costs of shared services, and the treatment of regulatory liabilities for Accumulated Deferred Income Taxes lost in connection with the transaction. Further, the rate case filing should include a depreciation study and a class cost of service study.

D. The ALJ Report would allow setting rates based on stale, mixed data, and it places undue reliance on ambiguous testimony and the possibility of credits.

Previously, the Commission has required the study of numerous ratemaking issues in PBRC plan filings and could use the same plan for addressing the numerous, complex issues that need to be reviewed for SUO after the acquisition.³⁵ The ALJ Report appears to conclude—without elaboration—that PBRC plan reviews are therefore able to accommodate a review of the many issues that should be reviewed for SUO in the near future.³⁶ However, the Commission has generally only addressed one or no such issues in a single case.³⁷ Addressing these issues one by one over many years would result in setting rates for SUO based on old and mixed data that would not be appropriate for regulatory purposes.³⁸

³⁴ Hrg. Tr. 8/17/21 68:5–11.

³⁵ Bohrmann Responsive 14:3–11.

³⁶ ALJ Report 6, ¶ 22.

³⁷ Bohrmann Responsive 14:9–11.

³⁸ Hrg. Tr. 8/26/21 27:10–14; Hrg. Tr. 8/17/21 70:14–17.

Further, the ALJ Report relies on the possibility of a credit in PBRC plan filings as support for continuing to conduct annual PBRC reviews based on stale, mixed data.³⁹ The possibility of credits does not warrant conducting an annual review with stale or mixed data. As Mr. Bohrmann explained, the “overriding purpose of the PBRC, or any ratemaking[] action taken by the Commission is not for the customers to receive a credit[;] instead, the overriding purpose for the Commission is to make sure that rates are fair, just and reasonable.”⁴⁰ The record also indicates that both SUO and CenterPoint intend significant increases to annual capital investments that would tend to increase rates.⁴¹ The low likelihood of sustained credits in these circumstances does not warrant reliance on such credits for determining the most appropriate review of SUO’s rates after the acquisition.

The ALJ Report also relies on the notion that SUO’s costs after the acquisition, including its costs for services rendered by CenterPoint Oklahoma affiliates under a transition services agreement, will be “equivalent.”⁴² No such evidence exists in the record. Instead, a witness for SUO testified that the costs would be “consistent,”⁴³ which Mr. Bohrmann indicated was not a reliable guidepost to making decisions: “consistent does not mean equal.”⁴⁴

III. Unlawful sur-sur-rebuttal testimony should be stricken from the record.

At the continued hearing on the merits on August 26, 2021, PUD’s witness John Givens offered additional sur-sur-rebuttal testimony that was not authorized under the procedural schedule.⁴⁵ Counsel for PUD argued that this testimony was in the nature of “sur-rebuttal

³⁹ ALJ Report 6, ¶ 19.

⁴⁰ Tr. 8/17/21 72:9–13.

⁴¹ Givens Responsive 10:12–11:16; Hrg. Tr. 8/17/21 48:7–51:9.

⁴² ALJ Report 6, ¶ 21.

⁴³ Birchfield Direct 19:13–18.

⁴⁴ Tr. 8/17/21 85:6–10; *see also* Tr. 8/17/21 84:6–17.

⁴⁵ Hrg. Tr. 8/26/21 9:4–6.

testimony” in response to Todd F. Bohrmann’s allegedly unauthorized live “rebuttal” testimony on August 17, 2021, even though no objection was raised at the time to Mr. Bohrmann’s sur-rebuttal testimony.⁴⁶ The record shows that Mr. Bohrmann simply provided brief sur-rebuttal testimony in response to the rebuttal testimony of John Givens,⁴⁷ as allowed under the procedural schedule.⁴⁸

The Commission’s procedural schedule entered in this case sets the following standard for sur-rebuttal testimony:

After admittance of the pre-filed testimony (direct, responsive, rebuttal) into the record, each witness shall then be permitted to offer oral surrebuttal testimony in response to any new matters raised in the rebuttal testimony of the other parties.⁴⁹

The order thus allowed for the adoption of prefiled testimony, sur-rebuttal testimony in response to *new matters raised in the rebuttal testimony of other parties*, and submission to cross-examination and redirect examination.

Since Mr. Bohrmann had lawfully provided sur-rebuttal testimony in response to the rebuttal testimony of Mr. Givens, there was no opportunity under the procedural schedule for Mr. Givens to then provide more sur-rebuttal testimony in response to Mr. Bohrmann. Rather, PUD intended for its witness to give sur-sur-rebuttal testimony.

The applicable standard for sur-sur-rebuttal, as set out by the Commission in its procedural schedule in this case, is provided below:

Due to Joint Applicants having the burden of proof, after other parties have presented their testimony, summaries and statements of position, Joint Applicants, or either of them, may be allowed to

⁴⁶ Compare Hrg. 8/26/21 Tr. 9:16–20 (arguing previous sur-rebuttal testimony was “not called for”) with Hrg. Tr. 8/17/21 67:3–72:16 (revealing no objection raised).

⁴⁷ Compare Hrg. Tr. 8/26/21 9:4–6 (noting proposed testimony would respond to Bohrmann’s testimony “last Tuesday” on August 17) with Hrg. Tr. 8/17/21 69:13–17 (providing sur-rebuttal testimony).

⁴⁸ Order No. 719,420, at 2.

⁴⁹ *Id.*

present oral sur-surrebuttal testimony provided the requesting Joint Applicant can show that other parties have raised new issues which Joint Applicant was unable to adequately address through cross-examination. The oral sur-surrebuttal shall be strictly limited to the new issues, whether raised in testimony or a statement of position.⁵⁰

The standard effectively requires that some showing be made by counsel of two elements: that new issues were raised and that the issues were unable to be addressed by cross-examination.

However, counsel for PUD made no attempt to show any new issues had been raised by Todd F. Bohrmann on August 17, 2021,⁵¹ while the record shows Mr. Bohrmann was subject to an extensive cross-examination by counsel for both the Joint Applicants and PUD.⁵² The standard for oral sur-sur-rebuttal testimony was not met. The additional live testimony of Mr. Givens which was subject to objection at the time⁵³ should be stricken.⁵⁴

In continuing to allow the unlawful testimony of Mr. Givens in the record, the ALJ Report relies on the procedural schedule giving “discretion in permitting additional testimony.”⁵⁵ The issue at hand, however, does not involve a specific inquiry by an administrative law judge, a commissioner, or a member of the public.⁵⁶ Rather, the testimony at issue was requested and presented by a party that agreed to the procedural schedule in this case.

The ALJ Report makes no citation to language in the procedural schedule actually granting such discretion in this circumstance. Other parts of the ALJ Report *do* explicitly grant discretion

⁵⁰ Order No. 719,420 at 2–3.

⁵¹ Hrg. Tr. 8/26/21 9:16–13:10.

⁵² Hrg. Tr. 8/17/21 72:23–119:11.

⁵³ Hrg. Tr. 8/26/21 9:7–15, 10:4–24, 11:17–12:4, 12:12–13:3. The material to be stricken runs from page 9, line 4 to page 16, line 2 on the August 26 transcript.

⁵⁴ Additionally, the standard for sur-sur-rebuttal testimony in the procedural schedule of this case only allows the *Joint Applicants* to offer sur-sur-rebuttal testimony. Even though PUD’s position in the case is substantially aligned with the utility, it is nevertheless not a Joint Applicant, further warranting striking the testimony at issue.

⁵⁵ ALJ Report 6, ¶ 23.

⁵⁶ The procedural schedule does recognize that the ALJ may have questions, which can be the subject of redirect examination. Order No. 719,420, at 2.

to change the procedural schedule's terms, such as the order and presentation of parties, where the applicable paragraph states that the "following order of witnesses shall be followed *unless the ALJ directs otherwise*."⁵⁷ In not including such language regarding live testimony, the procedural schedule sets an expectation that its terms will be followed. The Attorney General requests that the Commission enforce its order and strike the offending testimony of Mr. Givens.

Conclusion

The ALJ Report reaches the wrong result in this case by ignoring the applicable standard, ignoring the reliance on stale data if no action is taken, and ignoring previous Commission orders. The ALJ Report also allows material to enter the evidentiary record in violation of the procedural schedule entered in this case. The Attorney General takes exception to the ALJ Report and requests that the Commission only approve the acquisition of CenterPoint Oklahoma's assets and customer accounts by SUO if the PBRC tariff is suspended pending the filing of a general rate case with a quality test year.

Respectfully submitted,

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⁵⁷ Order No. 719,420, at 2 (emphasis added).


CERTIFICATE OF SERVICE

On this 1st day of October, 2021, a true and correct copy of the above and foregoing
*Attorney General's Exceptions to the Report and Recommendation of the Administrative Law
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