

IN THE SUPREME COURT OF 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

v.

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

Appellees.

FILED
SUPREME COURT
STATE OF OKLAHOMA

APR 19 2017

MICHAEL S. RICHIE
CLERK

) NO. 115334

) Appeal from the
) Oklahoma Corp. Comm'n
) Cause PUD201500344

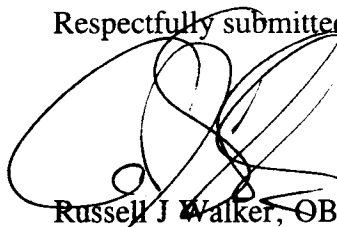
APPELLANTS' REPLY BRIEF

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CORPORATION COMMISSION
OF OKLAHOMA

Respectfully submitted,



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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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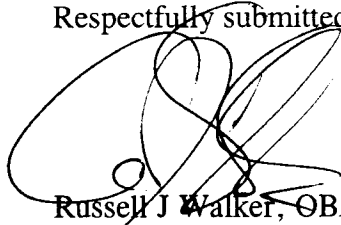
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APPELLANTS' REPLY BRIEF

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 against evil corporations and corporations acting in an evil and destructive manner.

With this context and background in mind, it is understandable why our Oklahoma forefathers proposed eight separate Constitutional provisions intended to reign 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.*, Oklahoma Politics, 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) senior executives 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 successful, 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:

<u>Legal arguments raised in Appellants' Brief in Chief</u>	<u>Appellees' Response</u>
a. SWBT miscites the holding in the <i>Wiley</i> case. <i>Wiley v. Oklahoma Natural Gas</i> , 1967 OK 152, Par. 5, expressly recognized that legislative acts can be "annul[ed] and pronounce[d] void" on grounds of " <u>repugnancy to the constitution</u> ").	Not addressed or refuted by Appellees in Response Briefs
b. Bribing an OCC Commissioner is <u>repugnant</u> to the Oklahoma Constitution and Oklahoma law. Oklahoma Constitution, Art. 9, Section 40; 17 O.S. 1968 177.	Not addressed or refuted by Appellees in Response Briefs
c. Allowing OCC matters to be determined by a minority of Commissioners is <u>repugnant</u> 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. <i>Wiley</i> did not address or consider the requirements of the Oklahoma Constitution, Art. 9, Section 40 or Art. 9, Section 18a. As such, the <i>Wiley</i> decision has no precedential value. See <i>Southwestern Bell Tel. Co. v. Oklahoma Corp Comm'n</i> , 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 <i>General Motors Corp v. Okla. Board of Equalization</i> , 1983 OK 59, Par. 17, citing <i>Norton v. Shelby County</i> , 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.); <i>Zane v. Hamilton County</i> , 189 US 370; 23 S.Ct. 538; 47 L.Ed. 858 (1903).	Not addressed or refuted by Appellees in Response Briefs
g. In any event, legislative acts may be amended or repealed at will for any	Not addressed or

reason. <i>Granger v. City of Tulsa</i> , 51 P.2d 567 (Okla. 1935); Op. of Oklahoma Atty Gen., 1995 OK AG 86, Par 6-8.	refuted by Appellees in Response Briefs
h. The OCC has jurisdiction to modify or reconsider its prior orders to account for new circumstances. <i>Marlin Oil Corp. v. Okla. Corp. Commission</i> , 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 <i>Henrickson v. Okla. Corp. Commission</i> , 2001 OK 89, Par. 15-16 (Subsequently raised issues of Southwestern Bell's <i>fraud</i> 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." <i>Conley v. Gibson</i> , 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 <i>Parker v. Elam</i> , 1992 OK 32, Par. 9. See also <i>Russell v. Board of County Commissioners</i> , 1997 OK 80, Par. 35; <i>Willis v. Nowata Land & Cattle Co., Inc.</i> , 1989 OK 169, Par. 7. The bribery issue could not have been settled by the prior <i>Henry</i> appeal, as the bribery was not publically known in 1991.	Not addressed or refuted by Appellees in Response Briefs
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. <i>Seymour v. Swart</i> , 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. <i>Parker v. Elam</i> , 1992 OK 32, Par. 13.	Not addressed or refuted by Appellees in Response Briefs
n. The <i>Henry</i> case remanded to the Commission the PUD 260 matter "... for all further proceedings not inconsistent with the Opinion." <i>Henry</i> , Par 44. <i>Henry</i> 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 " <i>Ample Legal Authority</i> " to reopen and rehear the PUD 260 case. See AG's 1997 Supreme Court Brief, pp. 2-6, 8-10. R. 852-854.	Not addressed or refuted by Appellees in Response Briefs
p. Contrary to the AG's argument, <i>Tupen</i> 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 <i>Turpen</i> , 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	Not addressed or refuted by Appellees in Response Briefs

<p>footnote 18] <i>Crews v. Shell Oil Company</i>, 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.); <i>Carter Oil Co. v. State</i>, 1951 OK 327, Par. 0, 9, 17; <i>Carpenter v. Powell Briscoe</i>, 1963 OK 33, Par. 5-7.</p>	
<p>q. Both SWBT and the OCC blame the Oklahoma Supreme Court for the resulting injustice and the ultimate failure to uphold the Oklahoma Constitution.</p>	<p>Not addressed or refuted by Appellees in Response Briefs</p>
<p>r. To the extent that the OCC fails to consider <u>subsequent undetermined issues</u> under the erroneous belief that it is precluded from doing so by prior appellate mandate, it commits a <u>reversible error of law</u>. See <i>Berland's of Tulsa v. Northside Vil. Shop Ctr.</i>, 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).</p>	<p>Not addressed or refuted by Appellees in Response Briefs</p>
<p>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 considered by the AG's office) and the massive benefit that SWBT rate-payers 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.</p>	<p>Not addressed or refuted by Appellees in Response Briefs</p>

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." ¹¹ See R. 723-724. Such a procedural determination, 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, 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 discretionary and extraordinary writ of mandamus and bill of review

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

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.¹² 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.¹³

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

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

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.)

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, at 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, 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.

Lastly, the PUD 250 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 and closed by Commissioner Anthony, *before* any subsequent OCC order "dismissing" it. R. 5563-5566. 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 Hiatt 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 statute 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. ¶ 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. ¶ 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**.

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 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. 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 understandable why our Oklahoma forefathers proposed eight separate Constitutional provisions intended to reign 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: "*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.*, Oklahoma Politics, pg 73.

R. 852-854.

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. ¹⁶ On its face, Oklahoma Constitution, Art. 9, § 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.** ¹⁷ 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

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.

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 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.

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, Secs. 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 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, Secs. 187, the treatise states, "While courts generally may not, in determining the constitutionality 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, Secs. 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. ¶ 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], 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

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 irrevocable 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).

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 incorporated and adopted herein by reference, 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."

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 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.

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CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that a copy of the Appellants Reply Brief was hand delivered to, or filed in, the Office of the Clerk of the Oklahoma Supreme Court on the 19th day of April, 2017.

This certifies that a true and correct copy of the above and foregoing document was dispatched on this 19th day of April, 2017, as follows:

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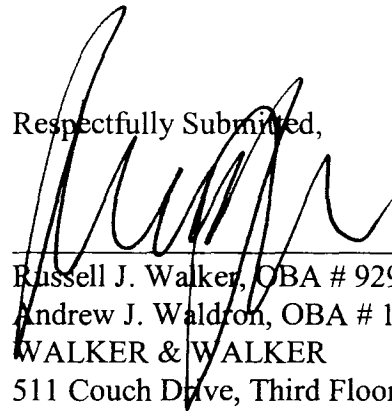
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