

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

APPLICANTS: HONORABLE SODY CLEMENTS, )  
an Individual and Oklahoma Resident on behalf of )  
herself and others similarly situated; LT. GENERAL ) CAUSE NO. PUD 201500344  
(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. ) ORDER NO. **655899**

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

HEARING: November 3, 2015, in Courtroom 301  
2101 North Lincoln Boulevard, Oklahoma City, Oklahoma 73105  
*Before the Oklahoma Corporation Commission en banc*

APPEARANCES: Curtis M. Long and John W. Gray, Jr., Attorneys *representing*  
Southwestern Bell Telephone Company d/b/a AT&T Oklahoma  
Russell J. Walker and Andrew J. Waldron, Attorneys *representing*  
Applicants  
Michael L. Velez, Assistant General Counsel, *representing* the Public  
Utility Division, Oklahoma Corporation Commission  
Abby Dillsaver and Dara M. Derryberry Assistant Attorneys General  
*representing* the Office of Attorney General, State of Oklahoma

**ORDER DISMISSING CAUSE**

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

On November 3, 2015, the Commission *en banc* heard the Motions. After hearing arguments by counsel to the Motions, the Commission took the matter under advisement.<sup>1</sup>

### **BACKGROUND**

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

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

2. Recognizing that time constraints would prevent Staff from completing its investigation and audit in Cause 260 due to the number of utilities being investigated, Staff and SWBT entered into a Stipulation on June 23, 1987 to establish the applicable effective date of a rate reduction in the event the Commission ultimately determined a rate reduction was warranted. Also on this date, the Commission entered Order No. 313853 in Cause 260, wherein the Commission adopted the Stipulation (“Cause 260 Stipulation”).<sup>3</sup> See Cause 260 Stipulation, attached as Ex. 10 to Application.

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

In order to allow the full benefits of the 1986 Tax Reform Act to accrue to the benefit of [SWBT]’s customers, [SWBT] and Staff agree that if the Commission, after hearing, ultimately determines a rate reduction is appropriate for [SWBT], taking into account all *known and measurable changes* in [SWBT]’s business, that said reduction will be effective as of July 1, 1987.<sup>4</sup>

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It is further agreed that in any further negotiation or proceeding, other than any proceeding involving the honoring, enforcement, or construction of this Stipulation, the parties shall not be bound or prejudiced by this Stipulation.

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<sup>1</sup> Also on this date, hearings were set before the Commission *en banc* on SWBT’s and the AG’s *Motions for Initial Screening Conference*. The Commission took no action on these matters.

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

<sup>3</sup> As corrected by Order No. 314277, *Order Nunc Pro Tunc*, entered July 7, 1987.

<sup>4</sup> The effective date of the Tax Reform Act of 1986.

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

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

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

6. On September 20, 1989, the Commission entered the Cause 260 Order that, with few exceptions, generally agreed with the recommendation of the Hearing Officer adopting Staff’s recommendations.<sup>5</sup>

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

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

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

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<sup>5</sup> As corrected by Order No. 341820, *Order Nunc Pro Tunc Concerning SWBT Rate Order 341630*, entered September 27, 1989. Commissioners Hopkins and Townsend voted in favor of the Cause 260 Order. A *Dissenting Opinion of Chairman Bob Anthony to Order No. 341630* was also filed on September 27, 1989 (“Cause 260 Order Dissent”)—stating that “on principal, I believe some or all of the overcharge should be refunded to the broad base of telephone customers. Also, I feel a larger total amount could have been determined.” Cause 260 Order Dissent, included in Ex. 9 attached to Application.

<sup>6</sup> The effective date was prior to the issuance of the Cause 260 Order under the terms of the Cause 260 Stipulation.

static, *Staff appropriately considered known and measurable changes pursuant to the [Cause 260 Stipulation].*

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

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

10. On October 19, 1989, the Commission entered Order No. 342343, *Order Regarding Motions for Modification, Reconsideration and to Stay and Abate Order Number 341630* (“Cause 260 Order on Motions”), which denied the Cause 260 Motions.<sup>7</sup> Specifically addressing the rate design in the form of service and central office improvements, the Commission found:

The record is replete with evidence of the impossibility of identifying the customers to whom any revenue excess would be owed, as well as establishing on any equitable basis the amounts owed.

More importantly, as a matter of policy, this Cause presents a unique opportunity to accomplish service and central office upgrades *in a manner which eliminates any adverse impact on basic exchange rates and any burden on ratepayers*. When the upgrade required by this Commission is completed, the state of Oklahoma will have one of the most modern, up-to-date telephone systems in the Southwest. Modern forms of communication will be available to residences, and large and small businesses in the exchanges which are upgraded.

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

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

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

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

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

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

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

*Id.* (emphasis added)

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

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

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

<sup>10</sup> The *Henry* decision was decided December 24, 1991, modified March 2, 1992, and mandate issued March 26, 1992.

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

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

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

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

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

The record leaves no doubt that the Commission viewed [SWBT]’s accumulation of surplus revenue as presenting a ‘unique opportunity to accomplish service and central office upgrades in a manner which eliminates any adverse impact on basic exchange rates and any burden on ratepayers.’ *The Commission’s decision in this regard was hence one of ‘policy,’ and this court is not free to disturb that ruling if it is supported by ‘substantial evidence.’*

The Commission’s efforts to replace multi-party lines with single-party connections are complemented by the ‘impossibility of identifying specific ratepayers’ who would be entitled to a refund. Indeed, it would be inequitable to distribute funds based on some artificial formula that lacks a relation to the ratepayers’ entitlement. *In any event, there can be no doubt that the service improvements ordered by the Commission are inherently beneficial and supported by substantial evidence.* On this record we are not free to block the Commission from pursuing its ‘goal of universal service by implementing this [improvement program].’

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

16. In evaluating the issues on appeal, the Supreme Court specifically reviewed the Commission’s finding that “Staff appropriately considered [other] known and measurable

changes in SWB[T]'s business operations in Oklahoma.” *Id.* at ¶ 5, 825 P.2d at 1309. The Supreme Court further acknowledged the Cause 260 Stipulation, wherein the Commission would take into account “all known and measurable changes” in SWBT’s business in determining whether a rate reduction would be warranted. *Id.* at ¶ 2, 825 P.2d at 1308. The Court noted the “Commission expressly found the terms of the [Cause 260 Stipulation] to be ‘fair, reasonable and equitable.’” *Id.* at n.7. The Court rejected AARP’s assertion that the Commission erred by including known and measurable changes in SWBT’s business operations, stating that:

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

*Id.* at ¶¶ 20-21, 825 P.2d at 1314.

17. On August 26, 1992, a new Commission (Commissioners Anthony, Watts and Apple) unanimously entered Order No. 367868, *Order of the Commission*, in Cause 662 (“**Cause 662 Order**”). After issuing the initial Interim Order (*see* discussion, *supra*, n.9), the Commission entered a final rate order—which directed SWBT refund approximately \$148 million to its Oklahoma ratepayers and reduce its Oklahoma rates by approximately \$92.7 million annually. The order further directed SWBT to invest \$84 million in its statewide network modernization during the next five years.

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

[T]he record should not be reopened in [Cause 662] to consider the issues remanded from [Cause 260], but instead we direct Staff to schedule a hearing concerning the remanded issues as quickly as schedules permit, in order to protect SWBT.

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The pending [Cause 662] is an entirely different proceeding, ... the Court’s opinion which remanded certain portions of a previous Order on evidentiary grounds, does *not* mandate any specific legal result in the pending Cause.

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

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

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<sup>11</sup> At the time of the Cause 662 Order, the remanded issues had not yet been addressed by the Commission.

The Commission *has not sought to retroactively adjust SWBT's authorized rates due to any mistake in the [Cause 260 Order]*, or any other previous orders. The [Cause 662 Interim Order], placing SWBT's earnings subject to refund, insures that *prospectively*, from the date of that Order, SWBT's ratepayers are not deprived of rate reductions due to regulatory lag.

*Id.* at 231. (emphasis added)

19. Beginning on September 24, 1992, the Cause 662 Order was appealed to the Supreme Court by numerous parties (“Cause 662 Appeals”).<sup>12</sup>

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

21. On October 30, 1995, the Commission entered Order No. 396704, *Settlement Order*, in Cause 662 (“Cause 662 Settlement Order”).<sup>13</sup> This order resulted from the parties reaching a settlement in the Cause 662 Appeals and to fully resolve Cause 662 and the remanded issues in Cause 29321. The Commission adopted the settlement, which superseded certain orders in Cause 662 and vacated all other orders to the extent that any provisions of those orders had not been implemented previously or were not implemented pursuant to the adopted Settlement Agreement.<sup>14</sup> The Cause 662 Settlement Order was approved over three years after the revelation of the bribery—and by two new Commissioners.

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<sup>12</sup> See Oklahoma Supreme Court Case Nos. 80,333, 80,334, 80,340, 80,342, and 80,345.

<sup>13</sup> Commissioners Graves and Apple—who were not in office at the time of the Cause 260 Order—voted in favor of the Cause 662 Settlement Order. A *Concurring Opinion of Commissioner Bob Anthony* was issued, wherein he noted the “basic validity and legal soundness of the Commission’s original [Cause 662 Order] is the reason the customers of SWBT will finally receive the economic benefits they deserve.” Commissioner Anthony further stated, “the final outcome of this settlement agreement is the best that can be done at this time to be fair and equitable to the utility and its customers. The Commission’s original [Cause 662 Order] was fair, just, and reasonable, and basically, so is this settlement.” See *Concurring Opinion*, attached to Cause 662 Settlement Order.

<sup>14</sup> The settlement was comprised of numerous benefits, including an \$84.4 million annual SWBT revenue reduction; a one-time cash payment in the amount of \$170 million to SWBT’s customers; vouchers to SWBT’s customers in an approximate amount of \$268 million; various educational and community and economic development benefits in an approximate amount of \$35 million; a commitment by SWBT not to increase its local exchange access line rates before January 1, 1998; the accelerated modernization of SWBT’s Oklahoma infrastructure; the enhancement of universal service by implementing a Lifeline service plan; a substantial reduction in SWBT’s Touch-Tone rates; the elimination by SWBT of mileage charges associated with local exchange services; a substantial reduction in SWBT’s switched intrastate access charges to long distance providers; and *the end of protracted proceedings*

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

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

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

25. On June 26, 1997, the Commission entered Order No. 413667, *Order on Remand*, in Cause 260 (“**Cause 260 Remand Order**”). The Cause 260 Remand Order addressed the four issues remanded to the Commission by the Supreme Court (severance pay, cash working capital, central office upgrades, and reserve depreciation deficiency). Based upon additional evidence introduced and the withdrawal by SWBT of its appeal regarding severance pay and cash working capital, it was determined the remanded issues were moot or otherwise resolved, and the entire record should not be reopened and the case closed.

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

[R]ehearing of the entire cause is neither warranted *nor in the public interest*.... There is no benefit to reopening a ten-year old case. The upgrades were funded by customer-supplied capital and were excluded from SWBT’s rate base. It could be argued that if such amount were now to be refunded, the costs of the upgrades

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between the parties concerning Cause 29321 and Cause 662. See Settlement Agreement, attached as Ex. A to Cause 662 Settlement Order.

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

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

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

27. The Cause 260 Remand Order, entered in 1997, provided closure to the 260 Cause, ordering "that the entire cause should not be reopened and that no further hearings, proceedings or orders are necessary with respect to this Cause." *Id.* at 10. This order was approved almost five years after the revelation of the bribery—and by two new Commissioners.

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

29. On June 25, 2014, an *Application to Assume Original Jurisdiction, Bill of Review and Petition for Writ of Mandamus with Brief in Support* was filed with the Oklahoma Supreme Court by two of the applicants in the instant Cause ("2014 Petition").<sup>17</sup> See Oklahoma Supreme Court Case No. 112,973. The 2014 Petition sought "to redress the proven bribery and corruption that occurred in 1989 in relation to [Cause 260]." 2014 Petition at 1. Additionally, petitioners stated they "present the needed evidence and legal basis required to ... remedy the *intrinsic fraud* utilized by SBTC to obtain ill-begotten orders and judgments from the OCC and also this Court." *Id.* at 3. (emphasis added)

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<sup>16</sup> Supreme Court review of appealable Commission orders are *judicial*. See Okla. Const., art. IX, § 20.

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

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

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

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

Petitioners, recognizing the *Henry* mandate, agreed the Commission *lacked “the authority to ‘recall mandate’ and ‘vacate’ the Opinion of the Oklahoma Supreme Court.”* *Id.* at 5. (emphasis added). Accordingly, petitioners sought the Supreme Court grant a Bill of Review to grant its requested relief. Petitioners further asserted that when the Cause 260 Order was appealed, the *Henry* decision was without any knowledge of the Hopkins bribery. *See id.*

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

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

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

In support of its Application, Applicants assert:

[N]o judgment has ever been entered finding that the “bribed” [Cause 260 Order] is unconstitutional for the reason that excluding the bribed vote of Commissioner Hopkins, the [Cause 260] Order lacks the approval of a majority of the OCC Commissioners as is required by the Oklahoma Constitution.

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The simple fact is that no valid and untainted Order has ever been entered either ultimately: (1) deciding [Cause 260] or (2) enforcing the parties’ agreed [Cause 260 Stipulation].

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

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

In filing Cause 344, Applicants request the Commission vacate or modify “its (‘bribed’) [Cause 260 Order], and determine (without bribery) the matters raised by [Cause 260]” and award attorneys’ fees and costs. *Id.* at 11.<sup>19</sup>

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

As demonstrated by the history surrounding this Cause, the Commission is being asked to remedy the actions taken by Corporation Commissioner Hopkins occurring over two decades ago. First and foremost, the Commission emphatically denounces the improper and intolerable actions which ultimately resulted in criminal convictions, and is aware of its Constitutional power and authority to correct abuses by the companies it regulates. *See* Okla. Const., art. IX, § 18. Accordingly, this request is not taken lightly, and takes into account its duty to serve the public interest. Upon due consideration of the matters presented in the Application, the Motions, and the arguments of counsel, the Commission finds and concludes as follows:

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

A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or **past facts** and ***under laws supposed to already exist***. That is its purpose and end. Legislation, on the other hand, looks to the ***future*** and changes existing conditions by making a new rule, ***to be applied thereafter*** to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial in kind....

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Proceedings legislative in nature are not proceedings in a court, ... no matter what may be the general or dominant character of the body in which they may take place.... That question depends not upon the character of the body, but upon the character of the proceedings.... And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. ***But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up .... The nature of the final act determines the nature of the previous inquiry.*** As the judge is bound to declare the law, he must know or discover the facts that establish the law. So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the question considered might be the same that would arise in the trial of a case.

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

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

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

3. The Oklahoma Supreme Court determined Cause 260 to be a legislative proceeding. See *Southwestern Bell Telephone Co.*, 1994 OK at ¶ 16, 873 P.2d at 1007 (finding Cause 260 to be “inarguably legislative in nature.”) Such treatment dictates the Cause 260 Order to be a legislative enactment rather than a judgment of a Court. See *Wiley*, 1967 OK 152 at ¶ 3, 429 P.2d at 957. Cause 344 is also legislative—as the act being determined results from the underlying legislative Cause 260 Order. See *id.*, 1994 OK at ¶¶ 10-11, 873 P.2d at 1005.

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

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

*Id.* at n.26. (citations omitted)

4. Because the Commission finds that both Cause 260 and Cause 344 are legislative in nature—and the Oklahoma courts have concluded on several occasions that the res judicata doctrine<sup>20</sup> is inapplicable to a legislative action by this Commission, Applicants are not barred under res judicata from seeking the requested relief in this new Application. See e.g., *Chicago, Rock Island & Pacific R.R. Co. v. State et al.*, 1950 OK 297, ¶ 21, 225 P.2d 363, 368 (the doctrine of res judicata is not recognized in legislative proceedings before the Corporation Commission); *Phillips v. Snug Harbor Water and Gas Co.*, 1979 OK CIV APP 24, ¶ 6, 596 P. 2d 1273, 1275 (questioning applicability of doctrine of res judicata in legislative action of

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<sup>20</sup> Res judicata refers to the doctrines of issue and claim preclusion.

Corporation Commission and citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 4 (1966) for proposition that Corporation Commission rate order was legislative in nature and therefore not res judicata); *Community Natural Gas Co. v. Corporation Commission et al.*, *Lone Star Gas Co. v. Same*, 1938 OK 51, ¶ 15, 76 P. 2d 393, 398 (“Ordinarily, the rule of res judicata applies only to judicial proceedings. As we pointed out in the Prentis Case ... the findings of fact and rules of law announced in a legislative proceeding cannot be res judicata upon the issue subject to the scrutiny of a court in judicial review.”)

5. Similarly, Applicants rely upon intrinsic fraud as the basis to grant their requested relief, which is likewise inapplicable to legislative proceedings. *See e.g.*, *Leck v. Continental Oil Co.*, 1989 OK 173, ¶21, 800 P.2d 224, 229 (recognizing the applicability of intrinsic fraud in an “actual adversary trial”, thus applicable to a Commission oil and gas *judicial* proceeding). *See also Southwestern Bell Telephone Co.*, 1994 OK at ¶ 17, 873 P.2d at 1007 (holding a writ of mandamus was improper in a legislative proceeding, and further explaining “[n]either is prohibition a proper remedy to reach an act which is legislative in nature. Prohibition will only lie where an inferior court or officer is acting in a judicial capacity exercising judicial or quasi-judicial power not granted by law or making an unauthorized or excessive application of judicial force.”); *id.* at ¶ 7, 873 P.2d at 1004 (recognizing the appropriateness of the Commission entering its orders by order nunc pro tunc when performing in a *judicial* capacity).

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

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

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<sup>21</sup> The Commission is sensitive to Applicants’ concerns. In *Southwestern Bell Telephone Co.*, Justice Opala, in his dissenting opinion, clearly addressed the interplay between judicial and legislative proceedings—which this case hinges upon. If adopted by the majority, arguably this Cause would dictate a different result. *See id.* at Dissent. As pronounced by Justice Opala:

*The Court is clearly in error when it pronounces today that because the Commission’s function of a public utility ratemaking is ‘legislative’, it goes unshielded by any form of due process.... The court’s analysis ... ignores a near-century of the most recent growth in the body of this Nation’s constitutional law. That case law unequivocally teaches that ratemaking for application to a single public utility is clothed with due process safeguards. Among those safeguards is the right to a neutral decisionmaker.*

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

The Cause 260 Stipulation specifically states parties shall not be bound or prejudiced by the stipulation in future proceedings—except to honor, enforce, or construe the stipulation. *See* discussion, *supra*, ¶ 3. Applicants assert the Cause 260 Stipulation affords the Commission the ability in this new proceeding to grant their requested relief. *See* Application at 4 (arguing no valid and untainted order has ever been entered ultimately enforcing the [Cause 260 Stipulation]) Additionally, Applicants claim it “is because of [the Cause 260 Stipulation] that SBTC owes customers the ‘excess revenues’ as ‘ultimately determined’ by the OCC, with interest, from July 1, 1987 to the present.” *See* Application at n.6. (emphasis added) and discussion, *supra*, ¶ 31.

The terms of the Cause 260 Stipulation did allow SWBT’s excess revenues (ultimately determined to be approximately \$31 million) to be effective July 1, 1987. *See* discussion, *supra*, ¶¶ 2-3. However, as discussed in *Henry*—and later recognized in the Cause 260 Remand Order

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While the concept of ratemaking as a legislative function has not been disturbed by the American constitutional order, *post-Prentis jurisprudence has superimposed upon its framework a host of due process protections. Participation by a neutral and detached decisionmaker is one of several essential elements of due process which has been applied to individual ratemaking.*

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The administrative process of American law distinguishes between *rulemaking* and *adjudication*. A “rule” is the product of administrative *legislation*. Rulemaking process is hence the administrative counterpart of legislative lawmaking. In contrast, an “order” is the product of administrative *adjudication*. Adjudicative process is the administrative equivalent of a court’s judicature.

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In sum, rules are agency directives of *general applicability* which are designed to *apply across the board to all regulated entities*. Ratemaking, although historically termed nonadjudicative, generally calls for *particularized applicability and trial-type hearings*. With the post-Prentis march of due process, today’s *individual ratemaking – gradually transformed for conformity to the adjudicative process – no longer fits under the general rubric of lawmaking (or rulemaking)*. The present-day acceptance of individual ratemaking as “adjudication” or as “on-the-record rulemaking” is but current recognition – by *both* the federal and state administrative law systems – that ratemaking of particularized applicability has indeed become *sui generis – a genre of legislation that bears procedural characteristics which implicate due process*. The essence of business profitability, the extent of capital investment, and the return rate for each utility, are *elements of proof*, all of which call for a *different analysis* and for a different fact finding process (for individual ratemaking) from that of ordinary general ratemaking. *It is for this reason that individual ratemaking inquiry must be surrounded with the full panoply of due process guarantees.*

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*One of the integral elements of due process is an individual’s right to be heard by a neutral and detached decisionmaker. That element is not constitutionally reserved for exclusive application to adjudicative proceedings. The neutrality mandate extends not only to judges but also to agency decisionmakers.*

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

voted affirmatively by two subsequent Commissioners, Cause 260 addressed the rates charged by SWBT for a specific period in question. “The rates charged by SWB[T] *during the period in question* (January 1, 1987 to September 20, 1989) clearly were authorized by the Commission.” *Henry*, 1991 OK at ¶ 11, 825 P.2d at 1311. (emphasis added)

In order for this Commission to have the ability to consider Applicants’ requested relief, the terms of the Cause 260 Stipulation would have to remain unsatisfied. This simply is not the case. This stipulation required the Commission to take into account all known and measurable changes in SWBT’s business. *See* discussion, *supra*, ¶ 3. In the Cause 260 Order, the Commission addressed such known and measurable changes, and specifically found that Staff appropriately considered this information pursuant to the Cause 260 Stipulation. *See id.* at ¶8. Most importantly, the Oklahoma Supreme Court examined—and rejected—assertions by AARP that the Commission erred by including known and measurable changes in SWBT’s business operations when it determined a rate reduction was warranted. In examining this issue, the Supreme Court acknowledged the Cause 260 Stipulation and the fact the Commission found its terms to be fair, reasonable, and equitable. *See id.* at ¶ 16.

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

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

8. Applicants further seek this Commission address *past facts* and now use the “complete test year” and “actual data” used in the Cause 662 Order to modify the Cause 260 Order. *See* discussion, *supra*, n.19. However, the Commission specifically addressed the interrelation of Cause 260 and the Cause 662 Order. *See* discussion, *supra*, ¶¶ 17-18. The Cause 662 Order unequivocally addressed Cause 260, and the Commission specifically found the matters to be separate proceedings and provided for specific treatment therein. The Cause 662 Order was finally resolved pursuant to the Cause 662 Settlement Order. *See* discussion, *supra*, ¶ 21. Moreover, the Cause 662 Settlement Order was never appealed, and became final and unappealable by operation of law thirty days after its issuance under *Turpen*. *See Turpen*, 1988

OK 126 at ¶ 76, 769 P.2d at 1332 (“The focus of ratemaking is on whether proposed rates are just and reasonable, not on accounting for mistakes in past rate cases.”); *see also S.W. Pub. Serv. Co. v. State*, 1981 OK 136, 637 P.2d 92 (where Commission attempted to account for mistakes in past ratemaking in the setting of future rates, it was engaging in prohibited retroactive ratemaking).

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

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

10. Throughout the entirety of proceedings related to the Cause 260 Order, an overriding issue has been overlooked by Applicants. Consistently, the Commission has found upgrading service and modernizing SWBT’s central offices—as opposed to ordering a refund—to be in the public interest. *See* discussion, *supra*, ¶¶ 10-11, 15 and 26. The Supreme Court likewise recognized there was no doubt the service improvements were inherently beneficial. *See Henry* 1991 OK 134 at ¶ 15, 825 P.2d at 1312. Citing the Cause 260 Order, the Supreme Court pointed out the following Commission findings, which were *not* challenged on appeal:

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

*Id.* at n.27.

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

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

also providing the highest quality service available. This Commission has had a long-standing service improvement program, but due to financial constraints, it has not been possible to implement such a program in a relatively short time frame.

*Id.* at n.25.

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

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

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

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

### **ORDER**

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

**THE COMMISSION ORDERS** the Application is dismissed with prejudice.

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

OKLAHOMA CORPORATION COMMISSION

DISSENTING OPINION ATTACHED

BOB ANTHONY, Chairman

  
DANA L. MURPHY, Vice Chairman

  
J. TODD HIETT, Commissioner

DONE AND PERFORMED this 7<sup>th</sup> day of September, 2016.

BY ORDER OF THE COMMISSION:

  
PEGGY MITCHELL, Secretary

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

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

CAUSE NO. PUD 201500344

**FILED**  
SEP 07 2016

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

COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

**Dissenting Opinion of Corporation Commissioner Bob Anthony**

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

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

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

In my opinion, the present Cause No. PUD 201500344 (PUD 344) is a Corporation Commission "rate case," and the case itself is legislative. In the words of *Cox v. State ex rel. Corporation Commission*, 2007 OK 55. 164 P.3d 150, "Ratemaking has been definitely labeled and treated as legislative."

**This case is about money.**

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

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

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

**Overview**

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

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

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

Instead the Majority tries to find flexibility in vaguely declaring that the matter is “legislative” and that the “public interest” is somehow upheld by another victory for bribery, public corruption, and intrinsic fraud at the Oklahoma Corporation Commission. Notice the total silence of today’s Commission Majority and the Order to Dismiss on the fundamental legal issue of bribery’s “repugnancy” to the Oklahoma Constitution. Numerous court cases say victims of intrinsic fraud that occurred at the Oklahoma Corporation Commission must be brought before the “forum where fraud occurred.”

### **Commission Majority Abdicates Its Constitutional Duty to Correct Abuses**

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

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

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

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

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

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

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

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

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

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

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

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

### **Commission Majority ignores fundamental points of law and denies due process**

The Commission Majority appears to be under the impression that reading an application is the same thing as hearing the case. Make no mistake, by today's action the Commission Majority has refused even to hear the Applicants' case, let alone consider the relevance of any evidence they were prepared to present or the merits of any arguments they were prepared to make.

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

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

In order for this Commission to have the ability to consider Applicant's requested relief, the terms of the Cause 260 Stipulation would have to remain unsatisfied.

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

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

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

The PUD 344 cause is a new application with several new Applicants. Collectively, the following descriptions apply: two former Commission staff members, two with law degrees, two with military service, and two Oklahoma businessmen. One is an elected official. One was the FBI Special Agent in Charge for all of Oklahoma when the FBI investigation concluded and guilty verdicts were obtained at the federal trial of Southwestern Bell attorney Bill Anderson and Commissioner Hopkins. One is the former commanding general of Tinker Air Force Base. One is the former Director of the Commission's Public Utility Division (PUD) whose staff once testified about falsified public utility legal billings by utility attorney Bill Anderson. This applicant has also formally testified or made filings for PUD in the PUD 260 and PUD 662 matters, and he finalized refunds from non-SWB companies who were original parties to PUD 260 and had Refund Orders and/or Stipulations like Southwestern Bell. He has since submitted three sworn affidavits as an expert witness for the Applicants in this cause and is intimately familiar with the details of PUD 260 and the consequences for ratepayers of its ethical shortcomings. In short, these are prominent citizens with distinguished records of service to Oklahoma and the public; that the Majority should refuse to hear their concerns is disturbing and shameful.

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

In my opinion, the OCC Court Clerk file for PUD 344 and the OCC transcripts of PUD 344 hearings contain new sworn affidavits, evidence and/or indications related to a commissioner “pay off,” intrinsic fraud, perjury and/or fraud on the Commission and fraud on the Oklahoma Supreme Court. There are newly unsealed deposition transcripts of Southwestern Bell officials, documents and filings conveying new information pointing to widespread wrongdoing and/or deceit, and new (less than two years old) indications multiple Southwestern Bell attorneys or officers were involved in conspiracy and/or fraud related to PUD 260.

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

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

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

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

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

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

The Majority finds:

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

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

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

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

The Majority also imputes the Oklahoma Supreme Court:

The Supreme Court likewise recognized there was no doubt the service improvements were inherently beneficial. *See Henry* 1991 OK 134 ...

The Court further acknowledged the [Bribed] Cause 260 Order, which explained that: One of the most important goals espoused consistently over the years by this Commission has been the goal of universal service. ...

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

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

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

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

Staff and SWB stipulated in writing that if the Commission, after taking into account “all known and measurable changes” in SWB’s business, determines a reduction in the utility’s rates to be warranted, the reduced rates would become effective July 1, 1987, the effective date of the Tax Reform Act of 1986. The Commission approved the stipulation.<sup>7</sup> (Footnote: <sup>7</sup>The Commission expressly found the terms of the stipulation between SWB and Staff to be “fair, reasonable and equitable.”) (Emphasis added.)

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

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

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

4. In order to allow the full benefits of the 1986 Tax Reform Act to accrue to the benefit of Respondent’s Oklahoma customers, Respondent and Staff agree that if the Commission, after hearing, ultimately determines a rate reduction is appropriate for Respondent, taking into account all known and measurable changes in Respondent’s business, that said reduction will be effective as of July 1, 1987. (Emphasis added.)

The Stipulation Order includes the Stipulation as its “Attachment ‘A’” and concludes,

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

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

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

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

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

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

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

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

To repeat, the Majority finds:

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

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

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

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

The year 1989 was the last year Southwestern Bell's "excess revenues" were subject to a rate order determination by the Commission. But actually, Southwestern Bell's revenue requirements and "excess revenues" for the year 1989 now have been determined twice by the Commission. PUD 260, started in 1986, determined \$7.8 million of Southwestern Bell "excess revenues" for the year 1989, but the companion case PUD 662, started in 1989, determined

\$100.5 million of SWB “excess revenues” for the same 1989 year. In today’s PUD 344 case the Applicants ask the OCC to use its ratemaking jurisdiction to ultimately determine between these two “excess revenue” outcomes (or otherwise resolve the discrepancy). The \$7.8 million annual amount for 1989 from the PUD 260 order came from projections, old and criticized test year data, and a bribed 2-1 vote. The \$100.5 million annual amount for 1989 from the PUD 662 order followed a full on-the-record hearing of actual audited data (not estimates) and received a unanimous and constitutionally valid 3-0 vote.

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

... the efforts of the parties should focus on quantifying the amount of that rate refund and prospective reduction. Bell’s motion should be denied.

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

### **Majority misinterprets the relationship between PUD 260 and PUD 662**

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

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

However, the Commission specifically addressed the interrelation of Cause 260 and the Cause 662 Order. *See* discussion, *supra*, ¶¶17-18. The Cause 662 Order unequivocally addressed Cause 260, and the Commission specifically found the matters to be separate proceedings [and provided for specific treatment therein]. ... The Commission, through both the Remand Order (June 1997) and the Cause 662 Settlement Order (October 1995), made significant ratemaking decisions affecting SWBT after it was aware of the bribery. In both instances, the Commission took into account SWBT’s [bribery] actions in making its decisions.

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

A May 20, 2002 written legal opinion to the General Counsel of the Oklahoma Corporation Commission addresses "the question of whether or not Cause No. PUD 860000260 was concluded by the settlement of Cause No. PUD 890000662." The document states, "In my opinion, the answer to your question is 'no'."

A June 21, 1994 letter from Attorney General Susan B. Loving regarding SBC 662 settlement discussions with SBC states, "Finally, [SBC] 's proposed treatment of the [SBC] 260 remand is unacceptable."

The September 13, 1994 Commission proposal regarding the SBC 662 case addresses "Other Issues" by saying, "Settlement of [SBC] 260 and the future treatment of the effects of FASB 106 not to be considered in settlement of [SBC] 662."

A March 1, 1995 letter from SBC circulates a new page 3 of a proposed settlement of the SBC 662 case. The referenced section from page 3 in part states, "... those parties agree that this [662] Agreement shall not become effective until the [SBC] 260 Settlement Agreement is approved by the Corporation Commission by a final order." Significantly, however, this provision was rejected and omitted prior to the drafting and signing of the final SBC 662 Settlement Agreement.

A March 30, 1995 Attorney General's settlement proposal for [SBC] 662 and related cases has a section entitled "[SBC] 260 REMAND" which states, "No consideration: [SBC] 260 remand to be settled or litigated separately."

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

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

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

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

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

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

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

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

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

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

The Oklahoma Supreme Court in its decision *State ex rel. Henry v. Southwestern Bell Telephone Co.*, 1991 OK 134, 825 P.2d 1305 in Paragraph 7 clearly states, "The State, AARP and SWB each seek corrective relief from various portions of the Commission's order. For the reasons to be stated we affirm in part, reverse in part and remand this cause for further proceedings." (Emphasis added.) Note that only "portions" of the Commission's September 20, 1989 order were appealed, and Paragraph 1 of the opinion numbers and names them 1 through 6 followed by 7(a), (b), (c) and (d). Note further that the Oklahoma Supreme Court decision twice states that "this cause" is remanded back to the Commission. *Henry* does not say, "Just the four remand issues are remanded." Therefore, the Commission has jurisdiction to deal with the entire Cause PUD 260 as allowed under the *Henry* decision and *Stetler v. Boling*, 1915 OK 625, 52 Okla. 214, 152 P.2 452 and *Harper v. Aetna* 1922 OK 208, 211 P.2 1031 and *Anson Corp. v. Hill* 1992 OK 138, 841 P.2d 583. *Stetler v. Boling*, in its Syllabus states,

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

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

**Commission doesn’t need this application to “correct abuses” but has a moral and constitutional duty to correct them regardless.**

As if “repugnancy to the constitution” of Oklahoma is not enough, our legal process should look to the United States Supreme Court decision to “set aside fraudulently begotten judgments” stated in *Hazel-Atlas Glass Company v. Hartford-Empire Company*, 1944, 64 S.Ct. 997, 322 U.S. 238, 88 L.Ed. 1250. The U.S. Supreme Court, in an opinion by Justice Black, held that the judgment must be vacated; stating,

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

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

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

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

Yes, the Oklahoma Corporation Commission does have a history of intrinsic fraud – not all of which involves bagman attorney Bill Anderson. The United States Tenth Circuit *Optima Oil v. Mewbourne Oil* case No. 11-6230 (D.C. No. 5:09-CV-00145-C) (W.D. Okla.) and the *Leck* case both address intrinsic fraud at the Commission as well as the Commission’s jurisdiction to hear

allegations of the intrinsic fraud and rule upon them. In Paragraph 22 of *Leck v. Continental Oil Co.* 1989 OK 173, 800 P.2d 224, the Oklahoma Supreme Court states,

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

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

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

In case of failure of any corporation, person or firm to obey or comply with any order or requirement of the Corporation Commission, ... contempt proceedings may be instituted by any citizen of this State ...

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

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

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

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

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

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

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

The Oklahoma Supreme Court in *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corporation Commission*, 164 P.3d 150 (Okla. 2007) states, “This court has adopted *Prentis*’s classic definition of legislative and judicial proceedings and has held that the kind of process that is a litigant’s due flows from the label attached by law to a proceeding.” *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908) states,

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

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

## **Conclusion**

The Relief Sought in PUD 344 includes, “Vacate or Modify the Oklahoma Corporation Commission Order No. 341630, Cause No. PUD 260” (the Bribed Order). The Bribed Order was entitled, “Order Regarding Rates of Southwestern Bell Telephone Company” and was issued on September 20, 1989 by a tainted 2-1 vote. Order No. 413667 dated June 26, 1997 was entitled “Order on Remand” and was the last OCC order issued in PUD 260. By its own terms, the Order on Remand restricted itself to only the four issues remanded to the Commission by the Supreme Court and did not reopen the entire PUD 260 case. Interestingly, no order entitled “Final Order” has ever issued in the legislative PUD 260 rate matter. In fact, certain aspects of PUD 260 are still open and unresolved, among them which rate reduction amount is right, the \$7.8 million for 1989 that is part of the PUD 260 \$31 million (as found in the Bribed Order) or the annual \$100.5 million (as found in the evidentiary record of PUD 662)?

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

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

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

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

September 7, 2016

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