

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA
COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

APPLICATION OF PUBLIC SERVICE)
COMPANY OF OKLAHOMA FOR A)
DETERMINATION THAT ADDITIONAL) CAUSE NO. PUD 200500516
ELECTRIC GENERATING)
CAPACITY WILL BE USED AND USEFUL)

APPLICATION OF PUBLIC SERVICE)
COMPANY OF OKLAHOMA FOR A) CAUSE NO. PUD 200600030
DETERMINATION THAT ADDITIONAL)
BASELOAD ELECTRIC GENERATING)
CAPACITY WILL BE USED AND USEFUL)

IN THE MATTER OF THE APPLICATION OF)
OKLAHOMA GAS AND ELECTRIC COMPANY)
FOR AN ORDER OF THE COMMISSION) CAUSE NO. PUD 200700012
GRANTING PRE-APPROVAL TO CONSTRUCT)
RED ROCK GENERATING FACILITY AND)
AUTHORIZING A RECOVERY RIDER)

**BRIEF OF OKLAHOMA GAS AND ELECTRIC COMPANY
RELATED TO UTILITY CONSTRUCTION OF A NEW
ELECTRIC GENERATING FACILITY AND THE APPLICATION OF
THE COMMISSION'S COMPETITIVE BIDDING RULES**

COMES NOW Oklahoma Gas and Electric Company ("OG&E") and submits the following for the Commission's consideration in response to the request for briefs by the Administrative Law Judge related to utility construction of a new electric generating facility.

In this matter, intervenors apparently contend that OG&E should be required to conduct its own Request for Proposal ("RFP"), pursuant to the Commission's Competitive Procurement Rules (OAC Title 165, Chapter 35, Subchapter 34) before being eligible for the relief provided for in Title 17, Section 286 of the Oklahoma Statutes or the Commission's Recoverable Cost Rules (OAC Title 165, Chapter 35, Subchapter 38). In large part, these claims seem to rest on assertions that use of gas-fired capacity might be more economic. Unfortunately, none of the intervenors conducted independent analyses to support this contention.

As important, there are three other reasons to reject the intervenors' contention. First, OG&E made its bid to construct a jointly owned coal-fired plant before the Commission's Competitive Procurement Rules were made effective. Second, the Commission's self-build rules anticipate the circumstance presented here—where a regulated utility chooses not to use competitive bidding to select its next capacity addition, but instead requests the Commission to find the choice that it otherwise made was prudent. That is the relief that OG&E's Application

seeks. Third, the intervenors' contention would require an interpretation which invades the prerogative of utility management in violation of Oklahoma law.

I. FACTS

Each part of the process by which OG&E ultimately submitted its RFP to Public Service Company of Oklahoma ("PSO") to build the facility at issue here occurred before the Commission's Competitive Procurement rules were in effect. OG&E began its resource planning process in January of 2005 (Langston Direct at p. 7). Four months later, in May 11, 2005, the Governor of the State of Oklahoma signed into law House Bill 1910. The legislation became immediately effective pursuant to an emergency provision. House Bill 1910 was codified at 17 O.S. §286. Subsection C of the Statute provides, in part, as follows:

1. An electric utility subject to rate regulation by the Corporation Commission may elect to file an application seeking approval by the Commission to construct a new electric generating facility or to purchase an existing electric generating facility subject to the provision of this subsection. If, and to the extent that, the Commission determines there is a need for construction or purchase of such electric generating facility, the generating facility shall be considered used and useful and its costs shall be subject to cost recovery rules promulgated by the Commission.

The Commission issued a Notice of Proposed Rulemaking in August 2005, which included the proposed Competitive Procurement rules. (RM 200500011) While these rules were still being considered by the Commission, PSO, on October 17, 2005, issued a draft Request for Proposals ("RFP") seeking bids for the construction or purchase of a base load electric generating facility.

On January 18, 2006, OG&E's executive management decided to respond to the PSO RFP. (Langston Direct, Exhibit JBL-1.) Two days *later*, the Commission sent the rules to the Governor for his approval.

While the Governor's review of the rules was still pending, OG&E, on February 16, 2006, submitted its bid as directed by executive management. One day *later*, the Governor approved the rules as submitted.

The Commission issued its public notice pursuant to the Oklahoma Administrative Procedures Act (75 O.S. §304.B.2) on February 21, 2006, advising that the emergency rules promulgated for Subchapters 34, 35, 37, and 38 of the Oklahoma Administrative Code, Chapter 165:35 "are now effective." Thus the Competitive Procurement Rules and the Recoverable Costs Rules (OAC Title 165, Chapter 35, Subchapter 38) (collectively "the New Rules") became effective on an emergency basis on February 21, 2006¹ and subsequently became effective on a permanent basis on July 1, 2006.

¹ February 21, 2006, became the effective date of the emergency rules pursuant to 75 O.S. §304.B.2.

The evidence before the Commission establishes that OG&E considered and rejected OG&E's own use of competitive bidding with respect to the construction of the proposed, jointly owned new electric generating facility, because the company concluded (a) the PSO RFP provided a test of generation resources available in the region; (b) an OG&E RFP would have lagged the PSO RFP time line by two to three months; (c) issuing an OG&E RFP could have threatened the viability of a jointly owned project from the perspective of both OG&E and PSO; and (d) had OG&E asked PSO to delay its RFP timeline it is likely PSO's evaluation of OG&E's bid would have been adversely affected, if not dismissed (Langston Direct at pp. 16-17).

II. BECAUSE THE COMMISSION'S NEW RULES WERE NOT EFFECTIVE DURING ANY PERIOD PRIOR TO OG&E'S DECISION TO BUILD THE FACILITY AT ISSUE OR TO SUBMIT A PROPOSAL IN RESPONSE TO THE PSO RFP AND PRIOR TO THE SUBMITTAL OF THAT PROPOSAL, THE NEW RULES ARE IRRELEVANT TO THESE PROCEEDINGS.

In determining the rules of law relevant to the issues raised in this proceeding, the Commission is limited to its constitutional and statutory authority contained in Article IX, Sections 19 through 34 of the Oklahoma Constitution and its jurisdiction granted through 17 O.S. §§151 *et seq.* Specifically, the Commission has ratemaking authority generally pursuant to §§151, 152 of Title 17, and that authority includes the ability to determine the appropriate rates, charges, and terms and conditions of service to be provided by regulated utilities. *Oklahoma Natural Gas Co. v. State*, 1920 OK 33, ¶¶ 7-9, 188 P. 338, 340-41 (*citing, inter alia, Muskogee G. & E. Co. v. State et al.*, 1922 OK 68, 206 P. 242).

An emergency rule "shall only be applied prospectively from its effective date." *See* 75 O.S. §304.B.2.a. In addition, an emergency rule of an administrative agency only becomes effective when the agency takes appropriate measures to make emergency rules known to those who may be affected by them. *See* 75 O.S. §304.B.2.b. The Commission issued its public notice of the emergency rules on February 21, 2006, advising that the emergency rules promulgated for Subchapters 34, 35, 37, and 38 of the Oklahoma Administrative Code, Chapter 165:35, "are now effective."

Clearly, the New Rules were not effective even on an emergency basis until **after OG&E submitted its bid in response to the PSO RFP**. On this basis alone, the application of the Competitive Procurement Rules would be *ex post facto* and contrary to Oklahoma law. Any attempt by the Commission to apply the Commission's New Rules would violate the express provisions of 75 O.S. §304.B.2., and Article 2, Section 15, of the Constitution of the State of Oklahoma.

The Commission did not need to promulgate any rules to consider any application at issue here. Indeed, even prior to the enactment of 17 O.S. § 286, the Commission had authority to review the applications at issue. Recently, the Attorney General recognized this very point in a brief filed with the Oklahoma Supreme Court in which certain intervenors unsuccessfully applied for a writ of prohibition to stop these proceedings:

In sum, the Attorney General submits that the Commission authority contemplated in Section 286(C) is neither an unlawful extension of power nor an attempt to confer “new” authority. Instead, the authority conferred by Section 286(C) is no more or less than conferred by Article 9, Section 18, of the constitution. The same authority that allows the Commission to make a determination of need after construction of a facility allows the Commission to make that determination prior to construction when the utility seeks the benefit of advance approval under the statute. [Attorney General’s Response to Petitioner’s Amended Brief in Support of the Application for Original Jurisdiction and Petition for Writ of Prohibition, filed in *Chesapeake Energy Corp., et al. v. Oklahoma Corp. Comm’n*, Case no. 104,744, at 4.]

Because the Commission already had the power to review the applications at issue, the Commission did not need to promulgate rules relating to 17 O.S. § 286 prior to the filing of any applications in reference to that statute or prior to consideration of those applications by the Commission. Given that pre-existing authority and the timing of when the rules became effective, it would be grossly unfair – not to mention untenable under Oklahoma law – to apply the Competitive Procurement Rules retroactively to OG&E’s response to PSO’s RFP and its decision to build the proposed Red Rock facility.

III. EVEN ASSUMING ARGUENDO THAT THE COMMISSION’S COMPETITIVE PROCUREMENT WERE EFFECTIVE BEFORE OG&E’S RESPONSE TO PSO’S RFP WAS SUBMITTED, THE COMMISSION’S RECOVERABLE COSTS RULES EXPRESSLY PERMIT CONSIDERATION OF AN APPLICATION WITHOUT AN RFP.

When the Oklahoma Legislature enacted 17 O.S. § 286, it clarified an aspect of the Commission’s general ratemaking authority with specific reference to the allowance of Construction Work In Progress (“CWIP”) where a utility voluntarily seeks pre-approval for the construction of a new electric generation facility. The legislative guidance provided in this statute is clear: if the Commission determines there is a need for construction of the Red Rock Generating Station, **“the generating facility shall be considered used and useful and its costs shall be subject to cost recovery rules promulgated by the Commission”** 17 O.S. § 286(C) (Emphasis added).

The Recoverable Costs Rules (OAC 165:35, Subchapter 38) were promulgated to implement 17 O.S. § 286. Subsection (a) of each rule promulgated under Subpart 38 is a *verbatim* recitation of the applicable statutory language. For OAC 165:35-38-5, **Self Build or Purchase Options**, subsection (a), provides:

An electric utility subject to rate regulation by the Corporation Commission may elect to file an application seeking approval by the Commission to construct a new electric generating facility or to purchase an existing electric generating facility subject to the

provisions of this section. If, and to the extent that, the Commission determines there is a need for construction or purchase of such electric generating facility, the generating facility shall be considered used and useful and its costs shall be subject to cost recovery rules promulgated by the Commission. The Commission shall enter an order on an application filed pursuant to this subsection within 240 days of the filing of the application, following notice and hearing and after consideration of reasonable alternatives.

Thus, under 17 O.S. § 286(C) and the Recoverable Costs Rules, the Commission is to consider proposals to build or to buy generation facilities.

The Recoverable Cost Rules specifically contemplate that an applicant seeking review of a plant construction or purchase decision may not have arrived at that decision through an RFP process. OAC 165-35-38-5(e) provides:

A Cause shall be opened by the utility for cost recovery if the competitive bidding RFP process established in 165-35-34 [Competitive Procurement] is not utilized and the utility wishes to gain approval of cost before construction starts.

OG&E's bid, as accepted by PSO, is for a "self-build generating facility" as contemplated by the statute. OAC165:35-38-5(e) specifically provides that a utility *may* construct a generating facility without first engaging in competitive bidding. Therefore, even if the New Rules had been effective before OG&E's submission of a bid in response to the PSO RFP, the process utilized to bring the Application before the Commission would have been congruent with the New Rules

Indeed, fundamental rules of statutory construction require that the portion of Commission's Recoverable Costs Rules relating specifically to utility construction of electric generating facilities be read as an exception to the more general Competitive Procurement Rules. Administrative rules, once effective, have the force and effect of law. *Tulsa County Budget Board et al. v. Tulsa County Excise Board et al.*, 2003 OK 103 ¶28, 81 P.3d 662, 674. Thus, the rules of statutory construction are equally applicable to administrative rules. *See e.g. Davis et al. v. GHS Health Maintenance Organization, Inc.*, 2001 OK 3, ¶13, 22 P.3d 1204, 1209.

Under the basic rules of statutory construction, a statutory scheme or set of administrative rules addressing the same subject area must be construed such that each of the separate provisions is given full force and effect. *See Haney v. State*, 1993 OK 41, ¶5, 850 P.2d 1087, 1089; *Public Service Company of Oklahoma v. State ex rel. Corporation Commission*, 1992 OK 153, ¶8, 842 P.2d 750, 752; *Davis*, ¶10, 22 P.3d at 1209.

To give full force and effect to provisions within a rule (or to each rule within a scheme of administrative rules addressing the same general subject matter), narrower provisions addressing the specific situation, or question, at issue take precedence over more generally

applicable provisions *See, e.g., Davis, supra*, (holding that a specific statute and regulation limiting State Employees Benefits Council's statutory authority to administrative review of claims for benefits govern over general grant of power authorizing Council to interpret health plan and decide "any matters arising thereunder.")

As applied here, the Competitive Procurement Rules and the Recoverable Costs Rules must be read together to give the provisions of each set of related rules full force and effect.

The Competitive Procurement Rules are intended to apply generally to the acquisition of fuels, fuel transportation services, and purchases of capacity or energy on a long-term basis. OAC 165:35-34-1(a) of those Rules provides:

All utilities shall employ a competitive bidding process when purchasing long-term generation or long-term fuel supply for self-generation of electricity. (Emphasis added).

In contrast, the Commission's Recoverable Costs Rules (OAC 165:35-38) are intended to implement the so-called "pre-approval" Statute, and Subsection 38-5 concerns cost recovery for construction of new generating facilities. Subsection 38-5(e) of the Recoverable Costs Rules, by recognizing that utilities seeking to build their own generation facilities may not issue an RFP before deciding to build, thus creates a specific exception to the Competitive Procurement Rules in a situation where an Application is filed concerning cost recovery for new generating facilities.

Unless Subsection 38-5(e) is read as an exception to the Competitive Procurement Rules – applicable to the narrow circumstances of an application to build or purchase a new generating facility – Subsection 38-5(e) would be devoid of meaning. Such a reading is contrary to basic rules of statutory construction requiring that each provision of the New Rules be given force and effect.

Interpreted, as they must be, in light of the more specific Recoverable Costs Rules, the generally applicable Competitive Procurement Rules – even if they had been effective during the time period relevant to these proceedings – would not have applied so as to require competitive bidding for a "self-build" facility.

IV. REQUIRING A UTILITY TO SUBMIT AN RFP BEFORE DECIDING TO BUILD OR ACQUIRE A GENERATION FACILITY IS UNLAWFUL.

If the Commission's Recoverable Costs Rules were construed to compel competitive bidding before seeking cost recovery pursuant to the Statute, such a construction would contravene the prerogative of management. As determined by the Oklahoma Supreme Court more than thirty years ago, the Commission's role is to regulate, not to manage the electric utilities subject to its jurisdiction. *See Oklahoma Gas and Electric Company v. Corporation Commission*, 1975 OK 15, 543 P. 2d 546 ("OG&E"). Thus, the Court in that case struck down an attempt by the Commission to require that OG&E seek approval before OG&E could build a

plant. The Court noted that the Commission had no power to approve or reject specific costs or expenses or to veto contracts.

Here, if the New Rules were read to require that OG&E should have issued an RFP and followed all of the other Competitive Procurement Rules, the Commission would be exercising an improper role by intruding into decisions properly left to OG&E's management. By requiring that OG&E follow the Competitive Procurement Rules prior to deciding to build a plant, the Commission would be, in effect, dictating to OG&E whether OG&E should build a plant or buy power from another source. That decision is up to OG&E's management and only OG&E's management.

As 17 O.S. § 286(C) contemplates, once OG&E's management decides to build a plant, management may then elect to ask the Commission to review that decision to see if there is a need for the facility. The statute further dictates that if the Commission determines that there is a need for the plant, then the plant will be considered to be used and useful. The Commission is also directed under the statute to develop rules regarding the recovery of costs for such facilities. There is nothing in the statute about requiring utilities – or the Commission – to determine that the decision to build the facilities (and the cost of those facilities) be subject to any competitive procurement process. Indeed, the Commissions' Recoverable Cost Rules confirm that the relief described may be granted subsequent to a competitive procurement process or when no competitive procurement process has occurred.

As the Court noted in *Oklahoma Gas and Electric Company v. Corporation Commission*, "it must be presumed that the Legislature did not intend to enact an unconstitutional statute," therefore, the construction of the statute "should, if at all possible, harmonize with the Legislative intent." *OG&E*, 1975 OK 15, ¶27, 543 P.2d at 551 (citing *McGrady v. Western Farmers Electric Cooperative*, 1958 OK 43, 323 P.2d 356). Because a requirement to subject plant construction decisions to competitive procurement would invade the prerogative of utility management, the absence of such a requirement expressly in the statute makes sense, and is the only way that the statute may be properly read.

V. CONCLUSION

The Commission's Competitive Procurement and Recoverable Costs Rules are not relevant to these proceedings because they did not become effective until **after** the submission of OG&E's winning bid in response to PSO's RFP.

Even if the Commission's New Rules had been effective prior to OG&E's bid submission in response to PSO's RFP, basic rules of statutory construction require that Subsection 38-5(e) of the Commission's Recoverable Costs Rules—specifically addressing an application for cost recovery for construction or purchase of electric generating facilities—be read as a specific exception to the more general Competitive Procurement Rules.

Thus, even if Commission's New Rules been in effect prior to the relevant time period, the Competitive Procurement Rules would not have applied to OG&E's Application. Any other reading of the rules or the statute would be an unconstitutional usurpation of management authority under Oklahoma law.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 13th day of August, 2007, a true and correct copy of the foregoing instrument was provided to the following:

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