

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF **PUBLIC SERVICE**)
COMPANY OF OKLAHOMA FOR A)
DETERMINATION THAT ADDITIONAL) CAUSE PUD 200500516
ELECTRIC GENERATION CAPACITY WILL)
BE USED AND USEFUL)

APPLICATION OF **PUBLIC SERVICE**)
COMPANY OF OKLAHOMA FOR A)
DETERMINATION THAT ADDITIONAL) CAUSE PUD 200Q600030
BASELOAD ELECTRIC GENERATION)
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 PUD 200700012
GRANTING PRE-APPROVAL TO)
CONSTRUCT RED ROCK GENERATING)
FACILITY AND AUTORIZING A RECOVERY)
RIDER)

STATEMENT OF POSITION OF QUALITY OF SERVICE COALITION

Quality of Service Coalition (“Coalition”) hereby offers this Statement of Position in response to the applications of Public Service Company of Oklahoma (“PSO”) and the application of Oklahoma Gas and Electric Company (“OG&E”) in these Causes. This Statement of Position addresses the requests of PSO for pre-approval of certain new peaking and baseload electric generating facilities and for OG&E’s request for both pre-approval and authorization of a recovery rider for its portion of the construction costs incurred associated with the construction of a coal-fired baseload electric generating facility.

On February 27, 2007, the Commission issued Order No. 535993 requesting the parties to voluntarily submit bench memos addressing the following:

- A. Why the Commission should, or should not, grant pre-approvals for major utility projects under 17 O.S. Section 286;
- B. The arguments for and against Commission pre-approval and consideration of reasonable alternatives; and
- C. The extent to which a pre-approval order by one Commission can or does bind a subsequent Commission.

Quality of Service Coalition filed its bench memo on March 13, 2007 in response to the Commission's request. A copy of that filing is attached to this Statement of Position as Attachment A. Quality of Service Coalition continues to question the power and authority of the Commission to pre-approve the construction of a new electric generating facility and to declare such facility to be used and useful pursuant to the provisions of 17 O.S. Section 286 (C).

Notwithstanding the concerns of Quality of Service Coalition expressed above, we offer the following Statement of Position on these cases. Two causes were filed by PSO. Cause No. PUD 200500516, originally filed on December 21, 2005, requested pre-approval of new peaking electric generating facilities and Cause No. PUD 200600030, originally filed on February 1, 2006, requested pre-approval of new baseload electric generating facilities. Both the peaking electric generating facilities and the baseload electric generating facilities were the subject of competitive bidding Request for Proposals issued by PSO. PSO used a process to create the Request for Proposals for each competitive bidding process that emulated rules under development by the Commission but not yet approved. Both solicitations for competitive bids were issued prior to any final approval of the rulemaking on competitive bidding, integrated resource

planning and for rules to implement new statutory language that would authorize the Commission to pre-approve the construction of new electric generating facilities.

In these comments, Coalition will address its concerns about these cases. First, the Commission in Cause No. 200200038, Order No. 538439, addressed certain aspects of PUD 200500516 in accepting and approving a Joint Stipulation and Settlement Agreement to resolve issues outstanding in that cause. Several parties in Cause No. PUD 200500516 were not parties to Cause No. PUD 200200038, including the Quality of Service Coalition. While the Joint Stipulation resolved issues among the signing parties, unresolved issues remain in Cause No. PUD 200500516 which need to be addressed in any hearings that might be held on these consolidated cases. For example, a competitive bidding process was used to solicit bids. Those bids resulted in a self-build proposal by PSO being selected for the peaking electric generating facilities. Issues surrounding the development of the Request for Proposal and the competitive bidding process should be reviewed by the Commission in these cases.

In Cause No. PUD 200600030, PSO seeks pre-approval of a coal-fired electric generating facility that is a joint venture involving OG&E and the Oklahoma Municipal Power Authority (OMPA). PSO will own fifty percent (50%), OG&E will own forty-two percent (42%) and OMPA will own eight percent (8%) of the joint venture. The electric generating facility will be built at OGE's Sooner Station located in Kay and Noble Counties, Oklahoma. The proposed electric generating facility will employ a new ultrasupercritical technology which has never been built in the United States. In addition the coal to be used as the major fuel source will be sub-bituminous coal from the Power River Basin. Sub-bituminous coal has never been used as a fuel source for any

ultrasupercritical coal-fired electric generating facility constructed anywhere in the United States or in any other location. Sub-bituminous coal's sulfur content is lower than other domestic coal sources but it has other characteristics which may adversely impact operations of an electric generating facility using sub-bituminous coal as the primary fuel source. The Commission should closely examine the competitive bidding process used to select the successful bidder, the technology recommended for this electric generating facility, the costs associated with its design and construction, and the operational concerns that may be present after its completion. All of these factors, plus the unknown environmental controls that may be required in the future will impact the cost of construction and thus will have a direct impact on Oklahoma customers of PSO, OG&E and OMPA.

OG&E, in Cause No. PUD 200700012, seeks pre-approval of its portion of the coal-based electric generation facility, now referred to as the Red Rock project. It further seeks to also receive authorization to recover the construction costs associated with this facility through a cost recovery rider. The pre-approval issues associated with OG&E's application are the same issues that impact PSO's application for the coal-based electric generating facility. The technology selected to be used in this plant, the costs of design and construction, and the operational concerns after completion are issues that are essential in making a determination that the selected electric generating facility is in the best interest of Oklahoma customers of OG&E, PSO and OMPA. In addition, OG&E has requested the establishment of a cost recovery mechanism for its share of the costs of construction of this electric generating facility. The Commission should examine the technology recommended for this electric generating facility, the costs associated with its

design and construction, and the operational concerns that may be present after its completion and should closely examine the request for establishment of a cost recovery ride for OG&E's portion of the costs of this facility.

Quality of Service Coalition continues to be concerned that the process used to create the competitive bidding package used in soliciting bids for both the peaking and baseload facilities did not fully consider all alternatives that might provide Oklahoma customers adequate supplies of electricity for the short term and in the future. Two existing electric generating facilities, the Calpine units located near Coweta, Oklahoma, and the Redbud units located near Luther, Oklahoma, have a combined capacity of 2,300+ MWs but are being utilized well below that level. Estimates indicate that both plants are operating at 10-25% of their capability. Using these facilities to meet both short term and long term needs should be carefully considered by the Commission. Quality of Service Coalition would suggest that the Commission strongly consider these other alternatives that are readily available to serve short term and long term capacity needs for both PSO and OG&E. The Quality of Service Coalition would support establishment of some level of return for power purchased from these existing plants to allow both PSO and OG&E some additional incentive to purchase power from these facilities that burn Oklahoma natural gas and already contribute to Oklahoma's economy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2007, a true and correct copy of the foregoing instrument was electronically filed with the Clerk of the Oklahoma Corporation Commission, served by electronic mail, and that a filed stamped copy was mailed to each on the 22nd day of May, 2007, to the following:

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**QUALITY OF SERVICE COALITION SUBMISSION OF MEMORANDUM IN RESPONSE TO
OKLAHOMA CORPORATION COMMISSION ORDER NO. 535993**

COMES NOW, the Quality of Service Coalition, an intervenor in these causes, and hereby submits the following response to the request of the Commissioners for briefs addressing the following issues:

- A. Why the Commission should, or should not, grant pre-approvals for major utility projects under 17 O.S. Section 286;
- B. The arguments for and against Commission pre-approval and consideration of reasonable alternatives; and
- C. The extent to which a pre-approval order by one Commission can or does bind a subsequent Commission.

OKLAHOMA CORPORATION COMMISSION JURISDICTION AND AUTHORITY

The Oklahoma Corporation Commission's jurisdiction and authority is derived from the Oklahoma Constitution, Article 9, Sections 18 through 35, and from statutes that vest the Corporation Commission with additional duties that are not inconsistent with the Constitution. A number of decisions of the Oklahoma Supreme Court have clearly expressed this concept. ⁱ No part of Sections 18 through 34 authorizes the Corporation Commission to grant a license, permit or a certificate of convenience and necessity to an electric utility to build a new electric generation facility or to purchase an existing electric generation facility. Our Supreme Court has stated that where the constitutionality of an act of the legislature is in question, "all reasonable doubt will be resolved in favor of its validity and the act will be declared constitutional unless it can be demonstrated clearly that the legislature acted arbitrarily and capriciously exercised its authority."ⁱⁱ

In 2005, the Oklahoma Legislature passed and Governor Brad Henry signed into law House Bill 1910, now codified in the Oklahoma Statutes as 17 O.S. Section 286. In pertinent part, subsection C of Section 286 provides that a utility proposing to construct a new electric generating facility or purchase an electric generating facility may request the Commission's approval of such new construction or purchase. The specific language of the statute provides:

"An electric utility subject to rate regulation by the Corporation Commission may elect to file an application seeking approval to construct a new electric generating facility or purchase an existing electric generating facility subject to the provisions of this subsection....."ⁱⁱⁱ

Neither the title of House Bill 1910 contained language purporting to amend the Oklahoma Constitution, Article 9, Sections 18 through 34, nor did any section of the bill provide language which attempted to amend those sections. Rather, the provisions of 17 O. S. Section 286 C

purport to grant the Corporation Commission new authority to approve construction of new electric generating facilities.

In 1975, the Oklahoma Supreme Court rendered a decision in a case involving the construction of an electric generating facility. In that case, Oklahoma Gas and Electric Company vs. Corporation Commission,^{iv} the Court found that internal management decisions of a utility are outside the authority and found that the Corporation Commission lacked the “power to regulate, supervise and control the internal management and control of a public utility to the extent that it may prohibit the construction the proposed project of O. G. & E.” In that case, O. G. & E. argued that the Legislature had enacted certificate of convenience and necessity legislation for construction of certain facilities, giving examples of such statutes, but in the case of electric utilities, no such legislation had been enacted relating to the construction of an electric generating facility. The Court pointed out that the “effect of the above statutes (the certificate of convenience and necessity statutes for construction of new cotton gins, for new telephone lines, etc. and water transportation lines) is that certain facilities shall not be constructed, extended or operations conducted, unless there exists a public necessity or the public convenience requiring such construction or operation.”

The Court went on to correctly point out that additional powers may be legislatively bestowed upon the Commission under the provisions of Section 19 of Article 9,^v but stated that “if additional powers are conferred upon the Corporation Commission which are inconsistent with the Commission’s constitutional powers, compliance with the provisions of Article 9, Section 35 of the Oklahoma Constitution, is mandatory.

The Court held that the “Constitution simply does not confer upon the Commission, either expressly or by necessary implication, the power to regulate, supervise and control the internal management and control of a public utility to the extent that it may prohibit the construction of the proposed project by O.G. & E.”. It further stated: “Since the Constitution does not empower the

Corporation Commission to regulate and supervise the internal operations of a public utility, such as O.G. & E., to the extent that it may prohibit O.G.&E. from constructing the proposed project, a Legislative enactment, not enacted pursuant to and within the purview of Article 9, Section 35, of the Constitution empowering the Commission with such authority, would be inconsistent with the Commission's constitutional powers.....”.

If the Commission does not possess the power to prohibit a construction project by an electric utility, it is clear that it does not have the power to approve the construction of an electric generating project. The Oklahoma Legislature may have attempted to provide the Corporation Commission additional authority when it passed House Bill 1910. But the Supreme Court's decision in the O.G. & E case makes it clear that authority to empower the Commission to approve or prohibit the construction of a new generating facility would require an amendment of Article 9, Sections 18 through 34. The language of House Bill 1019 does not amend any section of the Oklahoma Constitution. Neither the title of that bill nor any section of that bill provide for amendment of any section of Article 9, Sections 18 through 34. In addition, when comparing the language of subsection C to the language of other sections of Title 17 that grant the Commission authority to issue certificates of convenience and necessity, the provisions of subsection C are not even mandatory but grant the utility the option to ask the Commission to approve new construction or purchase of existing electric generating facilities. The attempt to confer additional authority on the Commission was an arbitrary and capricious act of the Legislature and thus must be considered unconstitutional because it fails to adhere to the decision rendered by the Oklahoma Supreme Court in the O. G. & E. case.

It is clear that the Oklahoma Constitution does not grant the Commission the authority to prohibit construction of an electric generating facility nor does it grant the Commission the authority to approve such construction. Without express constitutional authority to make such a determination, the Commission is barred from rendering an opinion that would authorize pre-approval of major utility projects.

**ARGUMENTS FOR AND AGAINST COMMISSION PRE-APPROVAL AND CONSIDERATION
OF REASONABLE ALTERNATIVES**

For the reasons stated above, the Corporation Commission lacks the authority to pre-approve the construction by an electric utility of an electric generating facility but Oklahoma statutes do provide the Commission with authority to conduct other duties associated with the regulation, supervision and control of an electric utility's activities which would allow the consideration of reasonable alternatives to an electric utility's proposed construction planning process without granting any pre-approval. Title 17 O.S. Section 157^{vi}, was enacted in 1983, almost 10 years after the Supreme Court's opinion in O. G. & E. and provides:

A. The Commission shall prepare a ten-year assessment of the electrical power and energy requirements of this state and assess the need for additional or replacement generating facilities and the associated costs of such facilities to the electric consumers of this state. The Commission shall reassess the statewide future electrical generation requirements every two (2) years. Such assessments shall not constitute official Commission certification or approval of any proposed generating facilities. (*Emphasis added*)

B. For the purposes of this section, every public utility and generation and transmission association or cooperative corporation, the Grand River Dam Authority, the Oklahoma Municipal Power Authority, and any municipality proposing to construct generating facilities shall submit to the Commission, for the purpose of review, a list of all proposed projects for the construction, alteration or modification designed to increase electrical generating capacity of any electricity-production facility located within the state, along with any supporting data the Commission might direct.

This statute, enacted in 1983, is a good example of what the provisions of Article 9, Section 19 contemplated in legislative acts giving the Commission additional authority.

The purpose of this statute provides the Corporation Commission additional powers and duties not inconsistent with the Constitution in connection with the visitation, regulation, or control of operations by requiring the preparation of a 10 year assessment of electric power and energy requirements and the need for additional and replacement facilities and the associated costs of such facilities. It also directs the Commission to reassess the requirement every two years. It provides, however, that such assessment is not a certification or approval of any proposed facilities.

Using the authority contained in Section 157, the Commission can consider the planned generation submitted by an electric utility and also consider other reasonable alternatives that might be available to satisfy the need for additional or replacement power for the future. This statute is also a good example of a statutory authorization to consider reasonable alternatives that might be used to meet the future need for electric generating capacity to serve customers in the future.

The Corporation Commission has the necessary Constitutional and statutory authority to examine the need for power in our state. The assessment gives the Corporation Commission a great deal of latitude in making that examination but the Commission cannot certify or approve a proposed facility.

**ORDERS OF THE OKLAHOMA CORPORATION AND THEIR IMPACT ON
FUTURE COMMISSION ORDERS**

The Oklahoma Corporation Commission is a tribunal of limited jurisdiction and only the authority expressly stated or necessary by implication is conferred by the Oklahoma Constitution.^{vii} Article 9, Section 18 sets out the powers and duties of the Commission. That section provides “.....the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the Commission may, from time to time, alter or amend.....”^{viii} .

The Oklahoma Supreme Court has often held that an order of the Commission must be supported by substantial evidence.^{ix} But the Court has also ruled that a Commission order can be altered or modified. In a case involving an order issued by the Commission in an oil and gas matter, the Court said there must be a change of conditions or a change in knowledge of conditions as a requisite to modification of an unappealed corporation commission order.^x Such change in condition would have to be supported by evidence presented for Commission consideration.

Corporation commission orders must be enforced until such time as a change of condition, supported by substantial evidence is clearly provided to the Commission. When such an event occurs, the Commission has the ability to alter, change or amend the provisions of a previous order.

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ⁱ See *Muskogee Gas and Electric Co. vs. State*, 206 P. 242 (1922); *Burmah Oil and Gas Co. vs. Corporation Commission*, 541 P2nd 834 (1975); *State of Oklahoma, ex rel. Attorney General W. A. Drew Edmondson vs. Oklahoma Corporation Commission and Commissioners Cody Graves and Bob Anthony*, 971 P2nd 868 (1998), and *Oklahoma Gas and Electric Co. vs. Corporation Commission*, 543 P2nd 546 (1975).

ⁱⁱ See *Fair School Council of Oklahoma vs. State* 746 P2nd 1135(1987) (cited in *State v. Corporation Commission and Commissioners Cody Graves and Bob Anthony*, *supra*)

ⁱⁱⁱ See Oklahoma Statutes, 17 O.S. Section 286.

^{iv} *Oklahoma Gas and Electric Company vs. Corporation Commission*, 543 P2nd 546 (1975)

^vOklahoma Constitution, Article 9, provides, in part, that “...Commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe rates and charges in connection therewith,.....”.

^{vi} See Oklahoma Statutes, Title 17 OS. Section 157, enacted in 1983.

^{vii} State ex rel. Corporation Commission v. Loving 918 P.2nd 733 (1996)

^{viii} Oklahoma Constitution, Article 9, Section 18.

^{ix} See Application of Arkansas Louisiana Gas Co., 558 P.2nd 376 (1976)

^x See Marlin Oil Corp. vs. Corporation Commission, 569 P. 2nd 961 (1977)