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CORPORATION COMMISSION
OF OKLAHOMA

APPLICATION OF DAVID B. DYKEMAN,)
DIRECTOR OF THE PUBLIC UTILITY)
DIVISION OF THE OKLAHOMA)
CORPORATION COMMISSION, FOR AN)
ORDER DETERMINING WHAT RECORDS)
WILL BE KEPT CONFIDENTIAL IN)
COMPLIANCE WITH THE OKLAHOMA)
OPEN RECORDS ACT)

Cause No. PUD 201100097

ATTORNEY GENERAL'S STATEMENT OF POSITION

The Attorney General of the State of Oklahoma, E. Scott Pruitt, appearing by and through Assistant Attorney General William L. Humes submits his Statement of Position, as more fully set forth below.

The present Application was filed on June 16, 2011, by the Director of the Public Utility Division ("PUD") of the Corporation Commission and seeks relief in the form of an order from this Commission "determining (1) what records will be deemed proprietary, confidential, and competitively sensitive in Protective Orders, pursuant to Section 24A.22 of the Oklahoma Open Records Act; and (2) what information required by the Commission to be reported in the Annual Reports will be deemed proprietary, confidential, and competitively sensitive, in accordance with Section 24A.22 of the Oklahoma Open Records Act."

The Oklahoma Open Records Act ("Act") embodies the legislative intent to further "the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government." 51 O.S.2001, §24A.2. The stated purpose of the

Act is “to ensure and facilitate the public’s right of access to and review of government records so that they may efficiently and intelligently exercise their inherent political power.” *Id.*

Included in the Act are provisions that specifically pertain to public utilities and their need for the confidentiality of certain information and the Commission’s duty to protect such information. Pursuant to the Act, the Commission is statutorily mandated to “keep confidential those records of a public utility, its affiliates, suppliers and customers which the Commission determines are confidential books and records or trade secrets.” *See id.* at 24A.22. “Public utilities” intended to be protected are those involved in the generation, transmission, and distribution of electricity, telecommunications companies, and those transmitting and distributing natural or synthetic natural gas to the public. *See id.* In the event an order is issued directing that certain material be withheld or removed from a public record, the Act contains provisions concerning necessary language to be included in the order and procedures for storage and handling of the protected materials. *See* 17 O.S.Supp.2010, §24A.29.

After review of the Act, the Attorney General submits that the question posed by the style of the present Application – what records will be kept confidential in compliance with the Oklahoma Open Records Act – is answered in paragraph 1 of the Allegations of Fact contained in that same document. That is, the records that must be kept confidential are those records this Commission determines should be kept confidential because they constitute “confidential books and records or trade secrets.” Because the Act grants this Commission the authority to determine what is or is not confidential, the issue then becomes what criteria should this Commission use in

making that determination and the process that should be used when doing so. Currently, this Commission's rules allow for the issuance of a protective order, upon motion, as "necessary or appropriate for the protection of and to prevent hardship to and excessive burden upon a person." *See* OAC 165:5-11-1(d). These orders may limit areas of inquiry, excuse answers to questions on deposition, and limit production of documents or answers to interrogatories. *See id.*

It appears that the genesis of the present Cause may be the Commission's concern regarding the scope of previous protective orders, and more particularly, the protection afforded telecommunications companies in connection with Annual Reports and whether the information contained in those reports is still used or useful. On August 20, 2004, the Commission issued Order Number 493818, in Cause Number PUD 200400186. In that Order, the form and content of the Annual Report was set forth and the determination made that the information contained in the Reports is "proprietary, confidential, and competitively sensitive and, therefore, confidential in accordance with the pertinent provisions of the Oklahoma Open Records Act. However, the Order also provided that the grant of confidentiality could be challenged in a proceeding at the Commission and that the person whose information had been given the confidential designation bore the burden of proving the need for continued confidentiality.

Because questions have arisen as to whether the information contained in the Annual Reports is still useful to PUD staff, and if so to what extent, it appears that a change of conditions and circumstances has occurred since the issuance of Order 493818. If this Commission desires, it could consider another proceeding in which issues regarding continued need for information are determined, which, if any, of the information should be protected, as

well as the extent of confidentiality necessary to adequately protect that information. The Attorney General submits that it would still be advisable to allow challenges to confidentiality that are heard at the Commission and the burden should remain on those seeking protection, as currently exists.

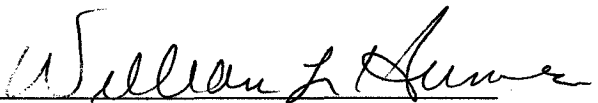
Further, simply because information is deemed confidential in the context of the Annual Reports should not necessarily lead to an assumption that the same information requires protection in the context of another cause. In such a case, the party seeking protection could by motion set forth the information sought to be protected and the specific circumstances requiring protection of that information. Such an order would be premised upon the unique circumstances of the company and the cause and not solely upon the fact similar information was considered confidential in the Annual Reports.

In sum, the Attorney General submits that pursuant to the Oklahoma Open Records Act, it is the Commission that determines what public utility information is confidential. Under the Act, this Commission has a duty to protect public utility records that it determines constitute confidential books and records or trade secrets. The Attorney General further submits that nothing in the express language of the Act dictates or restricts the manner in which the Commission makes such a determination – whether it be on a case-by-case basis particular to a specific utility or a determination that a category or type of information is confidential as applied to several utilities, as in the case of the Annual Reports. In fact, in the instance of an annual report which numerous parties must submit, a determination as to a type of information applicable to several utilities may be the approach that is most cost effective for both the

Commission and the utility. Regardless of the method chosen, a determination of confidentiality as with any other finding by the Commission, must have an articulable basis and be supported by the evidence.

Respectfully Submitted,

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA


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CERTIFICATE OF SERVICE

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