

FILED
NOV 19 2019

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF PEOPLE’S ELECTRIC)
COOPERATIVE, INC. FOR AN ORDER)
ENJOINING OKLAHOMA GAS AND ELECTRIC)
COMPANY FROM SERVING, AN ELECTRIC-)
CONSUMING FACILITY IN VIOLATION OF THE)
RETAIL ELECTRIC SUPPLIER CERTIFIED)
TERRITORY ACT)

COURT CLERK’S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

CAUSE NO. PUD 201900026

**RESPONSE OF THE PUBLIC UTILITY DIVISION TO OG&E’S MOTION TO
DISMISS OR IN THE ALTERNATIVE TO HOLD IN ABEYANCE**

COMES NOW Brandy L. Wreath, Director of the Public Utility Division (“PUD”) of the Oklahoma Corporation Commission (“Commission”), by and through the undersigned counsel, and respectfully submits its response to the Motion to Dismiss or in the Alternative to Hold in Abeyance (“Motion”) filed by Oklahoma Gas and Electric Company (“OG&E”). In support of its position, PUD adopts and incorporates its Legal Brief, filed on October 18, 2019, and also shows as follows:

STIPULATED FACTS

On October 18, 2019, People’s Electric Cooperative, Inc. (“People’s”), OG&E, and PUD (collectively the “Parties”) filed the following Stipulated Facts in this Cause:

1. Oklahoma Gas and Electric Company (“OG&E”) and People’s Electric Cooperative, Inc. (“People’s”) are retail electric suppliers as defined by 17 O.S. § 158.22.
2. Both OG&E and People’s submitted proposals to serve the Tall Oaks Facility in the spring of 2018.
3. The Tall Oaks load for initial full operation was estimated by Tall Oaks to be twelve (12) Megawatts.
4. Tall Oaks selected OG&E to provide retail electric service to the Plant and a contract for service was executed by OG&E and Tall Oaks on June 28, 2018.
5. OG&E completed construction of its facilities on April 28, 2019 and thereafter began providing retail electric service to the Plant.

6. In April of 2019, Tall Oak Woodford, LLC completed construction on an electric consuming facility known as the Tall Oak Woodford Cryo Plant (the "Plant").
7. OG&E is currently furnishing retail electric service to the Plant.
8. The Plant is an electric consuming facility as defined by 17 O.S. § 158.22.
9. The Plant had a connected load for initial full operation greater than 1,000 kw.
10. The Plant is located in Section 17 of Township 2 North, Range 11 East in Coal County, Oklahoma.
11. The Plant is not located in a municipality where OG&E has a franchise to purchase electric service.
12. By order of the Oklahoma Corporation Commission (the "Commission"), Number 93132, dated September 22, 1972, the Plant is located in People's certified territory.
13. To provide electric service to the Plant with distribution facilities from its certified territory, People's would have tapped an existing double circuit 477 ACSR overhead distribution line energized at 25 kV, which runs approximately 0.9 miles south of OG&E's primary meter location. The cost for such an extension of People's distribution facilities would be approximately \$193,500.
14. OG&E did not have any retail distribution lines in the vicinity of the Plant at the time it agreed to provide electric service to the Plant.
15. OG&E built a distribution substation adjacent to a WFEC transmission line and ran 1.3 miles of distribution line to two primary meters for the customer. OG&E's total project cost was approximately \$5.6 million.
16. To serve the Plant with distribution facilities from its own certified territory, OG&E would have needed to construct approximately 25 miles of distribution facilities along roadways to reach the Plant.
17. OG&E's engineering work began on the design of the project and construction commenced on December 10, 2018.
18. To serve the Plant, OG&E interconnected with third-party transmission facilities of Western Farmers Electric Cooperative ("WFEC") via access through and approval by the Southwest Power Pool ("SPP").
19. OG&E tapped WFEC's 138 kV transmission line between People's Coalgate and Ashland Substations. From the WFEC transmission line, OG&E has a single slack span into the

newly constructed substation. The transmission voltage electricity is stepped down to distribution voltage via the 2-bay, 25 MVA 138/34.5 kV substation.

20. The substation that provides the Plant with electric service is not located in OG&E's certified territory.
21. The substation was constructed for the sole purpose of providing electric service to the Plant.
22. The SPP open access rules were enacted after the Retail Electric Supplier Certified Territory Act (17 O.S. §§ 158.21 *et seq.*).
23. In 1974, the SPP open access rules did not exist to allow a utility to access electric service from a transmission facility of another electric service provider.
24. Cause Number PUD 2018-00075, in which CKenergy Electric cooperative asserted that OG&E's service to an electric consuming facility with connected load in excess of 1,000KW from third-party transmission lines interconnected within the cooperatives certified territory was unlawful, was filed on July 3, 2018 before this Commission and served on OG&E.
25. On March 12, 2019 the Commission entered Final Order No. 692718 and ordered that "OG&E is enjoined from serving or furnishing retail electric service to the Pump Station directly from third-party transmission facilities in violation of the RESCTA."

BACKGROUND

This Application was filed by People's requesting an order from the Commission enjoining and restraining OG&E from constructing electric facilities to serve, and from furnishing retail electric service to, the electric-consuming facility known as the Tall Oak Woodford Cryo Plant ("Woodford Plant"), which is owned by Tall Oak Midstream, L.L.C. ("Tall Oak") and located in People's certified territory, directly from third-party transmission facilities in violation of the Retail Electric Supplier Certified Territory Act, 17 O.S. §§ 158.21 *et seq.* ("RESCTA" or the "Act").

OG&E seeks to serve the Woodford Plant pursuant to an exception to the RESCTA found at 17 O.S. § 158.25(E) known as the One Megawatt Exception, because the initial connected load at full operation of the Woodford Plant was greater than 1,000 kW.

The facts of this Cause are nearly identical to the facts of Cause No. PUD 201800075, heard by the Commission only a year ago. In PUD 201800075, the Commission found that utilizing a third-party transmission line to serve a customer in the certified territory of another utility is not an extension of service qualifying for an exception to the RESCTA.¹ On October 18, 2019, PUD, People's, and OAEC filed legal briefs fully supporting their respective positions in this Cause. In lieu of a legal brief, OG&E filed this Motion.

ARGUMENT AND AUTHORITY

1. OG&E's Motion to Dismiss should be denied.

As a general rule, motions to dismiss are disfavored by the courts in Oklahoma. *Dani v. Miller*, 2016 OK 35, ¶ 10, 374 P.3d 779. The party moving for dismissal bears the burden of proof to show the legal insufficiency of the petition. *Id.* In its Motion, the moving party, OG&E, has failed to meet the burden to show the legal insufficiency of the Applicant's claim. Further, a motion to dismiss may not be granted when there are facts consistent with allegations under a cognizable legal theory. *Dani v. Miller*, 2016 OK 35, ¶ 11, 374 P.3d 779. The facts of this case have been stipulated to by the Parties, and there can be no denying that People's has brought a case under a cognizable legal theory. In its own Motion, OG&E stated that the Commission addressed a cause with identical issues in PUD 201800075, a cause in which the applicant cooperative was successful in its request to enjoin OG&E from providing service in the same manner as it is being provided in this Cause. It can hardly be argued that People's has presented no cognizable legal theory when bringing a cause with nearly identical facts and legal theories before the Commission. Further, in PUD 201800075 OG&E likewise filed a Motion to Dismiss. While the arguments in OG&E's previous motion differ somewhat from the arguments made in its current Motion, the allegations

¹ See Final Order No. 692718. This case is currently on appeal to the Oklahoma Supreme Court in Sup. Ct. Case No. 117,896, which was filed by OG&E.

in the application filed in PUD 201800075 are nearly identical to this Cause. In PUD 201800075 the Commission denied OG&E's Motion to Dismiss by the Commission in Order No. 686213.

In its Motion to Dismiss, OG&E provides two reasons for the court to dismiss this Cause: 1) the Commission's interpretation of the One Megawatt Exception to the RESCTA, expressed in Final Order No. 692718, impairs contracts entered into by OG&E and its customer in violation of Article 2 § 15 of the Oklahoma Constitution; and 2) there is no provision for retroactive application of the RESCTA under either the Act itself or Final Order No. 692718. Neither reason provided by OG&E meets the burden to grant its Motion to Dismiss in this Cause.

In its first argument, OG&E states it entered into contracts to provide service to the Woodford Plant ten months prior to the Commission entering Order No. 692718. As stated above, in Order No. 692718 the Commission found that providing service via third-party transmission lines in the certified territory of another retail electric provider was unlawful under the One Megawatt Exception to the RESCTA. OG&E argues in its Motion that PUD 201800075 was the first time a retail electric supplier has been limited in its method of providing service in the certified territory of another provider under the One Megawatt Exception, and such an interpretation impairs OG&E's contracts in violation of the Oklahoma Constitution.

This argument mischaracterizes the nature of the Commission's interpretation of the One Megawatt Exception in PUD 201800075. While that cause may have been the first brought before the Commission asking it to enjoin OG&E from providing service via third-party transmission lines, the RESCTA has, by its plain and unambiguous language, prohibited a retail electric supplier from providing service in the certified territory of another provider since the Act became law in 1971. The fact that the Commission has only recently received an Application concerning the One Megawatt Exception to the RESCTA is irrelevant to the force and effect of the law. OG&E has an

obligation to understand the law and follow it regardless of whether the Commission has issued an order interpreting a specific provision of the law. *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶ 22, 184 P.3d 518. Further, had an Application of this nature been filed previously, the Commission could have reached the same conclusion it did in PUD 201800075.

In its Motion, OG&E also argues that the Commission's interpretation of the One Megawatt Exception to the general rules spelled out in the RESCTA violates Article 2 § 15 of the Oklahoma Constitution by impairing obligations of "lawful contracts for service." However, the Oklahoma Supreme Court has made it clear that private contracts between a utility and its customers do not create grounds to overcome the regulatory powers of the Commission. *Hixon v. Snug Harbor Water and Gas Company*, 1963 OK 99, 381 P.2d 308. The Court stated "[i]t is too well settled to require citation of authority that 'the law is part of every contract.' The police power of the State cannot be contracted away." *Id.* OG&E's claim that the contract between Tall Oak and OG&E is a "lawful contract" is a conclusory claim that has not been established in this cause. Further, as the law cannot be overcome by private contract, this argument does not provide a basis for granting OG&E's Motion to Dismiss.

In its second argument, OG&E argues that the RESCTA, which was enacted by the legislature in 1971, has been unlawfully applied *retroactively* to the contract in question in this Cause, which was signed in 2019. The basis of this argument seems to rely on the idea that the One Megawatt Exception had a different meaning prior the Commission's final order in PUD 201800075, and that new meaning cannot be retroactively applied to the contract in question which was signed prior to the issuance of that final order. However, there is no legal basis for this argument. The Commission found in PUD 201800075 that the statutory language of the One Megawatt Exception is plain and unambiguous. Under that Commission finding, OG&E should

have been aware that the contract signed with Tall Oak to provide service via third-party transmission lines was unlawful based on the plain language of the RESCTA, regardless of whether an order in PUD 201800075 had been issued. The law was not retroactively applied in this cause. A law which was enacted in 1971 would clearly apply to a contract signed in 2019.

Finally, the Commission's Rules of Practice also address the standard for evaluating a motion to dismiss at OAC 165:5-9-2(e)(3). Pursuant to this rule, the Commission may entertain motions to dismiss for the following reasons: (a) failure to prosecute, (b) unnecessary duplication of proceedings or res judicata, (c) withdrawal, (d) moot question or obsolete applications, (e) lack of jurisdiction, (f) failure to submit a proposed order in a timely manner, or (g) for other good cause shown. While OG&E did not address this rule in its Motion to Dismiss, it also presented no argument which would support a dismissal under this rule.

2. OG&E's alternative request to hold this Cause in abeyance should be denied.

As an alternative to its Motion to Dismiss, OG&E requested that this Cause be held in abeyance pending the results of the appeal to the Oklahoma Supreme Court in PUD 201800075. PUD does not support OG&E's request to hold this Cause in abeyance. There is no way to anticipate the duration of the appeal pending at the Oklahoma Supreme Court in PUD 201800075. Further, this is the first time in this proceeding that OG&E has made a request to hold this cause in abeyance, despite having negotiated a procedural schedule with the Parties in this Cause many months ago. The Parties in this Cause have incurred the expenditure of money and time in participating in this matter, have conducted discovery, filed testimony, filed legal briefs, and have prepared for trial. Proceeding with the hearing on the merits, as ordered by the Commission to be held on November 18, 2019, is the most judicially economical alternative.

CONCLUSION

OG&E's Motion to Dismiss should be denied by the ALJ for all the foregoing reasons. Further, the ALJ should hear this Cause in accordance with the procedural schedule agreed to by the Parties in this Cause and ordered by the Commission, and deny the request to hold this Cause in abeyance for an unspecified amount of time.

Respectfully submitted,



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CERTIFICATE OF ELECTRONIC SERVICE

I, the undersigned, do hereby certify that on the 13th day of November, 2019, a true and correct copy of the above and foregoing was sent electronically to:

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