

FILED

IN THE SUPREME COURT OF STATE OF OKLAHOMA JAN 30 2017

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.

Appellants

v.

SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a
AT&T OKLAHOMA; STATE ex rel. OKLAHOMA
CORPORATION COMMISSION,

Appellees.

) COURT CLERK'S OFFICE - OKC
) CORPORATION COMMISSION
) OF OKLAHOMA

) FILED
) SUPREME COURT
) STATE OF OKLAHOMA

) JAN 30 2017

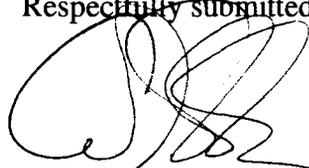
) MICHAEL S. RICHIE
) CLERK

) NO. 115334

) Appeal from the
) Oklahoma Corp. Comm'n
) Cause PUD201500344
)
)

APPELLANTS' BRIEF IN CHIEF

Respectfully submitted,



Russell J Walker, OBA No. 9693
Andrew J. Waldron, OBA No. 17362
WALKER & WALKER
511 Couch Dr., 3rd Floor
Oklahoma City, Oklahoma 73102
Telephone: (405) 943-9693

ATTORNEY FOR APPELLANTS

DATE: January 30th, 2017

Oral Argument Requested
Precedence Upon Docket of Supreme Court Requested (Okla. Constitution, Art 9, § 21)

IN THE SUPREME COURT OF STATE OF OKLAHOMA

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.)

Appellants)

v.)

NO. 115334)

SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a)
AT&T OKLAHOMA; STATE ex rel. OKLAHOMA)
CORPORATION COMMISSION,)

Appeal from the)
Oklahoma Corp. Comm'n)
Cause PUD201500344)

Appellees.)

APPELLANTS' BRIEF IN CHIEF

Respectfully submitted,



Russell J Walker, OBA No. 9693
Andrew J. Waldron, OBA No. 17362
WALKER & WALKER
511 Couch Dr., 3rd Floor
Oklahoma City, Oklahoma 73102
Telephone: (405) 943-9693

ATTORNEY FOR APPELLANTS

DATE: January 30th, 2017

Oral Argument Requested
Precedence Upon Docket of Supreme Court Requested (Okla. Constitution, Art 9, § 21)

TABLE OF CONTENTS

APPELLANTS' BRIEF IN CHIEF..... 1

Berland's of Tulsa v. Northside Vil. Shop Ctr., 1968 OK 136 3

Henrickson v. Okla. Corp. Comm'n 2001 OK 89 3

Robert Henry v. Southwestern Bell Telephone Company, 1991 OK 134 2

Turpen v. Okla. Corp. Comm'n, 1988 OK 126 3

Oklahoma Constitution Art. 9, § 18a 4

Oklahoma Constitution Art. 9, § 40 2

5 O.S. 1988 App. 3-A, Rule 3.3 (a)2 2

SUMMARY OF THE RECORD 4

STANDARD OF APPELLATE REVIEW 11

Dani v. Miller, 2016 OK 35 11

Darrow v. Integris Health, Inc., 2008 OK 1 12

Fanning v. Brown, 2004 OK 7 12

Gens v. Casady School, 2008 OK 5 12

Hayes v. Eateries, Inc., 1995 OK 108 11

Ladra v. New Dominion, LLC, 2015 OK 53 11

Lockhart v. Loosen, 1997 OK 103 12

Loofland Brothers Company, v. C.A. Overstreet, 1988 OK 60..... 13

May v. Mid-Century Ins. Co., 2006 OK 100 12

Neil Acquisition v. Wingrod Inv. Corp., 1996 OK 125..... 12

Salve Regina College v. Russell, 499 U.S. 225, 231; 111 S. Ct. 1217, 1221; 1
13 L.Ed.2d 190 (1991) 12

<i>Simonson v. Schaefer</i> , 2013 OK 25	11
<i>Tuffy's, Inc. v. City of Oklahoma City</i> , 2009 OK 4	12
<i>Washington v. State ex rel. Dept. of Corrections</i> , 1996 OK 139	12
<i>Wilson v. State ex rel. State Election Bd.</i> , 2012 OK 2	12
<i>Zaharias v. Gammill</i> , 1992 OK 149	12
LEGAL ARGUMENTS & AUTHORITIES	13
1. THE BASIS FOR OCC'S ORDER IS FUNDAMENTALLY FLAWED, LEGALLY AND FACTUALLY.	13
A. <u>The OCC's Bribed PUD 260 Order Violated the Oklahoma Constitution</u>	13
<i>General Motors Corp v. Okla. Board of Equalization</i> , 1983 OK 59	16
<i>Johnson v. Johnson</i> , 1967 OK 16	13
<i>Marshall v. Amos</i> , 1968 OK 86	13
<i>Norton v. Shelby County</i> , 118 U.S. 425; 6 S. Ct. 1121; 30 L.Ed. 178 (1886)	16
<i>Okla. Co. v. O'Neil</i> , 1967 OK 105	13
<i>State ex rel Okla. Assoc. v. James</i> , 1969 OK 119	16
<i>Zane v. Hamilton County</i> , 189 US 370; 23 S.Ct. 538; 47 L.Ed. 858 (1903)	16
Oklahoma Constitution Art. 9, § 17	14
Oklahoma Constitution Art. 9, § 18a	13
Oklahoma Constitution Art. 9, § 40	13
17 O.S. 1968 § 177	14
26 O.S. 1974 § 15-110	14

B.	<u>Because the PUD 260 Order was never constitutionally determined, it should be Remanded for proper determination.</u>	16
	<i>Johnson v. Johnson</i> , 1967 OK 16	16
	<i>Marshall v. Amos</i> , 1968 OK 86	16
	<i>Okla. Co. v. O'Neil</i> , 1967 OK 105	16
2.	WITH PROPER NOTICE, THE OCC HAS THE FULL POWER TO VACATE OR MODIFY ITS PRIOR ORDERS UPON NEW APPLICATION, TO INCLUDE THE POWER TO CONSIDER THE BRIBERY ISSUE NEVER ADJUDICATED IN THE HENRY APPEAL.	18
A.	<u>The OCC, SWBT and the Attorney General have misapplied the <i>Turpen</i> holding.</u>	18
	<i>Carpenter v. Powell Briscoe</i> , 1963 OK 33	20
	<i>Carter Oil Co. v. State</i> , 1951 OK 327	20
	<i>Crews v. Shell Oil Company</i> , 1965 OK 151	20
	<i>Granger v. City of Tulsa</i> , 1935 OK 801	20
	<i>Henrickson v. Okla. Corp. Comm'n</i> 2001 OK 89	21
	<i>Marlin Oil Corp. v. Okla. Corp. Comm'n</i> , 1977 OK 67	21
	<i>Southwestern Bell Tel. Co. v. Okla. Corp. Comm'n</i> , 1994 OK 38	20
	<i>Turpen v. Okla. Corp. Comm'n</i> , 1988 OK 126	18
	Oklahoma Constitution Art. 2, § 3	18
	OAC 165:5-17-2	18
	<i>Op. of Oklahoma Atty Gen.</i> , 1995 OK AG 86	21
	<i>Op. of Oklahoma Atty Gen.</i> , 69-221	20

B. SWBT and the OCC have misapplied the Wiley holding. 21

Coyle v. Smith, 1911 OK 64, affirmed 221 U.S. 559; 31 S.Ct. 688;
55 L.Ed. 853 (1911) 21

Dobbs v. Board of County Commissioners Okla. Co., 1953 OK 159 21

In re Block 1, Donly Heights Addition, 1944 OK 213 21

General Motors Corp v. Okla. Board of Equalization, 1983 OK 59 22

Prairie Oil and Gas Co. v. District Court of Grady County, 1918 OK 505 21

Norton v. Shelby County, 118 U.S. 425; 6 S. Ct. 1121; 30 L.Ed. 178 (1886) 22

Wiley v. Oklahoma Nat. Gas Co., 1967 OK 152 21

Zane v. Hamilton County, 189 US 370; 23 S.Ct. 538; 47 L.Ed. 858 (1903) 22

Oklahoma Constitution Art. 9, § 40 21

C. Even under legal standards which limit the reconsideration of matters decided, reconsideration is proper here. 22

General Motors Corp v. Okla. Board of Equalization, 1983 OK 59 24

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244-245 (1944) 22

Johnson v. Johnson, 1967 OK 16 24

Marshall v. Amos, 1968 OK 86 23

Okla. Co. v. O'Neil, 1967 OK 105 23

D. The Henry decision does not preclude consideration of the bribery issue. 24

Berland's of Tulsa v. Northside Vil. Shop Ctr., 1968 OK 136 25

Parker v. Elam, 1992 OK 32 24

Russell v. Board of County Commissioners, 1997 OK 80 24

<i>Seymour v. Swart</i> , 1985 OK 9	24
<i>Willis v. Nowata Land & Cattle Co., Inc.</i> , 1989 OK 169	24
3. THE BRIBED PUD 260 ORDER IS VOID AS UNCONSTITUTIONAL AND MAY BE CHALLENGED AT ANY TIME.	25
<i>Burns v. Cline</i> , 2016 OK 99	26
<i>Burns v. Cline</i> , 2016 OK 121	26
<i>Dobbs v. Board of County Commissioners Okla. Co.</i> , 1953 OK 159	26
<i>Douglas v. Cox Retirement Properties, Inc.</i> , 2013 OK 37	26
<i>Fent v. Fallin</i> , 2013 OK 107	26
<i>General Motors Corp v. Okla. Board of Equalization</i> , 1983 OK 59	25
<i>Johnson v. Johnson</i> , 1967 OK 16	25
<i>Lockett v. Evans</i> , 2014 OK 33	26
<i>Marshall v. Amos</i> , 1968 OK 86	25
<i>Maxwell v. Sprint PCS</i> , 2016 OK 41	26
<i>Montgomery v. Potter</i> , 2014 OK 118	26
<i>Okla. Co. v. O'Neil</i> , 1967 OK 105	25
<i>Prescott v. Okla. Capitol Preservation Comm'n</i> , 2015 OK 54	26
<i>Vasquez v. Dillard's Inc.</i> , 2016 OK 16	26
<i>Wall v. Marouk</i> , 2013 OK 36	26
Oklahoma Constitution Art. 9, § 18a	27
Oklahoma Constitution Art. 9, § 40	26
12 O.S. § 1038	25

4.	EVEN ON THE MERITS, APPELLANTS' CLAIMS ARE NOT BARRED BY "JUDICIAL" ISSUE OR CLAIM PRECLUSION OR BY SETTLED-LAW-OF -THE-CASE.	28
	<i>Southwestern Bell Tel. Co. v. Okla. Corp. Comm'n</i> , 1994 OK 38	30
	<i>State of Okla. Ex rel. Dep't of Transp. v. Little</i> , 2004 OK 74	29
	<i>Valley View Angus Ranch v. Duke Energy Field Servs., Inc.</i> , 497 F.3d 1096 (10 th Cir. 2007)	29
5.	APPELLANTS DO NOT SEEK EITHER A RATE CHANGE OR THE RECLASSIFICATION OF "SURPLUS FUNDS/ EXCESS EARNNGS" AS "OVERCHARGES."	30
	CONCLUSION	30

Introduction

This appeal involves the bribery of a state-wide elected public official by Southwestern Bell Telephone Company ("SWBT") in a public utility matter involving many millions of dollars. The bribery was done in direct violation of the Oklahoma Constitution, Art. 9, § 40. The bribery was proven beyond a reasonable doubt in federal district court. The bribery conviction of Corporation Commissioner Robert Hopkins was affirmed by the 10th Circuit Court of Appeals with the Court citing the strength of FBI Title III wiretaps of all involved, including top SWBT executives.

To this day, SWBT continues to enjoy the sweet fruit of its bribery as the underlying bribed Order has never been reformed. Perhaps shockingly, both SWBT and the Oklahoma Corporation Commission ("OCC"), directly blame the Oklahoma Supreme Court for the resulting injustice and ultimate failure to uphold the Oklahoma Constitution. ^{1/} Here, the OCC majority found that, ". . . *the Oklahoma Supreme Court itself has previously upheld the bribed order (notwithstanding the bribery) and/or ratified the intrinsic fraud herein at issue such that the matter is final even if the Oklahoma Corporation Commission wanted to correct the injustice . . .*" See R. 5570, Chairman's Certificate of Record, filed November 16, 2016, p. 2. See also R. 86-87, R. 1515, ¶ 26; R. 1517, ¶ 30, R. 1520, ¶ 5 (*The OCC finds that the Supreme Court has been made aware of the bribery of Commissioner Hopkins, has had opportunities to grant similar relief and has chosen not to grant relief*). Both SWBT and the OCC (majority) got it wrong; this appeal seeks to correct it.

1/ Such was the audacious argument made by SWBT's counsel. See R. 17-18, Transcript of Proceedings held November 3, 2015, pgs. 16-17 (Argument of SWBT's Counsel: "[The Oklahoma Supreme Court has previously upheld the bribery in this matter] -- bribed votes do count . . . [n]ow, that may not be what you and I would have ruled. That may not be -- if we took a vote, probably no one would have liked that ruling in -- in this --- in this courtroom today. It doesn't matter. That's the law."). In essence, SWBT's counsel boldly argued to a fully packed OCC hearing room that it is all the Supreme Court's fault; that even he thinks the Court *probably decided it wrong* in upholding bribery in violation of the Constitution, but that there is nothing we can do about it.

Importantly, it should be noted that this is, in fact, the very first time that the "bribery matter" has ever been presented to the Supreme Court in an appeal brought as a matter of right. When the Oklahoma Supreme Court issued its opinion in *Robert Henry v. Southwestern Bell Telephone Company*, 1991 OK 134, SWBT's bribery was not *publicly* known. ² See R. 717. As such, the *Henry* decision could not have addressed the bribery issue. It is true that in 1997 (R. 2906, Order of May 19, 1997) and again in 2010 (R. 2953, Order of February 8, 2010), the Oklahoma Supreme Court declined to consider the bribery issue on the grounds that Commissioner Bob Anthony's ". . . Suggestion to the Court does not invoke either the appellate or original jurisdiction of the Supreme Court." See R. 723-724. Here, the OCC and SWBT seemingly believe that the Supreme Court's decision to only act within its jurisdiction evidences the Court's desire to rubber stamp the violation of Oklahoma's Constitution, or to sweep the bribery issue under the rug. This appeal tests that belief, as it squarely invokes the Court's "appellate jurisdiction" and puts the bribery issue before this Court in the context of a non-discretionary appeal, brought as a matter of right.

In OCC's remand proceedings following the *Henry* decision, the OCC (erroneously) believed it had no jurisdiction to remedy the bribery as, *inter alia*, it lacked ". . . permission from the Oklahoma Supreme Court to rehear the entire cause." See R. 1515, ¶ 26, *C.f.*, 851-852. The

2/ SWBT argues that its misconduct of bribing Commissioner Hopkins (which it oddly equates to exercising merely "improper influence") was misconduct in a "legislative" proceeding and as such ". . . do not implicate judicial processes and do not require application of . . . judicial standards." Fundamentally, this argument ignores the fact that SWBT senior employees, including in-house counsel of record in *Henry* (*i.e.*, Glen Glass), were directly involved in SWBT's bribery schemes in PUD 260. See R. 701-702; R. 2346-2347. Title 5 O.S. 1988 App. 3-A, Rule 3.3 (a)2 provides that, "(a) A lawyer shall not knowingly (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." By not disclosing SWBT's bribery schemes to the Supreme Court in the *Henry* appeal, SWBT directly committed intrinsic fraud against the Supreme Court, a proceeding that is indisputably "**judicial**" in nature to which "judicial standards" apply. SWBT's argument also ignores Oklahoma Constitution Art. 9, § 40, and the key point that even "legislative" bodies must follow the Constitution.

Appellants' Application was likewise summarily dismissed (with prejudice) on this same erroneous basis. See R. 1515, ¶ 26; R. 1517, ¶ 30; R. 1520, ¶ 5; R. 1524, ¶ 10. **It simply is not a correct statement or understanding of Oklahoma law.** See R. 717-718. To the extent that the OCC failed to consider subsequent undetermined issues under the erroneous belief that it is precluded from doing so by a prior appellate mandate, it commits a reversible error of law. See *Berland's of Tulsa v. Northside Vil. Shop Ctr.*, 1968 OK 136, ¶ 5-10, 14, 27, 30 (Reversing trial court that failed to consider subsequent issue not determined by prior appeal under the erroneous belief that prior appellate mandate restricted the consideration of such issue). Additionally, the OCC has repeatedly misinterpreted *Turpen v. Okla. Corp. Comm'n*, 1988 OK 126, the basis for its erroneous decisions.

Anticipating SWBT's arguments and indeed, the OCC's frequent misconceptions, two of the Appellants herein had sought a *discretionary* and extraordinary writ of mandamus and bill of review in June 2014 (Cause No. 122,973), an effort that was denied without the reason being stated. On this point, the Appellants and Appellees seemingly have a different reading of the "tea leaves" -- that is, what was the meaning and effect of the Court's 2014 decision. Appellees and the OCC majority count it as an instance of the Supreme Court affirming the bribery at issue. See R. 1517, ¶ 30; R. 1520, ¶ 5. Appellants see it differently -- as perhaps the Court's determination that the matter should first be raised with the OCC. ³ As such, Applicants, with steadfast determination, have sought the appropriate relief before the OCC in the first instance.

The Appellants contend that there are two primary issues in this appeal. First, there is the issue of whether the OCC's (bribed) PUD 260 Order was entered in violation of the Oklahoma

3/ The Oklahoma Supreme Court's 2014 decision (in Case No. 112,973) may have simply been the reaffirmation of its prior decision in *Henrickson v. Okla. Corp. Comm'n* 2001 OK 89, ¶ 15-16 (Subsequently raised issues of Southwestern Bell's fraud in prior rate making matters are exclusively within the Commission's jurisdiction and must be properly raised there.)

Constitution, Art. 9, § 40 (no corporation shall be permitted to influence official duty [with bribes]) and also Art. 9, § 18a (matters before OCC must be determined by a majority). Second, if the (bribed) PUD 260 Order was entered in violation of the Oklahoma Constitution, is the bribed PUD 260 Order void or voidable such that it must be re-determined? Certainly numerous other issues are presented by this appeal, but Appellants maintain that reversal and remand is required if these primary issues are answered in the affirmative.

Summary of the Record

1. This matter concerns the legacy misconduct of SWBT occurring in 1989 and thereafter (including in 1991, in not disclosing the bribery during the *Henry* appeal) in bribing Commissioner Robert Hopkins in relation to a rate matter known as PUD 260. The misconduct of SWBT attorney William L. Anderson and Commissioner Hopkins was fully adjudicated and determined in the criminal trial brought in the United States District Court for the Western District of Oklahoma, CR-93-137-A, wherein both Commissioner Hopkins and SWBT's attorney Anderson were found guilty of Accepting Money to Influence a Vote and Bribery, respectively, in violation of 18 USC § 666 (a). *See* R. 196; R. 2333-2334; 2370-2372; R. 2379-2385. ⁴

2. The criminal conviction of Robert Hopkins (Note: William Anderson never appealed his conviction) was affirmed by the Tenth Circuit in its Order and Judgment filed February 14, 1996 (Case No. 95-6120), wherein the Court wrote, in part, "*The 1991 tapes, properly admitted under Fed.*

^{4/} The Superseding Indictment filed on July 7, 1994, asserted, *inter alia*, that on or about September, 1989, Robert E. Hopkins "knowingly and corruptly agreed to accept something of value, intending to be influenced or rewarded in connection with the business of the Oklahoma Corporation Commission; that is, [he] agreed to accept money offered to influence or reward his vote on PUD 260, permitting Southwestern Bell Telephone Company to reinvest approximately \$30,000,000 rather than reimburse that amount to Oklahoma rate-payers." *See* R. 2374-2378, superseding Indictment filed on July 7, 1994.

R. Evid. 801(d) 2(E), detailed efforts to conceal the payoffs from the FBI. From those tapes [tapes of the FBI's Title III wire taps], the jury heard recorded conversations among Hopkins, Anderson, Murphy and other Southwestern Bell executives plotting their "story" in the event federal agents questioned them." (Emphasis added.) See R. 193-336, R. 2379-2385.

3. Telephone rates and telephone company earnings are regulated to ensure that only fair rates are imposed, because left unregulated, charges for telecommunication services might be unfair due to lack of competition and the existence of monopolies. The OCC is the governmental agency with jurisdiction to determine such matters pursuant to the Oklahoma Constitution and statutes. See Oklahoma Constitution, Art. 9 and 17 O.S. § 131 *et seq.* PUD 260 was an Application brought by the Public Utility Division of the OCC on October 23, 1986, to determine the effect of the newly enacted (United States) Tax Reform Act of 1986 on Oklahoma utilities. Specifically, because the federal government had reduced the corporate federal income tax rate from 46% to 34%, effective July 1, 1987, such resulted in an annual "windfall" to SWBT under the existing rates and generated "excess revenues" which the OCC might order be refunded to Oklahoma consumers such as the Appellants. Motivating its wrongdoing, SWBT wished to keep for itself these "excess revenues" which later were found to amount to over \$100,000,000 per year.¹⁵ R. 193-336.

4. The details of SWBT's wrongdoing, as set forth in the Trial Brief of the United States, were that a conspiracy between Anderson and others began in early September 1989. See R. 2439-2444.

5/ On August 26, 1992, after extensive discovery, 37 days of witness testimony and lengthy hearings, the OCC unanimously approved its rate making Order in Cause No. PUD 662, Order No. 367868, which established SWBT's annual revenue excess to be more than \$100,000,000 based upon the actual data (not estimated data) for the complete test year 1989. See R. 3753-4009, Cause PUD 662, Order No. 367868. Applying the annual revenue excess as determined by the valid (unanimous) Commission Order No. 367868, with the approved 11.589% compounded annual interest rate as established in Commission Order No. 342343, the Appellants' expert has determined that the citizens of Oklahoma are due some **16 billion dollars.** R. 896-913. Appellants recognize that any amount due for SWBT's "excess revenues" over **28 years** is a matter for the OCC to determine.

The plan involved enlisting a third party to approach and influence Commissioner Hopkins in connection with his vote on PUD 260 (specifically, Commission Order No. 341630), a matter then pending before the Commission. *Id.* In furtherance of that conspiracy, Anderson called Michael R. Murphy (a state Representative) and asked him to approach Hopkins and offer him \$10,000 if the Commissioner voted for the position advanced by Anderson. *Id.* Murphy also received a call from Jewel Callahan, who told Murphy that he had \$5,000 more for Hopkins in the event of such a vote. Murphy agreed to act as the "go-between" or "bagman" between Anderson/Callahan and Commissioner Hopkins. *Id.* Within days, Murphy contacted Hopkins and advised that Anderson and Callahan had \$15,000 that he and Hopkins could "split" if Hopkins would vote for "reinvestment" in the PUD 260 case. *Id.* On or about September 18, 1989, Hopkins accepted the money in exchange for his vote in PUD 260, Order No. 341630, which occurred on September 20, 1989. *Id.* The vote was two votes in favor (including Hopkins' bribed vote), and one vote against. Excluding Hopkins' bribed vote, the vote on the Order was one in favor and one against, a vote which lacks approval from a majority and renders the ultimate Order unconstitutional, invalid and void. *See* R. 1816-1828. Oklahoma Constitution, Art. 9, § 18a(B); Art. 9, § 40. 16

5. The Title III wiretaps played in the federal criminal trial and relied upon by the Tenth Circuit in its Opinion, have to this day never been made public. Such tapes were, in part, the subject of Applicants' Motion for Full Evidentiary Hearing filed with the OCC (R. 878-880) and also with the

6/ Because of the extreme time constraints imposed by the Tax Reform Act of 1986 and the impossibility of examining rates prior to its effective date July 1, 1987, SWBT entered into a binding "Stipulation" on June 23, 1987 which was accepted by the OCC in Order No. 313853, that, "... *if the Commission ultimately determines that a rate reduction is appropriate for [SWBT], that said reduction would be effective as of July 1, 1987, in order to allow the full benefits of the Tax Reform Act to accrue to [SWBT's] customers.*" *See* R. 1741-1745. It is because of this Stipulation and Order that SWBT may owe customers the "excess revenues" as "ultimately determined" by the OCC, with interest, from July 1, 1987 to the present. Due to SWBT's own Stipulation, such is not impermissible retroactive rate making.

Oklahoma Supreme Court in this matter. Recently, however, the contents of some tapes were described under oath and uncovered by summaries; the tapes of conversations between Bill Anderson and Bill Free (a Southwestern Bell senior executive and attorney) on March 19, 1991– nine months before the *Henry* decision -- reveal that “[Glen] Glass knew the whole deal.” ⁷ See R. 825. Indeed, the evidence shows that SWBT's (in-house) attorney Glen Glass, counsel of record in the *Henry* appeal, was an active participant in SWBT's bribery schemes as many of the false "campaign contributors," whose names and addresses were provided so to make the bribes "untraceable," were, in fact, the obscure out-of-state relatives of SWBT's attorney Glen Glass. ⁸

6. On September 14, 2015, the Applicants filed at the OCC their Application pursuant to OAC 165:5-17-2, a rule which allows the filing of an Application by “...*any person, whether or not a party of record in the original cause.*” R. 193-336. By their filing, the Applicants presented the needed evidence and legal basis required to remedy the intrinsic fraud utilized by SWBT to obtain ill-begotten orders and judgments from the OCC and this Court. The Application sets forth Applicants' legal standing for making the Application. R. 197-202. The Applicants requested that

^{7/} See R. 416-417, Affidavit and Deliberations, p. 9-10, ¶ 19, filed on September 16, 2015.

^{8/} Compare R. 409-411, 434, 438-449, Commissioner Anthony Affidavit, p. 2-4, ¶ 2-7, and Exhibit 5A thereto with the FBI Interview Transcripts: Robert Finnismier (Nebraska resident who never gave any contributions to Commissioner and only knows one person who works for SWBT in Oklahoma, Glen Glass, who happens to be a cousin of his wife Judy), Eric White (Missouri resident who never gave any contributions to Commissioner, but his brother-in-law is Glen Glass), Raymond White (Missouri resident who never gave any contributions to Commissioner, but his son-in-law is attorney Glen Glass), Mildred White (Missouri resident who never gave any contributions to Commissioner, but her son-in-law is Glen Glass). See also Memo/Affidavit of FBI Special Agent John Hippard, R. 724-794, ¶ 4-6, 36-37, 43, 45, 57, 67-73 (probable cause exists to believe that Glen Glass is committing or about to commit bribery, conspiracy, etc.; outlining **98 phone calls** between Anderson and Glass over ten weeks.); FBI's time line of investigation with citation to wiretaps (Note: entry of **August 3, 1989**, (R. 801-802)) Anderson makes corrupt bargain with Anthony on PUD 260 and then “...went right over to SWB & told Miller, Glass and Caldwell of deal & was big hero”, 10-20-89 (R. 808) and also 3-14-91 to 3-19-91, R. 821-825, R. 200, Footnote 4.

the OCC vacate or modify its Order No. 341630 (subject to protecting the rights of innocent parties, if any), and that it reconsider certain of the issues which were determined therein. R. 202-203. Order 341630 was entered in Cause No. PUD 260 on September 20, 1989. *Id.* Specifically, the Applicants seek to vacate or modify Section III, Part K of the Order determining the "Excess Revenues" as being \$7,847,172 for 1989, and each year thereafter, and also, Section IV, setting forth the OCC's determination on how the revenue excess should be used. *Id.* The Application asserts that the (bribed) PUD 260 Order was obtained by intrinsic fraud. *Id.*

7. On October 2, 2015, both SWBT and the Oklahoma Attorney General ("AG") filed their Motions to Dismiss the Application. R. 618-629, R. 648-663. The AG's principal argument was that the Application was barred by this Court's holding in *Turpen*. R. 648-663. SWBT's principal arguments aped the AG and add that the Application was unmeritorious under the Court's holdings in *Henry and Wiley v. Oklahoma Nat. Gas Co.*, 1967 OK 152, 429 P.2d 957. R. 618-629.

8. On November 2, 2015, the Applicants filed their Combined Response to the Motions to Dismiss of SWBT and the AG. R.699-867. Therein, the Applicants state the substantial legal and factual errors made by SWBT and the AG in their respective Motions to Dismiss. *Id.*

9. On November 2, 2015, the Applicants also filed three motions: a Motion to Strike those portions of the Motions to Dismiss that assert new (unsupported or disputed) facts outside of the Application (R. 868-870), a Motion to Apply Heightened Scrutiny to the AG's filings based upon an apparent conflict of interest (R. 871-877), and a Motion for Full Evidentiary Hearing pursuant to Oklahoma Constitution, Art. 9, § 22 (R. 878-880).

10. On November 3, 2015, the OCC conducted a (non-evidentiary) hearing on the Motions to Dismiss filed by SWBT and the AG. *See* R. 2-89. At the hearing, SWBT's counsel argued, in part: "[The Oklahoma Supreme Court has previously upheld the bribery in this matter] -- bribed votes do

count . . . [n]ow, that may not be what you and I would have ruled. That may not be -- if we took a vote, probably no one would have liked that ruling in -- in this --- in this courtroom today. It doesn't matter. That's the law." R. 17-18. The AG, for its part, repeatedly argued "the OCC has no jurisdiction to reopen or reconsider the bribed vote based on the prior *Henry* appeal and *Turpen*." R. 23-30, R. 35- 37, R. 69-70. The Applicants thereafter addressed the history of the case, why the matter should be reformed and also the errors in SWBT's and the AG's arguments. R. 38-59. Ultimately the OCC took the matter under advisement, the expressly stated concern being that the Oklahoma Supreme Court's prior decisions may "jurisdictionally" prevent the OCC from reopening the bribed PUD 260 matter and entering a constitutionally valid order. *See* R. 86-87.

11. During the time period the matter was under advisement, the Applicants further supplemented the briefing on three occasions with additional argument and evidence. On November 25, 2015, the Applicants supplemented the record with additional evidence detailing, *inter alia.*, the flaws of the (bribed) 260 Order, misconceptions involving SWBT's Stipulation, the propriety of placing rates subject to refund, the need here to re-determine the "excess revenues," and the propriety of refunding excess revenues to the ratepayers. R. 893-941. On January 22, 2016, the Applicants supplemented the record with additional evidence detailing, *inter alia.*, other instances of rates being made subject to refund, how such is not "retroactive ratemaking," and how SWBT's Stipulation makes such refund required. R. 1179-1242. Finally, on February 23, 2016, the Applicants supplemented the record with additional evidence detailing, *inter alia.*, the shifting positions and inconsistencies of Oklahoma's AG, the history of the PUD 260 matter following the *Henry* remand, and the errors in the OCC's Remand Order and remand proceedings. R. 1249-1352. The additional argument and evidence submitted was never refuted or challenged.

12. On September 7, 2016, the OCC (majority) issued its Order No. 655899 dismissing the

Application with prejudice. R. 1507-1541. In substance, the OCC (majority) found that the bribery of Commissioner Hopkins did not make the PUD 260 Order unconstitutional (relying on *Wiley*, the OCC found that bribes are permissible in legislative matters) notwithstanding either Oklahoma Constitution, Art. 9, § 40 or Art. 9, § 18a, or the prior contrary position taken by the AG. *See* R. 1519, ¶ 3, R. 852-854. Quite amazingly, neither Art. 9, § 40 nor § 18a were even mentioned in the "legal analysis" provided. *See* R. 1519, ¶ 3. The OCC (majority) relied heavily on its determination that the Supreme Court has long known of the bribery of Commissioner Hopkins, but never chosen to grant relief. *See* R. 1517, ¶ 30, R. 1520, ¶ 5, R. 5570. The OCC (majority) determined that the PUD 260 Stipulation was "satisfied" by the bribed 260 Order (because the bribed Order says so), and that further review is precluded by the *Turpen* decision. R. 1522, ¶ 7.

Finally, the OCC concludes that the bribed Order was in the public interest because, in the *Henry* decision, the Court affirmed reinvestment rather than the refund of excess revenues. R. 1523-1524, ¶ 10. Here, the OCC majority decision fails to appreciate that on appeal, the Oklahoma Supreme Court's review is different from that of the OCC in the first instance -- the Court's review being only focused on whether the decision is legally permissible. Indeed, the Court is prohibited from reaching a different weighing of the facts if it finds the OCC Order is supported by "substantial evidence." *Henry*, ¶ 14. Just how the Court's "appellate review" in *Henry* could rightfully substitute for the (untainted) "merits review" it should have received in the OCC, is left unexplained. *Id.* All pending motions, including those referenced in ¶ 9, *Supra*, were denied. R. 1524.

13. The dissent to the OCC's September 7, 2016 Order was filed on September 7, 2016 (R. 1491-1506), September 8, 2016 (R. 1544-1560), and September 9, 2016 (R. 1564-1736). Additional materials were filed by the dissenting Commissioner prior to the decision in the form of a Transcript Errata with Deliberations (R. 942-996), a Deliberations Memorandum (R. 1401-1410) and

Deliberations (R. 1417-1460). Indeed, numerous additional points were made by the dissenting Commissioner in the hearing on November 3, 2015. R. 9-11, R. 19-22, R. 30-37 and R. 76-87.

As shown by the dissent, the flaws of the majority opinion are numerous. The dissenting opinion correctly notes in detail how the OCC majority decision wrongfully abdicates its constitutional duty "to correct abuses" (R. 1491-1493), how it ignores the actual holding of *Wiley* (R. 1493-1494), how the majority's summary dismissal of the Application denies due process (R. 1494-1497), how the majority errors in relying upon the bribed order itself as grounds for upholding the bribed order (R. 1497-1500), how the majority has misinterpreted the relationship between PUD 260 and PUD 662 (R. 1500-1501), how the majority has misconstrued its proper jurisdiction (R. 1501-1504), how the majority opinion ignores the public interest (R. 1504-1506), and how the majority errors in finding the SWBT Stipulation was "satisfied" by the bribed order (R. 1564-1567).

14. Pursuant to the Oklahoma Constitution, Art. 9, § 22, on November 16, 2016, the OCC Chairman filed his "Certificate of Record" summarizing the facts essential for a prompt resolution of this appeal as well as evidence he deemed proper to certify. *See* R. 5569-5576. The Certificate of Record details certain important evidence not in the record (precisely because the majority *summarily* (and wrongfully- R. 878-880) denied the request for an evidentiary hearing), as well as various other errors in the record, including on the issue of whether OCC "staff" had ever been influenced or bribed by SWBT in the PUD 260 matter. *See* R. 5571-5576; *C.f.*, R. 856, R. 1522.

STANDARD OF REVIEW

Motions to dismiss are generally viewed with disfavor and the standard of review is *de novo*. *Dani v. Miller*, 2016 OK 35, ¶10, 374 P.3d 779, *citing Ladra v. New Dominion, LLC*, 2015 OK 53, ¶8, 353 P.3d 529; *Id.*, *citing Simonson v. Schaefer*, 2013 OK 25, ¶3, 301 P.3d 413; *Hayes v. Eateries, Inc.*, 1995 OK 108, ¶2, 905 P.2d 778. The purpose of a motion to dismiss is to test the law

that governs the claim, not the underlying facts. *Id.*, citing *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶4, 270 P.3d 155; *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶7, 176 P.3d 1204; *Zaharias v. Gammill*, 1992 OK 149, ¶6, 844 P.2d 137. Accordingly, when considering the legal sufficiency of the petition (Application) the court takes all allegations in the pleading as true together with all reasonable inferences that may be drawn from them. *Id.*, citing *Ladra*, 2015 OK 53, ¶8; *Simonson*, 2013 OK 25, ¶3; *Fanning v. Brown*, 2004 OK 7, ¶4, 85 P.3d 841. A plaintiff is required neither to identify a specific theory of recovery nor to set out the correct remedy or relief to which the plaintiff may be entitled. *Id.*, citing *Gens v. Casady School*, 2008 OK 5, ¶8, 177 P.3d 565; *Darrow*, 2008 OK 1, ¶7; *May v. Mid-Century Ins. Co.*, 2006 OK 100, ¶10, 151 P.3d 132.

If relief is possible under any set of facts which can be established and is consistent with the allegations, a motion to dismiss should be denied. *Id.*, ¶11 citing *Gens*, 2008 OK 5, ¶8; *Darrow*, 2008 OK 1, ¶7; *Lockhart v. Loosen*, 1997 OK 103, ¶4, 943 P.2d 1074. A motion to dismiss is properly granted only when there are no facts consistent with the allegations under any cognizable legal theory or there are insufficient facts under a cognizable legal theory. *Id.*, citing *Wilson*, 2012 OK 2, ¶4; *Darrow*, 2008 OK 1, ¶7; *Lockhart*, 1997 OK 103, ¶5. Where not all claims appear to be frivolous on their face or without merit, dismissal for failure to state a claim upon which relief may be granted is premature. *Id.*, citing *Gens*, 2008 OK 5, ¶8; *Washington v. State ex rel. Dept. of Corrections*, 1996 OK 139, ¶12, 915 P.2d 359. The party moving for dismissal bears the burden of proof to show the legal insufficiency of the petition. *Id.*, citing *Ladra*, 2015 OK 53, ¶8; *Simonson*, 2013 OK 25, ¶3; *Tuffy's, Inc. v. City of Oklahoma City*, 2009 OK 4, ¶6, 212 P.3d 1158.

Additionally, this appeal raises legal issues such that a *de novo* review is required. The OCC's construction of the Constitution or other issues of law is subject to an independent and non-deferential *de novo* review. *Neil Acquisition v. Wingrod Inv. Corp.*, 1996 OK 125, ¶ 5, 932 P.2d

1100. Indeed, *de novo* review is also warranted based on the nature of the record made; Oklahoma law recognizes that here the reviewing court is free to substitute its own judgment of the record for that of the inferior court. *Loofland Brothers Company, v. C.A. Overstreet*, 1988 OK 60, ¶ 15.

ARGUMENTS & AUTHORITIES

1. THE BASIS FOR OCC'S ORDER IS FUNDAMENTALLY FLAWED, LEGALLY AND FACTUALLY.

A. The OCC's Bribed PUD 260 Order Violated the Oklahoma Constitution

Importantly, the Oklahoma Constitution mandates that it takes at least two (unbribed) Commissioner votes to determine matters before the OCC. *See* Oklahoma Constitution, Art. 9, § 18(a)B. Here, it is inherently repugnant to the Oklahoma Constitution that the "concurrence" of a Commissioner on a public matter and the *necessary vote* to decide a question in dispute could be fraudulently and feloniously bought by a regulated entity against the interests of the public. ⁹ Excluding the bribed vote of Commissioner Hopkins, the Commission's Order 341630 was simply not approved by a majority, and thus, is Constitutionally invalid and **void**. Indeed, this legal conclusion is mandated by the fact that SWBT's act of obtaining Commissioner Hopkins' vote by means of bribery is made directly illegal by the Oklahoma Constitution itself. *See* Oklahoma Constitution, Art. 9, § 40, which clearly and unequivocally states:

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

9/ The principle that "bribed" (Constitutional Votes) do not count has been repeatedly adopted by this Court. *See Okla. Co. v. O'Neil*, 1967 OK 105, ¶0, 9, 13-14, ¶ 17-24, 431 P.2d 445; *Marshall v. Amos*, 1968 OK 86, ¶22-32, ¶ 33-36; 442 P.2d 500; *Johnson v. Johnson*, 1967 OK 16, ¶ 14, 20, 31, 33, and Special Concurring Opinion, ¶ 3-5. Indeed, in addressing the cancerous effects of bribery, the Supreme Court said in *State ex rel Okla. Assoc. v. James*, 1969 OK 119, ¶23, "... [such is a circumstance that] cannot do else, if continued, but to destroy our system of justice which, in a free society, depends for its effectiveness upon the continued confidence and trust of the people."

This Constitutional provision could not be written any clearer. Indeed, the plain intent behind this Constitutional provision is to prevent the exact abuse that occurred here: a regulated company bribing a Commissioner (who regulates the company) to obtain a result contrary to the public interest. Obviously it cannot be *legitimately* argued, and in this matter has never even been suggested, that the bribery of a public official is somehow the rightful exercise of "free speech" rights under the 1st Amendment to the United States Constitution. Perhaps, SWBT is just too afraid to argue it. It is noteworthy that this Oklahoma Constitutional provision is found in Art. 9, the same article which governs the OCC. Clearly this provision is meant to apply to the OCC Commissioners.

By its express terms, SWBT's bribery of Commissioner Hopkins was constitutionally **impermissible** *regardless* of whether in his "official duty" Hopkins was acting in a "legislative" versus "judicial" capacity. ¹⁰ On its face, Oklahoma Constitution, Art. 9, § 40 establishes a mandatory rule which is **not dependant** on "the capacity" upon which the "official duty" was rendered. Of course, bribery is also illegal by statute. *See* 17 O.S. 1968 § 177. Under Oklahoma law, a corporate attorney illegally giving money to a Commissioner is "presumed to be acting for such corporation." *See* 26 O.S. 1974 § 15-110. On these facts, Oklahoma Attorney General Drew

10/ SWBT thus got it wrong when it argued that bribery is only wrongful/correctable if the matter is a "judicial proceeding," for which "judicial processes" and "judicial standards" apply. *See* R. 624-625, Constitution, Art. 9, § 40. Importantly, the Court in *Wiley*, the case relied upon by SWBT, never even considered this provision of the Constitution; the contention apparently was not one made by the appellant as the bribery there didn't involve the Commissioners themselves. Fundamentally, and more bluntly, *Wiley* also held that legislative acts which are **repugnant to the Constitution** may be declared void. *See Wiley*, ¶ 5. The OCC ignores these important points and distinctions.

Obviously all Commissioners are bound by oath, upon entering office, to uphold the Oklahoma Constitution. *See* Okla. Constitution, Art. 9, § 17 (Upon entry to office, Commissioners shall under oath, swear to "faithfully and justly execute and enforce the provisions of this Constitution, and all the laws of this State). As Commissioner Hopkins clearly did not faithfully uphold the Constitution in the PUD 260 matter, it is proper for the OCC to rehear the matter. Anything less would not be the "faithful and just" enforcement of the law.

Edmondson previously argued to the Oklahoma Supreme Court that the bribed PUD 260 order "... was not constitutionally adopted." R. 836, 852-854. ¹¹ With all due respect, either the Oklahoma Constitution means something or it doesn't. Either the Oklahoma Constitution is the supreme state law of the land, or it is a historical written statement of false and insincere aspirations, largely wasteful of paper and ink. Such is the issue presented here.

By this appeal the Appellants are not seeking to enforce "judicial standards" in "legislative proceedings;" rather, the Appellants seek to enforce Constitutional standards applicable in all manner of proceedings. SWBT's position that Oklahoma law holds *only* the bribery of judges to be wrongful and correctable, but that bribery of other elected officials, to include Oklahoma Corporation Commissioners, is not correctable if such occurred in a "quasi-legislative" proceeding, is both erroneous and absurd. ¹² Rather, the Oklahoma Constitution plainly says that bribery of Commissioners with respect to their "*official duty*" is impermissible.

Importantly, following the Constitution is a requirement of *even* "legislative" bodies. Here, the OCC, like all branches of government, shares equally in the responsibility to faithfully uphold the

¹¹ Substantial evidence and argument for *why* reconsideration of the PUD 260 matter is in the public interest has been presented. Indeed, there could be **16 billion reasons** why the matter should be re-determined -- *assuming arguendo that upholding the Oklahoma Constitution is not reason enough*. *C.f.*, R. 852-857. Such evidence includes the gross miscalculation of SWBT's "excess earnings" in the bribed order, evidence of "OCC staff misconduct" leading up to the Order (never even considered by the AG's office) and the massive benefit that SWBT ratepayers could receive upon rehearing the matter. *See* R. 38-54, R. 893-941, R. 1179-1242, R. 1249-1352. *See also* Dissent of Commissioner Anthony, R. 1497-1506, R. 1564-1567. Perhaps, the key point to be made, however, is that by *summarily dismissing* the Application (based on gross legal error), the OCC has denied Appellants with even the *chance* to prove in trial that upon the proper (unbribed) consideration of the PUD 260 matter, a different result in the public interest is appropriate.

¹² *For that to be the law*, Constitution, Art. 9, § 40, would have to read something like: "No corporation organized or doing business in this State shall be permitted to influence elections or official duty by contributions of money or anything of value, except in cases of legislative or quasi-legislative proceedings, in which case cash is king, the more the better." Thankfully, our Oklahoma founding fathers with their pioneers' wisdom and good sense did not adopt this alternate language.

Oklahoma Constitution. To that end, the Commissioners individually are duty bound to **faithfully and justly** uphold the Oklahoma Constitution. This Court likewise serves the critical function of enforcing the faithful and just upholding of the Constitution by all governmental bodies.

Indeed, where a legislative body has not acted within the framework of the Constitution, it has not acted; an unconstitutional statute confers no rights, imposes no duties and affords no protection. See *General Motors Corp v. Okla. Board of Equalization*, 1983 OK 59, ¶ 17 (General Motors was obligated to pay ad valorem taxes on its lease of public trust property [the Oklahoma City plant], notwithstanding execution of a tax abate agreement done pursuant to statute; as the underlying statute violated the Oklahoma Constitution - any tax abate agreement granted under the void statute was likewise void.) citing *Norton v. Shelby County*, 118 U.S. 425; 6 S. Ct. 1121; 30 L.Ed. 178 (1886) (An unconstitutional statute confers no rights, imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.); *Zane v. Hamilton County*, 189 US 370; 23 S.Ct. 538; 47 L.Ed. 858 (1903) (County bonds issued pursuant to statute which is later declared unconstitutional are void; no protectable federal interest is created because the Federal Constitution does not protect contract rights which are invalid or illegal. A right resting on an void and unconstitutional legislative act, is likewise void.).

For the reasons set forth above, the Court should find that the OCC's bribed PUD 260 Order violates the Oklahoma Constitution, that it by definition is unconstitutional, and thus, is **void**. Any "fruit" that derives from this "poisonous," **Void Order**, is likewise **Void**.

B. Because the PUD 260 Order was never constitutionally determined, it should be Remanded for proper determination.

Appellants assert that it is obvious and axiomatic that if the PUD 260 Order is unconstitutional and void, that the matter should be remanded for a constitutionally valid determination. Such was, after all, the natural relief granted in *O'Neil, Marshall and Johnson*. *C.f.*,

R. 852-854. Under the Oklahoma Constitution, only the OCC -- not this Court and certainly not the AG's office -- has the jurisdiction to determine the PUD 260 cause in the first instance. Here, the enforcement of Oklahoma's Constitution should not be made dependant upon the AG's (superficial and un-reviewed) determination of whether enforcement is "worth it," or even on the OCC's apparent reluctance to confront its sordid past. The OCC's ultimate, unbribed determination of the PUD 260 Order on the merits should only then be subject to this Court's "appellate review."

In deciding this matter, the OCC (wrongfully and quite improperly) concluded that the bribed Order was in the public interest because in the *Henry* decision *this Court* affirmed reinvestment rather than the refund of excess revenues. R. 1523-1524, ¶ 10. Here, the OCC majority decision fails to appreciate that on appeal, the Oklahoma Supreme Court's review is different from that of the OCC in the first instance -- the Court's review being only focused on whether the decision is legally permissible. Indeed, the Court is prohibited from reaching a different weighing of the facts if it finds the OCC Order is supported by "substantial evidence." *Henry*, ¶ 14. Just how the Court's "appellate review" in *Henry* could rightfully substitute for the (untainted) "merits review" it should have received in the OCC is left totally unexplained -- and is, in fact, inexplicable. *Id.*

Respectfully, under the Oklahoma Constitution, this Court's "appellate review" given in the *Henry* appeal can not be a *proper substitute* for the unbiased and unbribed consideration that it was due at the OCC. *See* R. 1522, 1524. Indeed, with the proper "merits decision" of the PUD 260 matter seemingly being abdicated by the OCC to the Oklahoma Supreme Court, or being directly bound by the *Henry* decision (absurdly putting the cart in front of the horse), the whole process is "tainted" because the "poisonous fruit" (the bribed result) gets the benefit of a presumption of correctness while the Appellants, and indeed all Oklahomans, are deprived of proper "appellate

review." *See* R. 1522, 1524. Absent doing it right, as the Oklahoma Constitution requires, due process and justice are thwarted and Oklahomans' faith in government is inherently undermined.

2. WITH PROPER NOTICE, THE OCC HAS THE FULL POWER TO VACATE OR MODIFY ITS PRIOR ORDERS UPON NEW APPLICATION, TO INCLUDE THE POWER TO CONSIDER THE BRIBERY ISSUE NEVER ADJUDICATED IN THE *HENRY* APPEAL.

A. The OCC, SWBT and the Attorney General have misapplied the *Turpen* holding.

This matter was filed as a new proceeding pursuant to OAC 165:5-17-2, on September 14, 2015. The application is based, in large part, on information that has only become publicly available within the past few years. Documents only recently made public include FBI witness transcripts, FBI witness and wiretap summaries, timelines, as well as affidavits and other key information that was not publicly available due to the needs and secrecy of the criminal proceedings. This evidence presents a compelling picture of corruption and fraud undermining the rule of law itself and establishes a wrong against the very institutions set up to safeguard the public good. R. 196-336.

Significantly, the Applicants/Appellants have never before sought relief from the OCC on these matters. Moreover, no Court (nor the OCC) has ever entered a Judgment holding that members of the public-at-large are or should be barred from seeking relief before the OCC on these issues. The OCC's rules specifically allow any person, whether an original party or not, to file a new application seeking to vacate or modify a prior OCC order. *See* OAC 165:5-17-2. Indeed, under the Oklahoma Constitution, Art. 2, § 3, "The people have the right peaceably to assemble for their own good, and to apply to those invested with redress of grievances by petition, address or remonstrance." Here, for the Appellants, the OCC abolishes this right "with prejudice." R. 1524.

In the AG's Motion to Dismiss, the AG argued that under *Turpen*, OCC orders cannot be modified by the Commission after thirty days, such orders having become final. *See* R. 654-655. Such arguments were mirrored by SWBT (R. 622) and were accepted by the OCC as, in part, the

basis for its ruling. R. 1522. **Such is a complete misread and misapplication of the *Turpen* case.** Specifically, the issue in *Turpen* was whether the OCC could, under its Rule 24, consider a timely filed Motion to Reconsider **filed in the same matter**, where the hearing on such Motion only occurs after the 30 day deadline to appeal (analogous to how Motions to Reconsider are treated under 12 O.S. § 1031), and while the case is on appeal. *Id.* ¶ 12, 18.

In a 5-4 decision, the Supreme Court answered "no," finding that 12 O.S. § 1031 had no application to OCC Orders because the appeals from such Orders are made directly to the Supreme Court only, a rule which provides an appellant with access for immediate review. *Id.*, ¶ 21. This Court also noted that the underlying statute for district court proceedings provides that a timely filed motion for new trial will delay the time to appeal in district court, but such does not apply to OCC orders. *Id.* Based on these differences, this Court held that Motions to Modify filed in the **same matter** (and not as a new application -- the circumstance here) had to be heard and decided prior to any appeal and within thirty days of the original Order. *Id.*, ¶ 20. It is only in this specific circumstance that, "[an OCC Order's] vacation [is] beyond that agency's power." *C.f.*, R. 1522, ¶ 7.

Contrary to the AG's and SWBT's argument and the OCC's ultimate determination, the holding in *Turpen* does not prohibit a **new Application** seeking to vacate or modify a prior OCC order. If indeed such were the holding of *Turpen*, then **OAC 165:5-17-2** (which requires and allows Applications to Vacate or Modify after thirty days, if filed as new proceedings) would be inherently illogical, pointless and void. How could the OCC have a rule allowing Applications to Modify or Vacate prior orders after thirty days, if the underlying orders were not modifiable after thirty days? Here, the purpose for requiring a **new application** is so that all proper parties can be provided the necessary notice. Notice to all interested persons is a necessary element to the OCC exercising its jurisdiction. Importantly, even the language used in *Turpen* makes clear that **with proper notice to all**

interested parties, the OCC, in fact, does have the power to review or modify its prior orders. See *Turpen*, ¶ 21 ("The Commission is without authority even to review and modify the order unless statutory notice of a hearing concerning the proposed modification is given to all interested parties"). (Emphasis added.) Citing [in footnote 18] *Crews v. Shell Oil Company*, 1965 OK 151, 406 P.2d 482. The "*Turpen*" arguments advanced by SWBT, the AG, and accepted by the OCC, frankly, don't pass "the laugh test." They are near frivolous, if not well past it.

Indeed, in *Crews*, ¶ 15-18, the case upon which *Turpen* relies for its holding, this Court makes clear that with the proper statutory notice to all interested persons, the OCC has the authority to review and modify or change a former order which has become a final order. Citing *Carter Oil Co. v. State*, 1951 OK 327, ¶ 0, 9, 17; *Carpenter v. Powell Briscoe*, 1963 OK 33, ¶ 5-7. Here, the AG and SWBT, and the OCC in accepting this erroneous legal argument, have clearly erred in applying the *Turpen* holding as prohibiting new applications which would seek to vacate or modify a prior order of the Commission. *Turpen* did not even concern new applications, but rather addressed applications filed in the original matter. See *Turpen*, ¶ 12, 18. When filed as a new application with proper notice given, nothing prohibits the OCC from reviewing its prior determinations.

Such is especially true in legislative matters. In this specific matter involving public utilities, the OCC acted as a legislative body. See *Southwestern Bell Tel. Co. v. Okla. Corp. Comm'n*, 1994 OK 38, ¶ 8-9 (The Commission's PUD 260 matter is "legislative in nature," and the Commissioners thus act in their legislative capacity). Obviously in the exercise of "legislative power," a legislative body is free to consider and/or reconsider matters as much as it deems proper; indeed, no legislative body can limit the legislative power of a future legislature. \13

13/ See *Op. of Oklahoma Atty Gen.*, 1995 OK AG 86, ¶ 6-8 (There is nothing in our Constitution which prohibits a Legislature from repealing or modifying the acts of its predecessors or its own; it is fundamental that the Legislature cannot pass an irrepealable law), citing *Granger v. City of Tulsa*,

B. SWBT and the OCC have misapplied the Wiley holding.

In its Motion to Dismiss, SWBT disingenuously cited to *Wiley* as holding that the OCC cannot modify its PUD 260 Order as the Applicants seek, because ratemaking proceedings are legislative not judicial acts. R. 625-626. SWBT's argument was nonsensical. **In the exercise of "legislative power," a legislature is free to consider and/or reconsider matters as much as it deems proper.** *See authorities cited, Supra. Dobbs v. Board of County Commissioners Okla. Co.,* 1953 OK 159, ¶ 0, 21, 43-46; *In re Block 1, Donly Heights Addition,* 1944 OK 213, ¶ 11; *Prairie Oil and Gas Co. v. District Court of Grady County,* 1918 OK 505, ¶ 3-4; *Coyle v. Smith,* 1911 OK 64, ¶ 93, 119, 123-124 (Oklahoma legislature had power to relocate state capitol and seat of government notwithstanding limitations in Enabling Act which prohibited removal of capitol prior to certain date; as a sovereign state Oklahoma's legislative power cannot be limited by prior legislative act), *affirmed* 221 U.S. 559; 31 S.Ct. 688; 55 L.Ed. 853 (1911).

Obviously a legislative "do-over" is especially proper when the prior legislative act was done in some way that directly violated the Constitution. The *Wiley* decision itself expressly recognizes that legislative acts can be "annul[ed] and pronounce[d] void" on grounds of "**repugnancy to the Constitution**." *See Wiley,* ¶ 5. While legislative power is vast, it must be utilized in substance and process within the limits of the Constitution. *Dobbs,* ¶ 0, 43-45. Clearly, bribery is not an acceptable "process" within the Constitution's allowable limits. *See Okla. Constitution, Art. 9, § 40.*

1935 OK 801, ¶ 0, 9, 18 (Legislative acts may be amended or repealed by a legislative body at will); *Op. of Oklahoma Atty Gen., 69-221* (A legislature is not bound by its own acts or the acts of a previous legislature, any amendment of the laws passed is thus valid). *Marlin Oil Corp. v. Okla. Corp. Comm'n,* 1977 OK 67, ¶ 5, 18, 20 (To hold that the Commission cannot modify its own final orders so to account for new circumstances, could impermissibly prevent the Commission from performing its mandated statutory duties. Such is not Oklahoma law; not every application for modification of a final order is deemed a collateral attack); *Henrickson,* ¶ 15-16 (Subsequently raised issues of Southwestern Bell's *fraud* in prior rate-making matters are exclusively within the Commission's jurisdiction and thus must be properly raised there).

Indeed, where a legislative body has not acted within the framework of the Constitution, it has not acted; an unconstitutional statute confers no rights, creates no liability and affords no protection. See *General Motors*, ¶ 17, citing U.S. Supreme Court cases of: *Norton*, *Zane*.

Here, it is inherently repugnant to the Oklahoma Constitution that the required "concurrence" of a Commissioner on a public matter and the *necessary vote* to decide a question in dispute could be fraudulently and feloniously bought by a regulated entity against the interests of the public. This legal conclusion is mandated by the fact that SWBT's act of obtaining Commissioner Hopkins' vote by means of bribery was directly unconstitutional under the Oklahoma Constitution. See Oklahoma Constitution, Art. 9, § 40. Again, Oklahoma law is plain: where a legislative body has not acted within the framework of the Constitution, it has not acted; an unconstitutional "legislative act" confers no rights, creates no liability and affords no protection. *General Motors*, ¶ 17.

- C. Even under legal standards which limit the reconsideration of matters decided, reconsideration is proper here.

Even if the Supreme Court were to consider the (bribed) PUD 260 Order to be like a Court Judgment (with the limitations to reconsideration that Judgments inherently present) or to consider the bribery issues in the context of SWBT's **fraud** on *this Court* in the *Henry* appeal (clearly a "judicial" proceeding to which "judicial standards" apply), the fact is it is never too late to correct a fraud. The principle is perhaps best articulated by the distinguished jurist Justice Hugo Black, who writing the Opinion for the United States Supreme Court in the case *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-245 (1944) wrote:

Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. [Citation omitted.] This salutary general rule springs from the belief that, in most instances, society is best served by putting an end to litigation after a case has been tried and judgment entered. This has not meant, however, that a judgment finally entered has ever been regarded as completely

immune from impeachment after the term. From the beginning, there has existed along side the term rule a rule of equity to the effect that, under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of their term of entry. [Citation omitted.] This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. Out of deference to the deep-rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments. [Citation omitted.] But where the occasion has demanded, where enforcement of the judgment is “manifestly unconscionable” [Citation omitted.], they have wielded the power without hesitation. [Citation omitted.] [I]n cases where courts have exercised this power, the relief granted has taken several forms; setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it. But, whatever form of relief has taken . . . the net result in every case has been the same; where situation has required, the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away.

Every element of the fraud here disclosed demands the exercise of this historic power of equity to set aside fraudulently begotten judgments. [. . .] 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.

The Circuit Court did not hold that Hartford’s fraud fell short of that which prompts equitable intervention, but thought Hazel had not exercised proper diligence in uncovering the fraud, and that this should stand in the way of its obtaining relief. We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence Hartford’s fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. [Citation omitted.] Furthermore, tampering with the administration of justice in the manner undisputably 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 consistent 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 agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.** (Emphasis added.)

The same principles have been repeatedly adopted by the Oklahoma Supreme Court. *See Oklahoma Company v. O’Neil*, 1967 OK 105, ¶0, 9, 13-14, ¶ 17-24, 431 P.2d 445; *Marshall v.*

Amos, 1968 OK 86, ¶22-32, ¶ 33-36; 442 P.2d 500; *Johnson v. Johnson*, 1967 OK 16, ¶ 14, 20, 31, 33, and Special Concurring Opinion, ¶ 3-5. ¹⁴ See also R. 852-854.

D. The *Henry* decision does not preclude consideration of the bribery issue.

In *Henry*, ¶ 1, the Supreme Court considered seven specific questions answering each of them. The issue of SWBT's bribery of Commissioner Hopkins was not an issue on appeal and could not have been an issue as the bribery was not publicly known in 1991. The issue of whether the OCC may order "refunds" of excess earnings was also not an issue on appeal as the (bribed) Order authorized solely "reinvestment." *Id.* The permissibility of refunds simply was not the issue. *Id.*

The "settled-law-of-the-case" doctrine only bars the relitigation of issues that were actually or necessarily settled by a prior appeal. See *Parker v. Elam*, 1992 OK 32, ¶ 9. See also *Russell v. Board of County Commissioners*, 1997 OK 80, ¶ 35; *Willis v. Nowata Land & Cattle Co., Inc.*, 1989 OK 169, ¶ 7; *Seymour v. Swart*, 1985 OK 9, ¶ 8 (Actions reversed on appeal proceed in the lower court anew as if no prior proceedings had occurred except as for issues actually settled in the appeal). On all other issues of a case, to include unknown or subsequently raised issues, upon remand from a reversed Judgment, a lower court may freely consider and determine the effect of any new or expanded issues as if no prior trial had been ever held. *Parker*, ¶ 13. Here, the *Henry* case remanded to the Commission the PUD 260 matter ". . . **for all further proceedings not inconsistent**

14/ In *O'Neil*, ¶ 13, the Oklahoma Supreme Court held that any "vote" resulting from bribery was "null and void and of no force and effect." In *Amos*, ¶ 24, the Court clarified that bribery did not render a "judicial" decision "absolutely void" in a "legal sense," as the rights of innocent third parties are protected for those who may have acted in reliance upon the legitimacy of the decision fair on its face. Such is not a concern in this matter, even if the PUD 260 Order were considered "judicial". Here, the only party who could be negatively effected by modifying the PUD 260 Order would be SWBT, *which clearly is not an innocent party*. Oklahoma ratepayers could only be benefitted by the just determination of what amount of "excess earnings" did SWBT receive and whether these true "excess earnings" should be "refunded." Moreover, in "legislative" matters, unconstitutional acts are void even if innocent parties are prejudiced. *General Motors*, ¶ 17.

with the Opinion." *Henry*, ¶ 44. Here, to the extent that the OCC fails to consider subsequent undetermined issues under the erroneous belief that it is precluded from doing so by prior appellate mandate, it commits a reversible error of law. See *Berland's of Tulsa*, ¶ 5-10, 14, 27, 30 (Reversing trial court that failed to consider subsequent issue not determined by prior appeal under the erroneous belief that prior appellate mandate restricted the consideration of such issue).

3. THE BRIBED PUD 260 ORDER IS VOID AS UNCONSTITUTIONAL AND MAY BE CHALLENGED AT ANY TIME.

O'Neil, ¶ 0, 9, 13-14, ¶ 17-24; *Amos*, ¶ 22-32, ¶ 33-36; and *Johnson v. Johnson*, 1967 OK 16, ¶ 14, 20, 31, 33, make clear that "judicial" Orders not constitutionally passed (due to bribery), are **absolutely void** unless it can be established they were "relied upon" by "innocent parties." *Amos*, ¶ 24. It is only in this narrow "technical" exception that Constitutionally invalid (bribed) Orders are not "absolutely void." *Id.* Because no innocent parties have relied upon the PUD 260 Order, this "technical" exception is inapplicable here, and thus, the bribed PUD 260 Order is properly treated as void. Void Orders may be challenged at any time. See 12 O.S. § 1038 ("A void judgment, decree or order may be vacated at any time, on motion of a party, or any person affected thereby").

Obviously these cases only apply to unconstitutional judgments rendered in "**judicial**" proceedings. For "legislative" matters, the rule is even more absolute. In legislative matters, Courts accept the harsh results that may flow from declaring unconstitutional "legislative" acts void, even when otherwise "innocent parties" are prejudiced. See *General Motors*, ¶ 6, 17 (GM was obligated to pay ad valorem taxes on its lease of public trust property [the OKC plant], notwithstanding its execution of a tax abate agreement with the State done in good faith pursuant to statute; as the underlying statute violated the Oklahoma Constitution - any tax abate agreement granted under the void statute was likewise void. GM willingly accepted the legal risks when it relied on a flawed

AG's opinion as to the statute's constitutionality and did so at its peril). *As the Court knows, in declaring void an unconstitutional legislative act, the issue is never what "innocent parties" are hurt by the removal of a monument from the Capital grounds.* Here, SWBT clearly assumed the risk that PUD 260 (SWBT's monument to bribery) could ultimately be declared unconstitutional, *when it fraudulently bribed Commissioner Hopkins to achieve it.* See Oklahoma Constitution, Art. 9, § 40.

Time and again this Court, in upholding its critical role of enforcing the Oklahoma Constitution, has declared "legislative acts" passed in violation of the Oklahoma Constitution to be *void* and of no effect. See *Vasquez v. Dillard's Inc.*, 2016 OK 16, ¶ 0 (Statute is "special law" in violation of Constitution, Art. 5, § 59, declared unconstitutional); *Maxwell v. Sprint PCS*, 2016 OK 41, ¶ 0 (Statute is "special law" in violation of Constitution, Art. 5, § 59, declared unconstitutional); *Burns v. Cline*, 2016 OK 99, ¶ 0 (Statute violates "logrolling" provision of Constitution, Art. 5, § 57, declared unconstitutional); *Burns v. Cline*, 2016 OK 121, ¶ 0 (Statute violated "single subject rule" in violation of Constitution, Art. 5, § 57, declared unconstitutional); *Prescott v. Okla. Capitol Preservation Comm'n*, 2015 OK 54, ¶ 0 (Legislative act approving placement of Ten Commandments Monument violates Constitution, Art. 2, § 5, declared unconstitutional); *Montgomery v. Potter*, 2014 OK 118, ¶ 0 (Statute is "special law" in violation of Constitution, Art. 5, § 46, declared unconstitutional); *Fent v. Fallin*, 2013 OK 107, ¶ 0 (Statute violates "single subject rule" in violation of Constitution, Art. 5, § 57, declared unconstitutional); *Wall v. Marouk*, 2013 OK 36, ¶ 0 (Statute is "special law" in violation of Constitution, Art. 5, § 46, declared unconstitutional); *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37, ¶ 0 (Statute violates "single subject rule" in violation of Constitution, Art. 5, § 57, declared unconstitutional and void). While legislative power is vast, it must be utilized in substance and process within Constitutional limits. *Dobbs*, ¶ 0, 43-45. Bribery is not acceptable "process" within the Constitution's limits. Okla. Constitution, Art. 9, § 40.

The Appellants have looked for, but have yet to find, cases where the Oklahoma Supreme Court held that some parts of Oklahoma's Constitution are without effect, are entirely unimportant, or for some reason are not binding on Oklahoma legislative bodies. To the Appellants' knowledge, never has the Supreme Court ruled that Oklahoma Constitution, Art. 9, § 40 is meaningless, unimportant or unenforceable. To the Appellants' knowledge, never has the Supreme Court ruled that Oklahoma Constitution, Art. 9, § 18a(B) is meaningless, unimportant or unenforceable. Seemingly, the prevention of bribery and upholding of the (fundamental) rule that the "concurrence of a majority" of Commissioners is necessary to decide a matter before the OCC would be important, and, it being expressly established by the Oklahoma Constitution, would be **binding**. Indeed, Appellants respectfully assert that these Constitutional provisions are important even today and that our founding fathers clearly intended them to be in full force as the supreme law.

Whether one is an "*Originalist*" or not, bribery of public officials is still wrong, *even today*. It is an affront to the "rule of law" itself that Constitutional provisions such as Art. 9, § 18a(B) and Art. 9, § 40 would be *summarily ignored* - the OCC never even mentioning them in its Order on appeal. R. 1507-1525. ¹⁵ Ignoring them is exactly what the OCC has done here -- invoking *this Court's* name to do it. When upholding the Oklahoma Constitution, this Court has, at least figuratively, "parted the Red Sea" -- pushing its own power and jurisdiction to the very limits. *See Lockett v. Evans*, 2014 OK 33 (Granting stay of execution in capital criminal matter by "necessity," despite proper jurisdiction being in Court of Criminal Appeals). This matter plainly invokes the Court's proper appellate jurisdiction. It likewise simply seeks to enforce the Oklahoma Constitution.

15 / These plainly relevant and applicable Oklahoma Constitutional provisions were cited by the Appellants in their Application and Response to Motions to Dismiss more than a dozen times. *See* R. 193-336, R. 699-867. Clearly they are the focal point of Appellants' Application. The fact that the OCC's Order never even mentions them shows its inherent and utter arbitrariness. R. 1507-1525.

As shown by the dissent, the flaws of the majority opinion are numerous. See R. 1491-1506, R. 1564-1567; R. 9-11; R. 19-22; R. 30-37 and R. 76-87. Moreover, the OCC majority decision is plainly contrary to the evidence submitted. See R. 193-336; R. 699-867; 893-941; R. 1179-1242; R. 1249-1352. While yet further evidence could have been submitted, the OCC majority wrongfully denied Appellants with an evidentiary hearing (as was requested, per Oklahoma Constitution, Art. 9, § 22). See R. 878-880; R. 1524. The OCC also wrongfully allowed the Motions to Dismiss to assert disputed facts outside of the Application and based its decision on such disputed facts contrary to law. See R. 868-870; R. 705-706, R. 724-725; R. 5571-5576. Even when the United States Department of Defense and Federal Executive Agencies sought to intervene in the case, such was blocked by the OCC majority. R. 1466-1485, R. 1524. Here, the Appellants have worked hard, tirelessly, and with steadfast determination to put this *admittedly* long injustice before this Court under its plainly proper jurisdiction. Respectfully, Appellants ask this Court to do the right thing: to declare SWBT's bribery to be wrong, unconstitutional, and **void** and to order the proper remedy.

4. EVEN ON THE MERITS, APPELLANTS' CLAIMS ARE NOT BARRED BY "JUDICIAL" ISSUE OR CLAIM PRECLUSION OR BY SETTLED-LAW-OF-THE-CASE.

While the OCC majority rejected the "issue preclusion" and other arguments raised by the AG and SWBT, they are addressed herein because they might nonetheless be raised by Appellees as "alternative grounds" in support of the OCC's appealed Order. See R. 1519, ¶ 4. Even if considered on the merits, the arguments fail. In its 2010 Oklahoma Supreme Court submissions the AG argued that Commissioner Anthony's "Suggestion" was "*without force*" because he "*cannot alone act in the name of the Corporation Commission*" (yet inconsistently, the AG now argues that it took only one unbribed Commissioner vote to decide PUD 260) because it is only the Attorney General who "*is charged by statute with the responsibility of representing the collective interests of all Oklahoma utility customers in state and federal administrative and judicial proceedings,*" and because his

"Suggestion" fails to even establish his "*standing as a private citizen in the present matter.*" See R. 2753. In effect, the AG argued that Commissioner Anthony's two "Suggestions" were not properly made on behalf of the Commission, the public (ratepayers such as Appellants), or even himself. *Id.* Issue and claim preclusion only prevents the re-litigation of facts and issues actually litigated and necessarily determined in an earlier proceedings between the same parties or their privies. See R. 658. See *Valley View Angus Ranch v. Duke Energy Field Servs., Inc.*, 497 F.3d 1096, 1106 (10th Cir. 2007); *State of Okla. Ex rel. Dep't of Transp. v. Little*, 2004 OK 74. As the AG argued, Anthony lacks privity with the Appellants. They were also not decided "on the merits." See R. 723-724.

Moreover, SWBT's "bribery" could not have been "actually litigated" and "necessarily determined" in the 1991 *Henry* decision, because the bribery was not publicly disclosed until October 1992, and was not proven until 1995. In the 1991 *Henry* appeal, the AG appealed the (bribed) PUD 260 Order and sought on behalf of all Oklahoma ratepayers a refund of SWBT's "excess revenues." Clearly then, the AG was in legal privity with Appellants when the AG brought the *Henry* appeal and the AG had aligned its interest with that of Oklahoma ratepayers. In that matter, the AG's office argued that a "refund" of "excess earnings" was in the public interest. How times have changed.

Although the AG previously argued that SWBT's actions were a deprivation of other parties' constitutional due process rights and provide "**Ample Legal Authority**" to reopen the PUD 260 case, the AG thereafter (for factually erroneous reasons) never brought any proceeding nor made any effort to uphold the Constitution or to rehear the PUD 260 case. R. 852-856. After the bribery was established, the AG aligned itself to SWBT's positions and thereafter abandoned the Oklahoma ratepayers. 16 These failings are fatal to the AG's efforts to apply issue and claim preclusion here.

16 / In the OCC proceedings, Applicants filed a motion to employ "Heightened Scrutiny" to the AG's filings herein, it being publicly reported that in 2014 dozens of AT&T executives (at virtually the exact same time, at least suggesting improper "corporate bundled" contributions) gave in excess

5. APPELLANTS DO NOT SEEK EITHER A RATE CHANGE OR THE RECLASSIFICATION OF "SURPLUS FUNDS" AS "OVERCHARGES."

In this matter, SWBT fails to correctly cite the holding of *Henry* [1991 OK 134], which only held (¶ 1, 10-11) that "surplus funds" were not "overcharge[s]" under 17 O.S. 1981 § 121, for which "refunds" were **required**. Contorting *Henry*, SWBT disingenuously argues that *Henry* held that the Commission was not even **permitted** to order refunds and that Appellants cannot get the relief they seek. See R. 619, 625-626. Such was not the issue raised in the *Henry* appeal, nor was such the holding of *Henry*. See *Henry*, ¶ 1, 10-11. See also R. 724, Footnote 14.

CONCLUSION

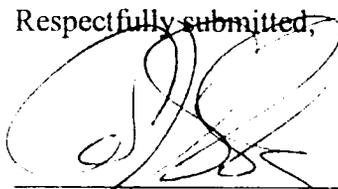
SWBT's Motion to Strike portions of the Record should be denied as the record designated is appropriate for the issues of this case, this Court may take judicial notice of the filings in other related OCC proceedings (12 O.S. 2002 § 2202 B-D) and the Oklahoma Constitution, Art, 9, § 22 provides the OCC's Chairman vast discretion to supplement the record on appeal.

Appellants respectfully request that this Court reverse the OCC's Order on appeal, find that the PUD 260 Order is **void** for the reason that it was "not constitutionally adopted," recall the mandate issued in *Henry* (which was obtained by SWBT's intrinsic fraud \17) to the extent inconsistent with this Opinion (granting a Bill of Review, if appropriate) and remand the Appellants' Application and the PUD 260 matter back to the OCC for a constitutionally proper determination.

of \$40,000 to the AG's election campaign (although the AG ran unopposed) literally weeks after the AG supported SWBT's positions at the Supreme Court. R. 871-877. Previously, the Supreme Court favorably discussed the use of "heightened scrutiny" where the bias of public officials might be questioned, but by "necessity," such are not subject to disqualification. See *Southwestern Bell*, 1994 OK 38, ¶ 29-33. Applicants did not request that the AG's briefing be subject to a different standard of review, but that such be reviewed, "*with a more critical eye than is usual*." *Id.*, ¶ 32. This same request is made for the AG's filings in this appeal.

17/ If the Court had been informed of SWBT's bribery, would *Henry* have upheld the PUD 260 Order? As the obvious answer is "no," the matter should be reheard and the intrinsic fraud reformed.

Respectfully submitted,



Russell J Walker, OBA No. 9693
Andrew J. Waldron, OBA No. 17362
WALKER & WALKER
511 Couch Dr., 3rd Floor
Oklahoma City, Oklahoma 73102
Telephone: (405) 943-9693

ATTORNEY FOR APPELLANTS

DATE: January 30th, 2017

CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that a copy of the Brief in Chief was hand delivered to, or filed in, the Office of the Clerk of the Oklahoma Supreme Court on the 30th day of January, 2017.

I further certify that a true and correct copy of the above was mailed this 30th day of January, 2017 to the below named respondents and/or interested parties by, depositing it in the US Mails, postage prepaid, to wit:

American Association of Retired Persons
Attn: General Counsel
601 E. Street NW
Washington, D.C. 20049

AT&T, Inc.
SWBT, Inc.
ATTN: General Counsel
208 South Akard Street
Dallas, Texas 75202

State of Oklahoma *ex rel* Oklahoma Corporation
Commission
Attn: OCC Office of General Counsel
Post Office Box 52000
Oklahoma City, Oklahoma 73152-2000

Oklahoma Rural Telephone Coalition
c/o Ron Comingdeer
6011 North Robinson
Oklahoma City, Oklahoma 73118

MCI Telecommunications Corp.
Attn: General Counsel
22001 Loudoun County Parkway
Ashburn, Virginia 20147

AT&T Communications of the Southwest, Inc.
c/o The Corporation Company
1833 South Morgan Rd.
Oklahoma City, Oklahoma 73128

James Bradford Ramsey, Esq., General Counsel
National Association of Regulatory Utility Commissions
1101 Vermont Avenue, N.W., Suite 200
Washington, D.C. 20005

Thomas A. Jernigan, Esq., Staff Attorney
Federal Executive Agencies
Utility Law Field Support Center
139 Barnes Drive, Suite 1
Tyndall Air Force Base, Florida 32403

John C. Degnan, Lt. Col., USAF
Juan J. Godinez, Capt., USAF
Toribio A. Garcia, TSgt., USAF
Federal Executive Agencies
NCOIC, Utility Law Field Support Center
AFLOA/JACE-ULFSC
Tyndall AFB, Florida 32403-5317

Chris Nelson, Chairman
South Dakota Public Utilities Commission
State Capitol, 500 East Capitol Avenue
Pierre, South Dakota 57501-5070

T.W. Patch, Commissioner
Regulatory Commission of Alaska
Post Office Box 91575
Anchorage, Alaska 99509

Janice A. Beecher, Ph.D.
Public Utilities Institute
Michigan State University
Owen Graduate Hall
735 East Shaw Lane, Room W157
East Lansing, Michigan 48825-1109

David C. Bergmann, Esq.
3293 Noreen Drive
Columbus, Ohio 43221-4568

National Association of State Utility Consumer Advocates
8380 Colesville Road, Suite 101
Silver Spring, Maryland 20910

Douglas Holsted, Chairman, Economic Justice Team
Voices Organized in Civic Engagement (VOICE)
Voice Action Fund, Inc.
Post Office Box 2432
Oklahoma City, Oklahoma 73101

Deborah R. Thompson, Esq.
OK Energy Firm, PLLC
Post Office Box 54632
Oklahoma City, Oklahoma 73154

Thomas P. Schroedter, Esq.
Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.
320 South Boston, Suite 200
Tulsa, Oklahoma 74103

Jennifer H. Castillo, Esq.
Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.
100 North Broadway, Suite 2900
Oklahoma City, Oklahoma 73102

Brandy Wreath, Esq., Director
Public Utilities Division
Oklahoma Corporation Commission
Post Office Box 52000
Oklahoma City, Oklahoma 73152-2000

Natasha M. Scott, Esq., Deputy General Counsel
Public Utilities Division
Oklahoma Corporation Commission
Post Office Box 52000
Oklahoma City, Oklahoma 73152-2000

Robert D. Allen
8101 Glenwood Avenue
Oklahoma City, Oklahoma 73114

Jerry R. Fent, Esq.
1830 Northwest 18th Street
Oklahoma City, Oklahoma 73106

Michael L. Velez, Assistant General Counsel
Public Utility Department
2101 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105

Abby Dillsaver, Esq., Assistant Attorney General
Jerry J. Sanger, Esq., Assistant Attorney General
Dara M. Derryberry, Esq., Assistant Attorney General
E. Scott Pruitt, Oklahoma Attorney General
313 Northeast 21st Street
Oklahoma City, Oklahoma 73105

John W. Gray, Jr., Esq., General Attorney
AT&T Services, Inc.
816 Congress Avenue, Room 1109
Austin, Texas 78701

Curtis M. Long, Esq.
4000 One Williams Center
Tulsa, Oklahoma 74172-0148

Nancy Thompson, Esq.
P.O. Box 18764
Oklahoma City, Oklahoma 73154

Matthew Dunne, General Attorney
Regulatory Law Division (JALS-RL/IP)
Office of the Judge Advocate General
U.S. Army Legal Services Agency
9275 Gunston Road, Suite 1300
Ft. Belvoir, Virginia 22060-5546

As requested by counsel, a courtesy copy was also
emailed this 30th of January, 2017, to Clyde A.
Muchmore, counsel for Southwestern Bell Telephone
Company

Robert J. Campbell, Jr., Deputy General Counsel
Office of General Counsel
Oklahoma Corporation Commission
Post Office Box 52000
Oklahoma City, Oklahoma 73152-2000

Clyde A. Muchmore, Esq.
Richard C. Ford, Esq.
Melanie Wilson Rughani, Esq.
Crowe & Dunlevy
324 North Robinson, Suite 100
Oklahoma City, Oklahoma 73102

City of Oklahoma City
Attn: Office of Municipal Counselors
200 North Walker, Suite 400
Oklahoma City, Oklahoma 73102



Andrew J. Waldron