

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

IN THE MATTER OF THE APPLICATION OF  
OKLAHOMA GAS AND ELECTRIC COMPANY  
FOR AN ORDER OF THE COMMISSION  
AUTHORIZING APPLICANT TO MODIFY ITS  
RATES, CHARGES, AND TARIFFS FOR RETAIL  
ELECTRIC SERVICE IN OKLAHOMA

CAUSE NO. PUD 201500273

**REPORT OF THE ADMINISTRATIVE LAW JUDGE ON THE ATTORNEY  
GENERAL'S MOTION FOR EXPERT WITNESS FEES**

On December 3, 2015, Administrative Law Judge Ben Jackson heard the Oklahoma Attorney General's Motion for Expert Witness Fees, and the hearing occurred in the Commission's Courtroom B, 2101 North Lincoln Boulevard, Oklahoma City, Oklahoma 73105. At the hearing, the following attorneys appeared: William J. Bullard, Patrick D. Shore, Kimber L. Shoop and Stephanie G. Houle, Attorneys *representing* Oklahoma Gas and Electric Company ("OG&E"); Ronald E. Stakem and Jack G. Clark, Jr., Attorneys *representing* OG&E Shareholders Association ("OG&E S/H"); Thomas P. Schroedter and Jennifer H. Castillo, Attorneys *representing* Oklahoma Industrial Energy Consumers ("OIEC"); Deborah R. Thompson, Attorney *representing* AARP; Rick D. Chamberlain, Attorney *representing* Walmart Stores East, LP, and Sam's East, Inc. ("Walmart/Sam's"); Assistant Attorneys General Dara M. Derryberry and Eric Davis *representing* Office of the Attorney General, State of Oklahoma ("AG"); and OCC Deputy General Counsels Natasha M. Scott and Judith L. Johnson *representing* the Public Utility Division, Oklahoma Corporation Commission ("PUD").

Being fully advised of the premises, the ALJ finds:

**Findings**

1. In its motion, the AG asks the Commission to assess OG&E's customers up to five-hundred thousand dollars to pay the AG's costs for expert witness services, including consultation, analysis and testimony for the AG.

2. After hearing oral arguments, the ALJ asked the parties to submit briefs within ten business days. During the ten day period, the parties obtained an extension until January 8, 2016.

3. The following summarizes the parties' arguments: The AG contends that it needs experts to properly represent the OG&E ratepayers as required by 74 O.S. §18b. A. 20.

The AG admits that it does not have a constitutional or statute provision expressly granting expert witness fees in a general rate proceeding for an energy utility, but the AG submits that expert witness fees are necessary due to the complexities of the OG&E application, that the Commission has implicit power to award expert witness fees, and that the Commission granted such fees recently in a PSO general rate case. In opposition, OG&E and OG&E S/H contend that the Commission cannot assess such costs, because they do not arise under any of the situations where costs are allowed by statute or Commission rule, namely, (1) pre-approval to buy or build a generation facility or enter into either a power purchase agreement or a long term contract for fuel, (2) hiring of an independent evaluator to review competitive bidding, or (3) in refund cases, costs due a customer as a prevailing party upon final order in the cause. Meanwhile, PUD contends that it is unaware of any constitutional provision or statute which allows the Commission to award expert witness fees to the Attorney General at the start of a general rate case for an energy utility. In any event, PSO in its amicus brief contends that in its recent rate case, the AG recovered witness fees only because the application involved pre-approval of a long-term power purchase agreement, for which expert witness fees are recoverable under 17 O.S. §286 C. 3.

4. After review of the record, the ALJ recommends denial of the AG's motion. The Commission is a tribunal of limited jurisdiction and only the authority expressly stated or necessary by implication is conferred by the Oklahoma Constitution. *State ex rel. Edmondson v. Ok. Corp. Comm.*, 1998 OK 118 ¶21, 971 P.2d 868, 873, *Smith v. Ok Corp. Comm.*, 1924 OK 386, 225 P.708. 17 O.S. §139.104 gives the AG two-hundred-fifty-thousand dollars per year from OUSF to prosecute telecommunications fraud and to represent telecommunications ratepayers, but the AG admits that the AG lacks express statutory authority to collect expert witness fees at the start of a general rate case for an electric utility. Consequently, the central issue in this motion is whether there is "necessary implication" for granting the AG expert witness fees. In plain meaning, the term "necessary implication" means one which is inescapable or unavoidable from the standpoint of reason. However, the AG proffers what is desirable for the AG's litigation strategy instead of what is ineluctable from the black letter law. Under Ok. Const. Article 9, §35, the Oklahoma Legislature enacted 17 O.S. §286 C. 3., which allows the Commission to award expert witness fees to the AG in a proceeding involving pre-

approval of new generation, purchase of an existing electric generation facility, or a long-term contract for purchased power and capacity and/or energy. Here, the OG&E application does not involve any pre-approval either directly or indirectly. The OG&E application seeks to add to rate-base the costs of environmental upgrade equipment--some already installed and other equipment to be installed before the end of the test year. The Commission cannot ignore the plain words of the statute or extend their meaning by construction. *Hale Computer Systems, Inc. v. Banking Board of Oklahoma*, 1983 OK 9, 736 P.2d 993, 994. 17 O.S. § 286 C. 3. authorized an award of witness fees to the AG in pre-approval cases as opposed to general rate cases.

5. In their brief, OG&E S/H referred to the "American Rule" for attorney fees which covers all litigation costs. With limited exceptions, public policy in Oklahoma is to promote access to the courts, by requiring each litigant to pay his litigation costs, absent an enforceable contract or a statute to the contrary. In civil law, exceptions exist for a common fund or misconduct of a litigant. *Id.*, pg. 994, FN 2. However, American jurisprudence has a long history of requiring litigants to pay their own expenses. See Kolker, *Expert Witness Fees as a Recoverable Item of Cost: Recent Litigation Trends*, 57 Ok. Law Rev. 803, and Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, Vol. 47 Law and Contemporary Problems pg. 2. Outside of telecommunications and pre-approval, along with nominal witness *per diem* and mileage in contempt proceedings (17 O.S. §9), Oklahoma legislation shows a restrictive view on granting witness fees in Commission cases: only 75 O.S. §318 provides reimbursement for witness fees in any type of case, but only if judicial review finds Commission action to be frivolous. Here, the AG has not shown a legislative intent for pre-final order fee-shifting.

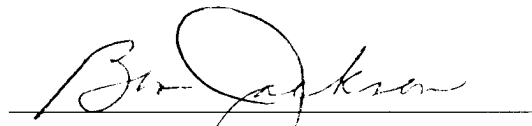
6. Concerning Commission rules, OAC 165:35-34-1, *et seq.*, set up competitive bidding procedures for purchase or self-build of new long-term generation and for entering into either a long-term power purchase agreement or a long-term fuel supply contract. In regard to hiring experts, OAC 165:35-34-4(b) (1) generally allows the AG to ask for costs associated with hiring an independent evaluation to monitor the RFP and competitive bidding process. Here, the OG&E application does not involve any of the items covered by OAC 165:35-34-1. As a result, the AG is not entitled to witness fees under OAC 165:35-34-4(b) (1).

7. In their brief, the OG&E S/H discussed 12 O.S. §938 applied to a Commission order in *PSO v. Norris Sucker Rods*, 1995 OK CIV APP 101, 917 P.2d 992. In *Norris*, the Court of Appeals found that the Commission could assess reasonable attorney fees against an electric utility in a Commission proceeding by a utility customer to collect a refund for an overcharge. However, the statute relied upon only involves attorney fees in a refund case by a customer. It would not apply to expert witness fees for the AG in a general rate case.

Recommendation

Based on the foregoing findings, the undersigned ALJ recommends that the Commission deny the motion.

Respectfully submitted,

  
Ben Jackson, Administrative Law Judge

Date: 1/14/2015

Xc:

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Commissioner Hiatt  
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